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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment delivered on: 25.04.2018*

\+ **FAO 54/2018, C.M.No.5481/2018**

MOHINDER PAL SINGH ..... Appellant

Through: Mr. Anoop Bagai, Senior Advocate with Mr. S.C. Varma and Mr. Narottam Vyas, Advocates.

versus

UPENDER PASWAN & ORS ..... Respondents

Through: Mr. Ashish Upadhyay, Advocate for R-1.
Mr. Siddharth Dutta, Advocate for R-2 & R-3.
Mr. V.K. Singh and Ms. Manogya Singh, Advocates with SSO Paramjit Singh Bains for R-3/ESIC.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

1. This appeal impugns an order dated 23.09.2016 passed by the learned Commissioner under Employees Compensation Act, 1923 (the Act) granting compensation to the claimant-respondent No.1.

2. The brief facts of the case are that Mr. Upender Paswan- respondent No.1, was employed with the appellant. During the course of his duties, on 15.02.2013, he suffered an injury resulting in amputation of his right wrist.

A claim for compensation was filed under the Act. The claim was allowed on 23.09.2016 and an amount of Rs.10,07,616/- was awarded alongwith simple interest @ 12 % per annum from the date of filing of the petition i.e. 15.03.2015. The appellant has deposited the requisite amount. The Award is challenged on the ground that an insurance cover under the Employees' State Insurance Act, 1948 (ESI Act) was sought on 25.02.2013 and insurance cover was granted to the employee concerned alongwith other employees of the appellant w.e.f. 08.02.2013. However, the insurance claim for compensation was rejected on 27.06.2013 by the Employees State Insurance Corporation.

3. In support of his contentions, the learned Senior Counsel for the appellant, relies upon the judgment of the Supreme Court in ***Bharagath Engineering vs. R. Ranganayaki & Anr., 2002 Supp (5) SCR 642,*** which held that it was immaterial as to when the application for registration and the payment of the premium was made, because under the beneficial scheme of the said Act, Rules and Regulations, the employee is deemed to be covered from the date of his employment. In that case, the employee had already passed away due to an accident in the course of his employment. The registration was sought much after his demise. The rejection of the insurance claim was quashed by the Supreme Court on the ground that:-

> *".....The payment of non-payment of contributions and action or non-action prior to or subsequent to the date of accident is really inconsequential. The deceased employee was clearly an 'insured person', as defined in the Act. As the deceased employee has suffered an employment injury as defined under Section 2(8) of the Act and there is no dispute that he was in employment of the employer, by*

operation of Section 53 of the Act, proceedings under the Compensation Act were excluded statutorily."

4. The appellant also relies upon the decision of the Kerala High Court in ***Employee's State Insurance Corporation vs. Maria Tiles,*** decided on 02.01.2014, which held that:-

"5. Section 2(14)of the Act defines "insured person" which reads thus: "insured person" means a person who is or was an employee in respect of whom contributions are or were INSA.80/2011 7 payable under the Act and who is by reason thereof, entitled to any of the benefits provided by the Act." The definition includes a person who is or was an employee in respect of whom contributions are or were payable under the Act and who is by reason thereof, entitled to any of the benefits provided by the Act. Scheme of the Act, Rules and Regulations thereunder, indicate that the insurance covered under the Act is distinct and different from the contract of insurance in general. Payment or nonpayment of contributions and action or non-action prior to or subsequent to the date of accident is really inconsequential in considering the entitlement of benefits by an injured employee in a covered establishment under the Act. Where the employee has suffered an employment injury as defined under section 2(8) of INSA.80/2011 8 the Act and there is no dispute that he was an employee of the employer and where there is a statutory interdiction under section 53 of the Act barring the employee or dependent from claiming compensation or damages under any other law, he has to be treated as an insured person under the Act even where no application had been moved to register him or contribution was paid in respect of him by the employer. Apex Court analysing section 2(14) of the Act in Bharaqgath Engineering v. Rranganayaki (2003(2) SCC138 has held that the employer has not paid contribution to Corporation is not a ground to hold that he was not an insured person and thus deny benefits under the Act or to his dependants. Application filed and contribution paid with respect to the employee, was much later to the accident cannot

be considered decisive to hold that the employee was not an 'insured person.' Section 2(14) clearly takes within its ambit an employee in respect of whom contribution is or was payable under the Act. That clearly would INSA.80/2011 9 show that even when there was default or negligence on the part of employer to pay contribution with respect to an employee, but, it was required to be paid under the Act, that employee has to be treated as an insured person."

5. It is the appellant's case that the proceedings before the Commissioner, Workmen Compensation, were barred under section 53 of the ESI Act and the injured-employee would need to be compensated under the same.

6. On 16.02.2018 this Court had ordered:-

"It is not in dispute that the injured-employee has to be compensated, be it under the Compensation Act, or under the ESI Act. Monies have been deposited under the Workmen's Compensation Act. If any monies are granted under the ESI Act, the appellant can be re-imbursed to the extent of payment made by them. Since the issue raised in this appeal may take some time to be adjudicated upon, monies awarded to the injured-employee ought to be released as he has suffered an injury way back on 15.02.2013 i.e. five years to date.

In the circumstances, a sum of Rs.2,00,000/- shall be released to the injured-employee. The remaining amount shall be kept in an interest bearing Fixed Deposits of Rs. 1,00,000/- each to mature every successive year; each FDR shall be released upon its maturity alongwith interest accrued thereon directly into the account of the injured-employee. The bank account shall be maintained in a Bank near his place of residence. Should the injured-employee require monies in any exigency, he will have the liberty to move an application in this regard before this Court".

7. The learned Senior Counsel for the appellant contends that the appellant came under the coverage of the ESI Act on 08.02.2013 because the strength of its employees became twelve as on that date. It was required to apply for registration within 15 days of reaching that threshold. A letter dated 25.02.2013 was issued by the ESIC apropos the registration of appellant's employees under Section 2(12) of the ESI Act. An online application was made on 25.02.2013 and the hard copy of the same was submitted to the ESIC Office on 26.02.2013. The employment of the appellant's employees including the injured employee, Mr. Upender Paswan was verified. The appellant company was issued an Employer Code; subsequently, the employee was issued an Insured Person Certificate. The appellant contends that the application for registration dated 26.02.2013 mentioned, at Serial No.18 of the Form, that Mr. Upender Paswan had met with an accident on 15.02.2013. The Court would note that the said information was not a statutory requirement of disclosure but an additional information provided by the appellant without any particulars. The appellants were thereafter directed to deposit interests towards late payment of the "employee contribution", which they so did. An application for compensation/indemnification for loss was filed by the insured-injured employee-Mr. Upender Paswan. The claim was rejected by the ESIC by a letter dated 27.06.2013 on the ground that the case has not been admitted as an employment injury because the registration of the factory with the ESIC was done after the occurrence of accident. Therefore, no case was made out from the date of coverage. The employee then sought compensation under the Employees Compensation Act. A compensation of Rs. 10,07,616/- was

awarded along with an interest @ of 12% per annum. This amount has already been directed to be released to the injured employee.

8. The dispute is essentially between the appellant and ESIC. The learned Senior Advocate for the appellant submits, that in term of ***Bagarath Engineering*** *(supra)* the benefit of insurance coverage under the ESIC would be extended to the injured employee prior to the registration of the employer under the said Act. In the same vein, the High Court of Kerala in ***Employee's State Insurance Corporation vs. Maria Tiles*** decided on 02.01.2014, held as under:-

> *"5. Section 2(14)of the Act defines "insured person" which reads thus: "insured person" means a person who is or was an employee in respect of whom contributions are or were INSA.80/2011 7 payable under the Act and who is by reason thereof, entitled to any of the benefits provided by the Act." The definition includes a person who is or was an employee in respect of whom contributions are or were payable under the Act and who is by reason thereof, entitled to any of the benefits provided by the Act. Scheme of the Act, Rules and Regulations thereunder, indicate that the insurance covered under the Act is distinct and different from the contract of insurance in general. Payment or nonpayment of contributions and action or non-action prior to or subsequent to the date of accident is really inconsequential in considering the entitlement of benefits by an injured employee in a covered establishment under the Act. Where the employee has suffered an employment injury as defined under section 2(8) of INSA.80/2011 8 the Act and there is no dispute that he was an employee of the employer and where there is a statutory interdiction under section 53 of the Act barring the employee or dependent from claiming compensation or damages under any other law, he has to be treated as an insured person under the Act even where no application had been moved to register him or contribution was paid in respect of him by the employer. Apex Court analysing section 2(14) of the Act in*

Bharaqgath Engineering v. Ranganayaki (2003(2) SCC138 has held that the employer has not paid contribution to Corporation is not a ground to hold that he was not an insured person and thus deny benefits under the Act or to his dependants. Application filed and contribution paid with respect to the employee, was much later to the accident cannot be considered decisive to hold that the employee was not an 'insured person.' Section 2(14) clearly takes within its ambit an employee in respect of whom contribution is or was payable under the Act. That clearly would INSA.80/2011 9 show that even when there was default or negligence on the part of employer to pay contribution with respect to an employee, but, it was required to be paid under the Act, that employee has to be treated as an insured person.

6. Section 68 of the Act enable the Corporation to initiate recovery proceedings against the opposite party after the Corporation providing benefits to the employee with respect to whom there was default or negligence on his part to pay contribution and even twice the amount of contribution can be recovered from the employer in such case, has been canvassed by the counsel to impeach the order of E.I. Court. In the Writ Petition W.P(c) 38153/2007 Corporation impleaded as additional respondent has not canvassed or raised such a contention. In the judgment rendered in the writ petition specific direction had been issued for deposit of compensation awarded by the Commissioner by the opposite party, providing him opportunity to claim reimbursement from INSA. 80/2011 10 Corporation proving that the employee was an 'insured person' under the Act. In the light of such specific directions given under the judgment E.I. court was bound to order reimbursement of the amount deposited by opposite party to satisfy the claim of the employee when such employee was proved to be an insured person under the Act. If the Corporation is having statutory empowerment under section 68 of the Act to proceed against the opposite party for its failure or negligence to pay contribution under the Act with respect to the employee it can resort do so in accordance with

law. Order of the E.I. Court does not reflect that Corporation has set forth its statutory entitlement to have recovery from the employer on a challenge referable to section 68 of the Act. Further more any recovery proceeding thereunder can arise only after providing benefits to employer by Corporation and that too for realisation of defaulted contribution, even to twice the sum due, from employer. There is no merit in the challenges INSA. 80/2011 11 raised to impeach the order of E.I. Court. Appeal is dismissed directing both partied to suffer their respective costs."

9. The learned counsel for the respondents submits that this Court in ***Sushil Goyal vs. Luckson Siddique & Ors.*** MANU/DE/0366/2014, has distinguished the applicability of ***Bharagath Engineering*** *(supra)* in the facts of that case and held that unless the unit stood registered with the ESIC and the name of the employee was registered with the latter, benefits would not flow to the injured employee, otherwise it would be deemed to be a fraud upon the statutory insurance scheme. It held, inter alia:

"6. In my opinion, in the facts of this case, the argument urged on behalf of the appellant placing reliance on the judgment of the Supreme Court in Bharagath Engineering (supra) case is misconceived because the judgment in the case of Bharagath Engineering proceeds in a factual basis where an employee is in fact an employee and his name is shown in the register of employees as duly registered with ESIC. It is not the law as per Bharagath Engineering(supra) case that even if a person is not shown in the register of employees and is not an employee on the date of the accident, even then ESIC still incurs liabilities for an employee who is not in the register and who is not registered with ESIC as per the returns filed by the employer. Section 44 of the ESIC Act talks of filing of returns with ESIC, and, maintenance of a register of employees by the employer. Contributions are to be made therefore with respect to specified employees existing on the employment register whose total number have to be specified

in the returns made as per the register. A mere registration of an employer under ESIC Act cannot and does not mean that such registration applies with respect to un-specified number of employees inasmuch as registration is applicable only for specific employees and specified number of employees. There cannot be any other interpretation of the liability of ESIC Act under the provisions of the Act otherwise it will be very easy for an employer to give a lesser number of employees in the employment register, pay lesser contribution, and then after happening of an accident seek to include employees who have suffered as a result of the accident, by filing returns with ESIC thereafter, and thereby deny its/employers' liability by seeking to fasten the liability upon ESIC. If the employer is permitted in such a case to plead that it is not liable then it will be as if to permit a fraud to be played upon ESIC, and which interpretation of the provisions of the Act I cannot subscribe to. I cannot permit the argument as urged on behalf of the appellant to succeed because admittedly in the documents filed with ESIC by the employer of the previous year of the accident the deceased Sh. Aftab Alam was not shown as an employee and he was sought to be shown as an employee only by filing returns after one year. Registration with ESIC is valid only with respect to such employees who are employees as duly shown in the returns with ESIC and also in the employees' register maintained by the employer for being covered under the ESIC Act. If I permit the argument urged on behalf of the appellant to succeed then grave fraud can be played upon ESIC because a person would not be an employee covered under ESIC and yet, liability would be thrown on ESIC. The object of the observations of the Supreme Court in the case Bharagath Engineering (supra) is to ensure that once an employer with a particular number of specified employees with details is registered with ESIC, then, even when premiums are not paid by the employer, ESIC would still be liable to the dependents of the deceased, inasmuch as, it is the duty of ESIC to recover the premiums and other amounts recoverable under the ESIC Act from the employer. The argument, therefore, urged on behalf of the appellant/employer is rejected and the

liability in the present case falls upon the appellant and not upon ESIC".

10. The respondents also rely upon the decision of this Court in Writ Petition (Civil) No. 11027/2016 between the same parties and concerning the same *lis* and issue. It was held:

> *"9. ESI Corporation have submitted the relevant documents with respect to the petitioner's coverage as Annexure R1 to R6 along with the affidavit dated 07th December, 2016. ESI Corporation has also submitted verified copy of the entire record.*
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> *10. On careful consideration of the submissions made by the petitioner and the record of the Corporation, this Court is satisfied that the petitioner was not covered under the ESI Act on the date of the accident i.e. 15th February, 2013. The petitioner applied for registration of its unit by an on-line application on 25th February, 2013. ESI Corporation, therefore, rightly rejected the petitioner's claim on 27th June, 2013. The rejection of the petitioner's claim has not been challenged by the petitioner and has, therefore, attained finality. The claim of respondent No. 1 is therefore, not barred by Section 53 of ESI Act".*

11. The appellant's LPA No. 166/2017, was rejected by an order dated 12.09.2017. The Court held:-

> *" .....11. A compensation of the relevant provisions of the two Act makes it clear that both the Acts provide for compensation to a workman/employee for personal injury caused to him by accident arising out of and in the course of his employment. The ESI is a later Act and has a wider coverage. It is more comprehensive. It also provides for more compensation than what a workman would get under the Workmen's Compensation Act. The benefits which an employee can get under the ESI Act are more substantial than the benefits which he can get under the Workmen's Compensation Act. The only disadvantage, if at all it can be*

called a disadvantage, is that he will get compensation under the ESI Act by way of periodical payments and not in a lump sum as under the Workmen's Compensation Act. If the legislature in it; wisdom thought better to provide for periodical payments rather than lump sum compensation its wisdom cannot be doubted. Even if it is assumed that the workman had a better right under the Workmen's Compensation Act in this behalf it was open to the legislature to take away or modify that right. While enacting the ESI Act the intention of the legislature could not have been to create another remedy and a forum for claiming compensation for an injury received by the employee by accident arising out of and in the course of his employment.

12. In this background and context we have to consider the effect of the bar created by Section 53 of the ESI Act. Bar is against receiving or recovering any compensation or damages under the Workmen's Compensation Act or any other law for the time being in force or otherwise in respect of an employment injury. The bar is absolute as can be seen from the. use of the words shall not be entitled to receive or recover, "whether from the employer of the insured person or from any other person", "any compensation or damages" and "under the Workmen's Compensation Act, 1923 (8 of 1923), or any other law for the time being in force or otherwise". The words "employed by the legislature" are clear and unequivocal. When such a bar is created in clear and express terms it would neither be permissible nor proper to infer a different intention by referring to the previous history of the legislation. That would amount to by passing the bar and defeating the object of the provision. In view of the clear language of the section we find no justification in interpreting or construing it as not taking away the right of the workman who is an insured person and an employee under the ESI Act to claim compensation under the Workmen's Compensation Act. We are of the opinion that the High Court was right in holding that in view of the bar created by Section 53 of application for compensation Act was not maintainable."

12. The appellants then preferred an SLP No. 33855/2017 in which the following order was passed on 05.01.2018:-

> *"The Special Leave Petition is dismissed.*
>
> *However, if an appeal is filed by the petitioner within a period of two weeks from today the same shall be entertained and disposed of on merits and in accordance with law without raising the question of limitation.*
>
> *Pending application stands disposed of".*

13. Pursuant thereto, the present appeal has been filed under section 30 of the Act. The learned counsel for the ESIC states that the appeal is not maintainable, in view of the bar under section 75 of the ESI Act. The sub-section 75 (1)(g) of the ESI Act reads as under:-

> *"75.* ***Matters to be decided by the Employees' Insurance Court****. — (1) If any question or dispute arises as to —*
>
> *(g) any other matter which is in dispute between a principal employer and the Corporation, or between a principal employer and an immediate employer, or between a person and the Corporation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues payable or recoverable under this Act, 3 [or any other matter required to be or which may be decided by the Employees' Insurance Court under this Act],*
>
> *such question or dispute 4 [subject to the provisions of sub-section (2A)] shall be decided by the Employees' Insurance Court in accordance with the provisions of this Act."*

14. It is not in dispute that the ESIC's letter dated 27.06.2013 rejecting the appellant's claim has not been challenged either by the employee

concerned or the appellant-employer. Should the appellants have had a grievance against the rejection, a statutory appeal could have been preferred before the appropriate forum, as specified under the statue, i.e., before the Employees' Insurance Court.

15. In view of the preceding discussion, it is evident that the employee could not have been awarded the benefit of compensation under the ESI Act, because of the denial of his coverage under the insurance scheme. This issue was between the employer and the ESIC because the denial of coverage to or rejection of the claim, would inexorably lead to a liability for compensation on the employer. The employee could not have been kept waiting to rehabilitate himself till the issue of his coverage and benefits under the said Act was determined in the appeal. The statutory appeal against the rejection of the claim because of non-coverage would lie only before the Employees Insurance Court. Hence, this appeal is not maintainable.

16. On 14.10.2016, the present appellant-employer had sought a review of the order rejecting the claim of the injured employee. This Review Petition was rejected. While dismissing the SLP preferred by the appellant, on 05.01.2018, the Supreme Court had noted that if an appeal is filed within a period of two weeks from that day, the same shall be entertained and disposed off on merits in accordance with law without raising the question of limitation. The appeal in accordance with the law, would mean the appeal envisaged under section 75 of the ESI Act. Without there being an adjudication under section 75 of the ESI Act, this appeal would not be maintainable. In view of the ESIC's contention that there was no insurance coverage and this position not having been reversed in appeal by a court of

competent jurisdiction; the impugned order passed by the Commissioner, Employees' Compensation cannot be said to be in error because the injured employee would either be under the coverage of ESIC scheme or by default under the Employees Compensation Act. It cannot be the case that the workman/ employee would not be covered under either of the statutes. He cannot be rendered remediless. Insofar as is was established that the injury occurred during the course of employment, the compensation having been awarded to the injured-employee in terms of the Act, the impugned order cannot be faulted. Should the workman be entitled to a higher compensation pursuant to other proceedings pursued by the appellants, the former shall be duly accorded the additional benefits.

17. In the circumstances, the appeal is without merits and is accordingly dismissed.

NAJMI WAZIRI, J

APRIL 25, 2018
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