

(1983) 10 BOM CK 0009
In the Bombay High Court
Case No : F.A. No. 242 of 1978

Arjitsing Fakirsing Potiwala

APPELLANT

Vs

Omega Engineering Corporation

RESPONDENT

Date of Decision : 13-10-1983

Acts Referred:

Bombay Shops and Establishments Act, 1948 — Section 38A
Factories Act, 1948 — Section 2
Workmens Compensation Act, 1923 — Section 2(1), 4A

Citation : (1985) ACJ 115

Hon'ble Judges : P.B. Sawant, J

Bench : Single Bench

Advocate : S.V. Suvarna, for the Appellant; F.P. Kapadia, for the Respondent

Judgement

P.B. Sawant, J.—This is an appeal by the unsuccessful workman under the Workmen's Compensation Act, 1923. The workman was employed with the Respondent on a lathe machine. While so working on the 24th February, 1976 his left hand thumb was caught in the machine and was crushed. The injury resulted in the loss of his thumb. Being a left handed person he was physically incapacitated from working and therefore, the opponent terminated his services after the accident without paying him any compensation. The Applicant therefore filed an application for compensation under the said Act claiming a sum of Rs. 8,064/- on the basis that he had suffered 30 per cent loss of his earning capacity and that his monthly salary was between Rs. 300-400. The Respondent-opposite party resisted the claim by raising various issues. The opposite party contended firstly that the Applicant was not a workman; that he had not sustained injury during the course of the employment; that the injury had not resulted in loss of his earning capacity as claimed by the workman; that his monthly salary was not as claimed by him and further that the Act was not applicable to the workman since the establishment was registered under the Shops and Establishments Act, 1948. The Commissioner on the basis of the evidence led before him came to the conclusion that the workman was employed with the opposite party and that he

had sustained the injury in question in the course of the employment. The Commissioner, however, held that the injury sustained had resulted in permanent partial disablement with only 7 per cent loss of his earning capacity. The Commissioner also held that the wage group of the Applicant was between Rs. 150-200. On this basis the Commissioner came to the conclusion that the workman was entitled to compensation of Rs. 1,646.40. However, the Commissioner dismissed the workman's application on the ground that in view of Section 38-A of the Shops and Establishments Act, the provisions of the Workmen's Compensation Act were not applicable to the establishment of the opposite party where the workman was employed. It is aggrieved by this decision dated the 12th December, 1977 of the Commissioner that the present appeal has been preferred.

2. The only question raised in this appeal is whether the Commissioner is right in holding that the provisions of the Act are not applicable to the establishment of the Respondent opposite party. In paragraph 10 of his judgment the learned Commissioner has discussed this issue and strangely enough accepted the argument advanced on behalf of the opposite party that since the establishment employed less than five employees on the day of the accident the Applicant was not a workman within the meaning of Section 2(1)(n)(ii) read with item (ii) of Schedule II of the Act in view of the provisions of Section 38-A of the Shops and Establishments Act. I find nothing either in the provisions of Section 2(1)(n)(ii) read with item (ii) of Schedule II of the Workmen's Compensation Act or under the provisions of Section 38-A of the Shops and Establishments Act to debar the Applicant workman from claiming compensation under the Act. In fact, it is very difficult to understand the reasoning of the Commissioner and the basis on which he has proceeded to create a bar in the way of the Applicant workman for claiming compensation. Section 38-A of the Shops and Establishments Act which was introduced by the amending Maharashtra Act 26 of 1961 in terms makes the provisions of the Workmen's Compensation Act and the rules made from time to time thereunder applicable to the employees of an establishment to which the said Act namely the Shops and Establishments Act applies as if they were workmen within the meaning of the Workmen's Compensation Act. Far from therefore the said Section 38-A preventing an employee of the establishment registered under the Shops and Establishments Act from claiming compensation in fact a bare reading of these provisions is sufficient to negative any such argument. The Commissioner has also tried to make a distinction between an establishment having five workmen and those having less than five workmen and has held that because the Applicant himself had stated that there were in all four employees including himself, the bar created by Section 38-A of the Shops and Establishments Act applied in the present case. There is no such distinction made by Section 38-A of the Shops and Establishments Act for the applicability of the Workmen's Compensation Act. Mr. Kapadia for the opposite party contended that those who are not involved in the manufacturing process as defined in Clause (a) of Section 2 of the Factories Act, 1948 are not workmen within the meaning of

the Act. According to him those who are involved in manufacturing process would be covered by the Factories Act, 1948. In the first instance, as pointed out earlier, Section 38-A specifically covers even the employees of the establishment registered under the Shops and Establishments Act. Secondly item (ii) of Schedule II of Act contemplates workmen involved in the manufacturing process defined in the Factories Act and they are expressly covered by the present Act.

3. Since the learned Commissioner has disallowed the Applicant's claim only on the ground that the establishment of the opposite party was covered by the Shops and Establishments Act, this appeal will have to be allowed. The learned Commissioner as pointed out above, answered all other issues in favour of the workman though he has not granted the entire amount claimed by the workman. There is no grievance on the part of the Applicant-Appellant with regard to the said finding. Mrs. Suvarna appearing for the workman claims penalty u/s 4-A of the said Act by pointing out that the learned Commissioner has held that if the workman is entitled to the amount as calculated by him, he will be entitled also to the penalty and interest u/s 4-A of the Act. Mr. Kapadia contends that the workman had initially claimed that he was in the salary group of Rs. 300-400 and that he had sustained an injury which had resulted in 30 per cent loss in his earning capacity. The Commissioner himself had found that the loss in the earning capacity was 7 per cent and the workman fell within the wage group of Rs. 150-200. Hence no compensation should be paid to him. This argument does not appeal to me since Section 4-A does not prevent awarding penalty because the workman claims to be in a wrong wage group or because he claims more loss of his earning capacity than he actually sustained. Section 4-A only states that where an employer does not make even provisional payment based on the extent of liability which he accepts, the workman would be entitled to penalty and interest as stated therein. In the present case the opposite party had raised frivolous defences by even claiming that the workman was not employed with it and that the "Workmen's Compensation Act was itself not applicable to the employee.

4. Hence I set aside the order dated the 12th December, 1977 passed by the learned Commissioner and award Rs. 1,646.40 as compensation to the workman plus a penalty of Rs. 500/- . I also award costs of Rs. 500/- throughout. The opposite party will deposit with the Commissioner an amount of Rs. 2,146.40 with interest at 6 per cent per annum from 24th February, 1976 plus the costs of Rs. 500/- within one month from the date of this order.

If the employer fails to deposit the said amount within one month from today the workman will be entitled to recover the said amount with interest at 6 per cent per annum thereon till realisation.

The Commissioner to distribute the amount as expeditiously as possible after the receipt of the writ from this Court.