

(2007) 01 BOM CK 0118

In the Bombay High Court

Case No : Writ Petition No. 2705 of 2006

Crecent Catalysts and Chemicals

APPELLANT

Vs

Vithal Shankar Bhoir and Others

RESPONDENT

Date of Decision : 24-01-2007

Acts Referred:

Companies Act, 1956 — Section 38, 53
Constitution of India, 1950 — Article 226
Employees State Insurance Act, 1948 — Section 2, 2(11), 2(13), 2(14), 2(23)

Citation : (2007) ACJ 2702 : (2007) 4 ALLMR 531 : (2007) 2 BomCR 631 :
(2007) 113 FLR 911 : (2007) 3 LLJ 147

Hon'ble Judges : S.C. Dharmadhikari, J

Bench : Single Bench

Advocate : S.C. Naidu, M.M.Gujar and instructed by Jay Choksi, instructed by C.R. Naidu and Co, for the Appellant; H.V. Mehta and J.B. Joil, for the Respondent

Judgement

S.C. Dharmadhikari, J.—Rule. First respondent did not make any arrangement for his appearance, although served. Since, he was appearing in person, this Court had passed an order appointing Mr. R.D. Bhatt as Amicus Curaie to assist the Court. With his consent so also of Mr.Mehta, learned Counsel appearing for respondent -Employees State Insurance Corporation (ESIC), Ms.Joil for respondent No. 3, petition is taken up for hearing and final disposal.

2. Petitioner is a company incorporated and registered under the Companies Act, 1956. It has a factory at Dombivali (East), where the activities of manufacturing chemicals are undertaken by it. For these activities, it engages direct employees as well as through Contractors.

3. Respondent No. 3 is father of one Narayan Vitthal Bhoir (deceased), who was a direct employee of petitioner. He was taken up in employment and worked as an Operator at the factory since 1st April 2001. Petitioner has been registered under the provisions of Employees State Insurance Act, 1948 (ESI Act for short). It has covered the petitioner on and with effect from 10th September 1991 and

has been allotted Employers Code No. 31-25401-90.

4. There was a fire at the factory at Dombivali and the deceased sustained injuries on 6th August 2001 and expired on 10th August 2001.

5. It is the case of petitioner that the deceased being an employee at the factory, is required to be covered under the ESI Act. The deceased was so covered and his contribution for the period 1st April 2001 to 30th September 2001 was duly paid along with other employees. It is the case of petitioner that Return of contribution for aforesaid period was filed with ESIC on 4th October 2001.

6. It is further not in dispute that the dependents of the deceased approached the petitioner for compensation on account of the death of the deceased during the course of his employment. Since the compensation was not paid and the dependents were also not informed with regard to follow up action, they were constrained to apply to the Commissioner for Workmens Compensation (Commissioner for short) by filing an application being Application (WCA) No. 80/B-18/2002.

7. Upon receipt of the copy of the said application, petitioner filed its written statement and inter alia raised an issue of jurisdiction of the Commissioner to entertain and adjudicate the claim. According to the petitioner, deceased was covered under the provisions of ESI Act. Considering the provisions of the ESI Act and more particularly, Section 53 thereof, the bar created thereunder would operate. Consequently, the application cannot be entertained and tried, it being patently not maintainable.

8. To the application filed before the Commissioner, viz., 9th Labour Court, Mumbai, an Insurer viz., New India Assurance Company Ltd. was impleaded as Opposite Party. It also took up the plea that the claim of dependents is not maintainable.

9. It appears that an order was passed by 9th Labour Court framing issue as to whether the petitioner proves that the deceased employee was member of ESI Scheme or not and directed the parties to lead evidence. In other words, the issue of maintainability was directed to be decided as a preliminary issue. It appears that an order was passed by 9th Labour Court holding that the application of dependents was maintainable. Aggrieved by the said order, a writ petition was filed in this Court and this Court directed that the preliminary issue be re-considered and a finding rendered thereon on merits and in accordance with law. That is how the 9th Labour Court took up the preliminary issue for consideration afresh. It permitted parties to lead evidence. After the evidence was led, it heard oral arguments and by the order dated 19th July 2006 it declared that the deceased is not a member of ESIC and, therefore, the application before it can proceed.

10. Aggrieved by this order and finding on the preliminary issue that the present writ petition under Article 226 of the Constitution of India has been instituted by

the petitioner company.

11. Mr.Naidu appearing for petitioner submits that although, the petition assails an order and direction on a preliminary issue, it is maintainable and should be entertained by this Court. He submits that an exception will have to be made and the petitioner permitted to invoke writ jurisdiction, because, maintainability of the application before Commissioner is an issue which goes to the root of the matter. If a finding is rendered on maintainability either way, whole proceedings would come to an end. He submits that the basic undisputed factual position is that the deceased was an employee recruited against a permanent vacancy and post by the petitioner. His employment is not disputed. The incident, viz., fire in the factory is also not disputed. That some of the employees, including the deceased was injured in the said accident and later succumbed to the injuries is also not disputed. However, the coverage of the workman concerned under the ESI Act would attract the bar u/s 53 thereof and no claim can be made by the dependents under the Workmens Compensation Act, 1923 (Compensation Act for short). He submits that Section 53 is an absolute bar. He submits that further factual position is also undisputed inasmuch as even if the Corporation would dispute that workman was not covered, documents produced from the custody of the ESI Corporation and exhibited during the course of trial on the preliminary issue, would indicate that the Corporation had collected sums from the petitioner employer in respect of employees covered by the scheme which included the deceased. He was allotted registration number. He submits that that inadvertently wrong number was mentioned during the course of proceedings. That apart, the finding of 9th Labour Court (Commissioner) to the effect that the employee has been covered after the death is not an answer to the plea raised by the petitioner. He submits that even if the employee is sought to be covered after his death, all that would happen is that ESI Corporation would be at liberty to recover all contributions in respect of such an employee in accordance with law. That would not mean that the bar u/s 53 cannot operate. He submits that the words "an insured person or his dependents" in Section 53 are crucial. The Commissioner has overlooked the same. That apart, the provisions of ESI Act and more particularly Section 53 fell for consideration of Supreme Court in the case of M/s.Bharaqgath Engineering and R. Ranganayaki and Anr. (Civil Appeal No. 8623 of 2002 decided on 20th December 2002). The Supreme Court has considered identical objections and has held that in the teeth of the clear provisions, the deceased employee was clearly an insured person as defined in the ESI Act and when he suffered an injury, then, the bar of Section 53 would operate. Consequently, proceedings for Workmens Compensation would stand excluded statutorily.

12. On the other hand, Mr.Bhatt brought to the notice of this Court the relevant documents and contended that finding on preliminary issue is not liable for being interfered with. He submits that this finding would not be capable of being interfered with as it is based on the materials produced before trial Court. He submits that there is serious dispute with regard to the coverage of an employee

under the ESI Act. Such being the position, judgement of the Supreme Court would not apply as the fact situation is not identical.

13. Mr.Mehta appearing for ESIC supported submissions of Mr.Bhatt and additionally contended that the affidavit filed by the Corporation, on the record of this petition, would indicate that employers like the petitioner are misusing the decision of Supreme Court. With a view to avoid their liabilities under the Compensation Act, establishments like petitioners on several occasions are found to be colluding with the officials of Corporation and purporting to cover the employee in question after his death. Such coverage is on the eve of the commencement of proceedings under the Compensation Act. This is a modus operandi adopted with a view to defeat the Compensation Act and the remedies available to the insured thereunder. He submits that this practice needs to be deprecated and discouraged. Apart from the fact that in this case, the employee was not covered. Inasmuch as, seeking details by the Corporation would not be enough to hold that he is so covered, it is also brought to my notice by Mr.Mehta that the Registration Number is doubtful. The Registration card produced on record would indicate that it bears a distinct number. The attempt to cover the employee in question is admittedly after the death in the fire. The correspondence between the employer and the Corporation is indicative of this fact. In such circumstances and when this is a clear case of collusion and fraud on the Corporation so also the Statute, this Court should not lend its assistance to the petitioner employer in its equitable, discretionary and extra-ordinary jurisdiction under Article 226 of Constitution of India.

14. Ms.Joil appearing for New India Assurance Company supported submissions of Mr.Naidu and additionally invited my attention to the affidavit in reply filed in this petition. She submits that the petitioner employer has not taken out any policy in respect of deceased employee as he was direct employee. The policy of insurance/assurance pertains only to employees of the Contractor and not to direct employees of petitioner. That being so and considering the mandate of Section 53, the workman or his dependents could not have laid any claim for compensation under the Compensation Act.

15. For properly appreciating rival contentions, a reference to the ESI Act would be necessary. ESI Act, as is clear, is an Act to provide for certain benefits to employees in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto. Definitions in Section 2 are crucial and some of them are material in this petition. The word "Contribution" is defined in Section 2(4) which reads thus:

"Contribution" means the sum of money payable to the Corporation by the principal employer in respect of an employee and includes any amount payable by or on behalf of the employee in accordance with the provisions of this Act.

16. The term "Corporation" is defined in Section 2(6). Term "Dependent" is defined in Section 2(6A), to mean any of the relatives of deceased insured

person. The words "employment injury" and "employee" are defined in Sections 2(8) and 2(9). The word "Family" is also defined in Section 2(11). The word "Immediate employer" is defined in Section 2(13) and the word "Insured person" is defined in Section 2(14), which reads thus;

"Insured person" means a person who is or was an employee in respect of whom contributions are or were payable under this Act and who is by reason thereof, entitled to any of the benefits provided by this Act

17. A bare perusal of all these definitions would indicate that an insured person means a person who is or was an employee in respect of whom contributions are or were payable under ESI Act and who is by reason thereof, entitled to any of the benefits provided by the Act.

18. It is in this context and noticing the provisions contained in Chapters II, III, IV and V, that the operation of Section 53 needs to be considered. Section 53 reads as under:

53. Bar against receiving or recovery of compensation or damages under any other law:An insured person or his dependents 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 under the Workmens Compensation Act, 1923 (8 of 1923), or any other law for the time being in force or otherwise, in respect of an employment injury sustained by the insured person as an employee under this Act.

19. A perusal of the same would indicate that the insured person or his dependents would not be entitled to receive or recover whether from the employer of the insured person or from any other person, any compensation or damages under the Compensation Act or any other law for the time being in force or otherwise, in respect of employment injury sustained by the insured person as an employee under this Act.

20. The argument of the employer before the Court below was that the deceased was permanent workman and also member of Corporation. The Corporation had issued identity card to him. It is in such circumstances that the bar would operate. The argument further was that assuming without admitting that the deceased was not covered during his lifetime but the correspondence between the employer and the Corporation would indicate that an application was made, relevant forms filled, and details forwarded and later on the deceased was covered. The registration number was granted to the deceased. It is in these circumstances and when the details of the dependents were forwarded that the Corporation addressed a letter dated 10th July 2002 and sought further details with regard to the claim of dependents. Once all this correspondence has been produced from the custody of Corporation and evidence is led also by the employer, then, bar of Section 53 would operate. Additionally, Mr.Naidu contends that the registration/identity card was also produced. Father of the dependent who stepped in the witness box, was cross examined and questioned specifically

with regard to the issuance of registration card.

21. In my view, there is much substance in the contentions of employer and the learned Commissioner has clearly overlooked the materials which were produced.

22. When Mr. Ajit Gopaldas Mehta, witness on behalf of employer stepped into box, he has clearly deposed that the company is filing returns of workers to Corporation. Deceased was covered under the scheme. He produced copies of the letters addressed by the employer to the Corporation and the reply thereto including letter dated 10th July 2002. He has categorically stated that deceased was issued ESIC Card by the Corporation. There was cross examination of this witness by the Advocate for dependents (Respondent No. 1 before me). A perusal of the entire cross examination would indicate that insofar as the registration and coverage under ESIC is concerned, the testimony of Ajit Gopaldas Mehta is not shaken in any manner. In fact in an answer to a pertinent question during the course of cross examination, the witness states that after receiving letter dated 5th March 2002, he submitted declaration form of the deceased employee. Thus, all that is brought on record is that an attempt was made to cover the employee after his death and the coverage or registration number is issued about a year after the death of deceased.

23. In this context, observations of the Supreme Court in the decision relied by Mr. Naidu are pertinent. After noticing identical contention, the Supreme Court observes thus:

7. Section 2(14) of the Act, which is the pivotal provision, reads as follows:

"Insured person" means a person who is or was an employee in respect of whom contributions are or were payable under this Act and who is, by reason thereof, entitled to any of the benefits provided by this Act.

8. It is to be noted that the crucial expression in Section 2(14) of the Act is "are or were payable". It is the obligation of the employer to pay the contribution from the date the Act applies to the factory or the establishment. In *Employees' State Insurance Corpn. Vs. M/s. Harrison Malayalam Pvt. Ltd.*, the stand of the employer that employees are not traceable or that there is dispute about their whereabouts does not do away with the employers obligation to pay the contribution. In *Employees State Insurance Corporation Vs. M/s. Hotel Kalpaka International*, it was held that the employer cannot be heard to contend that since he had not deducted the employees contribution from the wages of the employees or that the business had been closed, he could not be liable. Said view was reiterated in *Employees' State Insurance Corpn. Vs. Harrison Malayalam Ltd.*, that being the position, the date of payment of Contribution is really not very material. In fact Section 38 of the Act casts a statutory obligation on the employer to insure its employees. That being a statutory obligation, the date of commencement has to be from the date of employment of the concerned employee.

9. The Scheme of the Act, the rules and the Regulations clearly spell out that the insurance covered under the Act is distinct and different from the contract of insurance in general. Under the Act, the contributions go into a Fund u/s 26 for disbursement of benefits in case of accident, disablement, sickness, maternity etc. The contribution required to be made is not paid back even if an employee does not avail any benefit. It is to be noted that under Regulation 17-A, if medical care is needed before the issuance of temporary identification certificate, the employer is required to issue a certificate of employment so that the employee can avail the facilities available. "Wage period", "benefit period" and "contribution period" are defined in Section 2(23) of the Act, Rule 2(1C) and Rule 2(2-A) of the Rules. Rule 58(2)(b) is a very significant provision. For a person who becomes an employee for the first time within the meaning of the Act, the contribution period under Regulation 4 commences from the date of such employment from the contribution period current on that day and corresponding benefit period shall commence on the expiry of the period of nine months from the date of such employment. In cases where employment injuries results in death before the commencement of the first benefit period, Rule 58(2)(b)(ii) provides the method of computation of dependent benefit. It provides for computation of dependent benefits in the case of an employee dying as a result of employment injuries sustained before the first benefit period and before the expiry of the first wage period.

11. When considered in the background of statutory provisions, noted above, the payment or 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 u/s 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. The High Court was not justified in holding otherwise. We find that the Corporation has filed an affidavit indicating that the benefits under the Act shall be extended to the persons entitled under the Act. The benefits shall be worked out by the Corporation, and shall be extended to the eligible persons.

24. My attention is also invited to the decision of a learned Single Judge (F.I.Rebello, J) in Writ Petition No. 243 of 2004 where following the view taken by the Supreme Court, learned Single Judge accepted the contention of the employer and upheld the objection to the maintainability of the claim under Compensation Act on identical ground. In W.P. 243 of 2004, the learned Single Judge in his order delivered on 23rd December 2004 has adverted to an identical objection and observed thus:

The issue therefore, would be whether on account of subsequent coverage of establishment, the petitioner is not liable to pay and it is respondent No. 2 who is bound to pay the legal entitlement of respondent No. 1. To my mind the issue is no longer res integra having been covered by the judgement of the Apex Court in

Bharagath Engineering Vs. R. Ranganayaki and Another, . The Apex Court therein was considering amongst others, meaning of expression "Insured Person". In that case, the application for insurance was made after accident resulted in a death of the workman. The establishment was registered after the said date. It is on the facts of that case, that the Apex Court was considering whether the persons so deceased before the coverage would be an insured person.

It will therefore, be clear that even if the establishment is not covered and if by subsequent order the establishment is covered it will cover the period within which the workman suffered injury or died, consequent to the injury and would be entitled to the benefits under the E.S.I.C. Act. Having said so, the authority under the Workmens Compensation act would have no jurisdiction to entertain the claim. To that extent, the impugned order will have to be set aside.

25. No decision of either the Supreme Court or this Court taking a contrary view has been brought to my notice.

26. In these circumstances, I am of the view that the learned Commissioner was in total error in rejecting the preliminary objection. In the facts and circumstances of the present case and when an application was made for issuance of summons to ESIC and all documents including correspondence between the employer and ESIC is placed on record, the objection could not have been over-ruled on the ground that the insured was not covered during his lifetime. Once necessity of such coverage is ruled out in the light of the interpretation placed on Section 53 by the Supreme Court, then, the view of the learned Commissioner cannot be sustained.

27. Additionally, in the deposition of the respondent, a suggestion was given to the witness with regard to the registration card, but he denied the same. At the same time in an answer to one of the question, he states thus: "It is not true to say that my sons ESIC Number is 31/9657952".

This registration card is produced and the original is also exhibited during the course of proceedings before the learned Commissioner. I have perused the same and I have no doubt in my mind that the objection could not have been over-ruled, once this material and the registration card was placed on record.

28. Now what remains is to take note of the submissions of Mr.Mehta and the apprehensions expressed by the Corporation in its affidavit.

29. Mr. K. Raghuraman, Assistant Inspector, on behalf of Corporation has filed affidavit in this petition and in para 5, while not disputing that the incident was reported by the petitioner to the Corporation under a wrong insurance number and referring to the correspondence between Advocate for respondent and the employer and ESIC, it is contended that the total number of workers employed in the factory was 36. All these workmen were working in the factory premises but the petitioner did not pay contribution in respect of these workers, including two employees allegedly directly employed. Thereafter, in para 7 of the affidavit, a

reference is made to the regulations and the action of the employer in this case. Thereafter, it is contended that if the insurance number of the deceased has been given as 319657952 and if this registration card was really in possession of the employer there is no reason why the petitioner did not submit the necessary form immediately but took considerable time in doing so. This, according to the deponent, is nothing but an act subsequent to the incident and the claim lodged before the Commissioner. Thus, in collusion with the officers of the local office of Corporation, the registration was procured. There is a serious dispute raised with regard to the authority and power of the Kalyan local office to register the employee. In para 8 a reference is made to the policy taken out with New India Assurance company and the stand of petitioner that the claim would be settled under the policy with New India Assurance. Once such a stand was taken and when the dependents of the deceased did not know anything about the coverage of the deceased, then, the entire act of obtaining registration under the ESI Act is doubtful and a result of manipulation and mischief committed by the petitioner, in collusion with staff of the Corporation. My attention is invited to paras 9 and 10 of the affidavit and it is contended that once the record has been fabricated and petitioner has not approached this Court with clean hands so also an enquiry being launched by the Corporation against its staff and employees, this Court should not interfere in Writ Jurisdiction.

30. In the light of the clear provision and the decision of the Supreme Court so also the materials produced in this case, I am unable to accept the contentions of Mr.Mehta that a fraud has been perpetrated in this case. In fact, in the court below the ESIC produced the record. Its officer did not object to the documents being exhibited. No objection was raised of any nature much less that a fraud has been perpetrated or mischief played by petitioner and staff of ESIC. The allegation of collusion with the staff of Corporation and the enquiry launched is no doubt a serious matter. Mr.Mehtas apprehension cannot be said to be totally unfounded and baseless. The tendency to resort to such tactics cannot be ruled. Thus, after the death of deceased and the claim launched for compensation with the local Commissioner that such pleas are raised may be a common feature. It might be that in a given case, the Corporation may be able to establish the fraud by leading evidence. It would also be open for the Corporation to demonstrate by such material as is available in its records that registration or coverage is result of collusion between employer and the local staff of Corporation. I have no doubt in my mind that all authorities and Tribunals are bound to take note of such tactics seriously. If registration or coverage is as a result of fraud, then, the settled principle that fraud vitiates everything, depending upon other materials, would apply. Therefore, it is not necessary to go into these aspects in further details, more so in the facts and circumstances of the present case.

31. In my view, the order of learned Commissioner cannot be sustained for the aforesaid reasons. The impugned order would, therefore, have to be quashed and set aside. Rule is made absolute in terms of prayer Clause (a).

32. However, this does not prevent the dependents from claiming compensation from the petitioner under General Law so also making a claim against New India Assurance Company, all pleas in such claims be gone into on their own merits and in accordance with law so also uninfluenced by the observations of this Court in this order. Similarly, the observations made by me while allowing the present petition would not in any manner influence the outcome of any investigation or enquiry commenced by the ESI Corporation. Needless to state further that if, as a result of such investigation and enquiry, Corporation desires to set the criminal law in motion, then even the investigation and enquiry under the Criminal Laws would not be adversely affected by the outcome of the present petition.

33. Mr. Mehta states that irrespective of the conclusion of this Court with regard to the role of ESIC staff and the allegations of collusion in this case, Corporation would entertain the claim of the dependents and honour the same. I have no doubt in my mind that for honouring the claim of dependents and assurance given to this Court, the Corporation will also resort to all provisions and remedies under the ESI Act and take action u/s 68 of the same. In the light of the disposal of this petition, R & P be sent back after the appeal period is over.

34. Mr. Mehta states that upon receipt of an application from the dependents of deceased, the Corporation would endeavour and make payment to the dependents within a period of eight weeks from the date of receipt of request/application.

35. The Court appreciates fairness on the part of Mr.Mehta and E.S.I.C. so also it appreciates the efforts undertaken by Mr. Bhat, Amicus Curaie and Mr.Naidu for petitioner.