

(2011) 08 MP CK 0048

In the Madhya Pradesh High Court

Case No : M.A. No"s. 3106 of 2005 and 2556 of 2006

Employees' State Insurance Corporation

APPELLANT

Vs

Smt. Basanti and others

RESPONDENT

Date of Decision : 11-08-2011

Acts Referred:

Employees State Insurance Act, 1948 — Section 2, 2(8), 51(1), 51A, 52
Penal Code, 1860 (IPC) — Section 284, 304
Workmens Compensation Act, 1923 — Section 3

Citation : (2011) 131 FLR 739

Hon'ble Judges : N.K. Mody, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

N.K. Mody, J.—This order shall also govern the disposal of MA. No. 2556/06 as in both the appeals parties are one and the same except claimants.

2. In MA. No. 3106/05 order under challenge is dated 31.8.2005 passed by Employees State Insurance, Labour Court, indore in Case No. 9/02 ESI and the claimants are legal representatives of deceased Rajesh. While in MA. No. 2556/06 order under challenge is dated 5.4.2006 passed by Employees State Insurance Labour Court, Indore in Case No. 10/03 ESI and the claimants are legal representatives of deceased Sanjay.

3. Short facts of the case are that two claim petitions were filed by the legal representatives of deceased Rajesh and Sanjay u/s 52 of Employees State Insurance Act, wherein it was alleged that the deceased Rajesh aged 36 years and deceased Sanjay aged 22 years were in employment of respondent No. 5 and were working as Operator since last more than 10 years. Salary of deceased Rajesh was Rs. 2,500/- per month while salary of deceased Sanjay was Rs. 2,600/- per month. It was alleged that both of them were insured with the appellant. It was alleged that provident fund was being deducted from the account of the deceased and was being deposited with respondent No. 7. It was

alleged that on 22.12.1001 when the deceased were working in the employment of respondent No. 5 because of effect of poisonous chemical at the time of cleaning of machinery both of them died. It was alleged that the intimation of their death was not given by the respondent No. 6 proprietor of respondent No. 5 to respondent Nos. 7 & 8 and the appellant and also no arrangement was made for their treatment. It was alleged that the members of the family brought to the deceased to M.Y. Hospital, Indore on 23.12.2001, where they were declared died. It was alleged that the case was registered at Police Station, Annapurna u/s 284 & 304 of IPC. Further case of claimants was that since the accident occurred because of carelessness of respondent Nos. 5 and 6, therefore, respondents Nos. 5 to 8 and the appellant are liable for dependents benefit. It was alleged that appellant also asked the claimants to open an account for depositing dependents benefit, but no amount was deposited, hence petition was filed.

4. The claim petition was contested by respondent Nos. 5 & 6, wherein it was alleged that the death of Sanjay and Rajesh took place at their residence, which is at a substantial distance from the factory premises. It was alleged that no accident occurred during course of employment. It was alleged that the claimants are not entitled for any dependent's benefit. It was prayed that the petition be dismissed. After framing of issues and recording of evidence learned Court below allowed the application and directed the appellant to provide dependents benefit to the claimants, against which present appeal has been filed.

5. Learned Counsel for the appellant argued at length and submits that the impugned order passed by the learned Court below is illegal, incorrect and deserves to be set aside. It is submitted that for the purpose of getting the claim of dependent's benefit under the provisions of ESI Act it was the duty of claimants to prove that there was an accident and the accident had a causal connection with the employment and the accident was suffered in the course of employment. It is submitted that since all the three ingredients which are statutory requirement for getting dependent's benefit are required to be proved were not proved, therefore, learned Court below committed error in allowing the application filed by appellant. It is submitted that in fact no such accident took place. It is submitted that in the inspection carried out immediately after the accident on the next day of the incident of the premises of the respondent Nos. 5 & 6 it was found that the accident as alleged is without any basis. It is submitted that in the facts and circumstances of the case appeal filed by the appellant be allowed and the impugned order passed by the learned Court below be set aside.

6. Learned Counsel for the respondent Nos. 1 to 6 / claimants submit that after due appreciation of evidence learned Court below has allowed the application filed by claimants. It is submitted that since the deceased were young man and were working with respondent Nos. 5 & 6 since last more than 10 years, therefore, burden was on the appellant to prove that the death was not during course of employment. It is submitted that in the facts and circumstances of the case, appeal filed by the appellant has no substance and the same be dismissed.

7. From perusal of the record it is evident that to prove the case claimants have filed the documents Ex.P/1 to Ex.P/6. In the post mortem report of Rajesh it is alleged that Alcohol type unpleasant substance was found in the stomach and the cause of death is alleged that cardio respiratory failure. It is also mentioned that the cause remains open as viscera is preserved and sealed. Apart from the documentary evidence to prove the case Basantibai wife of Rajesh was examined as AW/1, Dilip AW/2, Mayadevi AW/3 and Cabbar Sinde AW/4 were examined. While Dinesh Salodiya was examined from the Office of respondent No, 7. Shobha Ingle was examined by the appellant, who has stated that as per information given by respondent Nos. 5 & 6 no accident has taken place as alleged.

8. Section 2 of ESI Act deals with the "Definition". Sub-Section (8) of section 2 of ESI Act deals with the definition of "Employment Injury" which reads as under:--

"Employment Injury" means a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment, being an insurable employment, "whether the accident occurs or the occupational disease is contracted within or outside the territorial limits of India.

9. Section 51A of ESI Act deals with "Presumption as to accident arising in course of employment" according to which for the purpose of ESI Act an accident arising in the course of an insured person's employment shall be presumed, in the absence of evidence the contrary, also to have arisen out of that employment. As per sub-section (1) of section 52 of ESI Act if an insured person dies as a result of an employment injury sustained as an employee under this Act dependents benefit shall be payable for such period and subject to such conditions as may be prescribed shall be payable to his dependents specified as per section 2.

10. In the matter of Regional Director. ESI Corporation v. Francis De Costa, 1996 (74) FLR 2326 (SC), wherein while dealing with employment injury wherein injuries caused by an accident while the employee was going to his place of employment on his own bicycle. Hon'ble Apex Court held that injuries sustained by the employee are not covered. It was further held that the mere fact that he was to report for duty just within a short time of 15 minutes or that his place of employment was only at a short distance is inconsequential. It was further held that the accident should have its origin in the employment as under the statute words are "arising out of and in the course of his employment". It was further observed by the Hon'ble Apex Court that in order to succeed, it has to be proved by the employee that (1) there was an accident, (2) the accident had a causal connection with the employment, (3) the accident was suffered in the course of employment. In the instant case the employee was unable to prove that the accident had any causal connection with the work he was doing at the factory and in any event, it was not suffered in the course of employment. In the matter of General Manager, B.E.S.T. Undertaking, Bombay Vs. Mrs. Agnes, wherein bus

driver employed by the Municipal Corporation after leaving the bus in the depot boarded another bus in order to go to his residence and the said bus collided With the stationary lorry and as a result of the said collusion driver was thrown out on the road and injured was hospitalised where he expired, Hon''ble Apex Court held that the accident occurred during course of his employment and therefore his wife is entitled for compensation. In the matter of Shakuntala Chandrakant Shreshti v. Prabhakar Maruti Garvali, 2007 (112) FLR 203 (SC), wherein Hon''ble Apex Court had an occasion to deal with section 3 of Workmen Compensation Act which deals with accidental injury. In this case deceased was working as cleaner in vehicle and was travelling in the vehicle, Hon''ble Apex Court held that same by itself cannot give rise to an inference, that job was strenuous, unless evidence is brought on record to elaborate that death by way of cardiac arrest has occurred because of stress or strain, Commissioner will not have jurisdiction to grant damages.

11. In the matter of General Manager, B.E.S.T. (supra) is concerned, undisputedly at the time of accident the workman was not on duty but was-going to his residence by another bus of B.E.S.T. after finishing his duties. The Hon''ble Apex Court by holding B.E.S.T. liable for compensation observed that right to travel in the bus was given to the workmen in order to discharge his duties punctually and efficiently which was the condition of the service. It was also held that free transport was provided to the workmen in the interest of service. It was also held that in the circumstances to travel in another bus was part of his duty. In the matter of Regional Director, ESI Corporation (supra) is concerned, the workman was going on his own bicycle to his job and met with an accident, Hon''ble Apex Court has observed that since the accident was not having its origin in the employment, it was not arising out of and in the course of his employment. Similarly in the matter of Shakuntala Chandrakant Shresthi (supra) wherein deceased who was cleaner sustained massive heart attack when he was deboarding, Hon''ble Apex Court has held that since there is no evidence that death by way of cardiac arrest was because of stress or strain, the workman is not entitled for compensation.

12. In the present case there are two workmen namely Rajesh and Sanjay and both of them died on 22.2.2001 at their residence. In the evidence it has come that Basanti wife of Rajesh has stated that on 22.2.2001 Rajesh came from his duties at about 8:30 P.M. She has further stated that deceased R(sic)esh and Sanjay were cleaning the machinery by Kerosene and chemicals and after returning house he complained that he is not feeling well and there after he died. In cross-examination she was suggested that Rajesh left the place of his job at 5:30 PM but she has specifically denied and further stated that on that day it was Saturday and extra care of cleaning of machinery was taken from the deceased. She has further stated that for extra work over time was being paid to the deceased. She was also suggested in cross-examination that in viscera report poisonous substance of chemical was not found in his stomach, but it was the alcohol which was found. She was also suggested that since the work in the

printing press was being done in two shifts, therefore, it was not possible to get the work from him upto 9:00 P.M. AW/2 Mayadevi is the mother of deceased Sanjay. She has also stated the same story as stated by AW/1 Basantibai. No cross-examination has been made to that effect as Basantibai was cross-examined. One Dilip was also examined by the claimant who was the resident of the same vicinity, where Rajesh and Sanjay were living and was the brother of Rajesh. He has stated that when Rajesh was not well he was called and he saw that Rajesh was vomiting and was sweating. Thus the initial evidence was adduced by the claimants to prove the nexus between the employment and the death. Gabbar Shinde was examined who was the co-employee who has stated that Rajesh and Sanjay were cleaning the Machinery. He has further stated that both of them on spot stated that they are not feeling well because of foul odour of the chemicals.

13. In rebuttal Dinesh Salodiya was examined who was a clerk in the office of Provident Fund and his statement is having nothing to do with the alleged accident. Apart from this Shobha Ingle was examined, who was working on behalf of appellant who has stated that the information was called by respondent No. 5 & 6, wherein it was stated that no such accident was taken place. In the evidence adduced by the appellant no effort was made to call the employer to disprove the fact that the deceased employees were not working with poisonous chemicals and the death was having no nexus and was not arising out of and in the course of their employment. It is true that the job of the workmen was not serious. It is also true that the death did not take place at the Factory premises. Since as per respondents death occurred because of use of poisonous chemical which was established by the evidence and no evidence was adduced by the appellant in rebuttal by examining the concerned Doctor to prove that as per post mortem report and as per viscera the cause of death was poisonous alcohol which was found in the stomach of deceased, this Court is of the view that the appeal has no merits and deserves to be dismissed. The appeal filed by the appellant stands dismissed holding that the claimants are entitled for the dependent's benefit.

Copy of the order be placed in the record of connected appeal.

No order as to costs.