

(2000) 12 BOM CK 0018
In the Bombay High Court
Case No : C.A.J.F.A. No. 1057 of 2000

Jitu Yadav

APPELLANT

Vs

Employees" State Insurance Corporation

RESPONDENT

Date of Decision : 14-12-2000

Acts Referred:

Employees State Insurance (Central) Rules, 1950 — Rule 57
Employees State Insurance Act, 1948 — Section 2, 2(15A), 2(15B), 46, 51

Citation : (2001) 91 FLR 385 : (2001) 2 LLJ 1622

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : Jame Cox, for the Appellant; H.V. Mehta, for the Respondent

Final Decision : Allowed

Judgement

D.Y. Chandrachud, J.—Admit. The learned counsel for the Respondent waives service. By consent taken up for hearing and final disposal.

2. This is an Appeal u/s 82(2) of the Employees" State Insurance Act, 1948. The appeal is directed against a judgment and order dated August 29, 2000 of the Employees" Insurance Court, Thane. With the consent of the learned counsel appearing on behalf of the contesting parties, this First Appeal has been heard for final hearing. A compilation of the record has been made available to the Court by the learned counsel and with their assistance I have perused the record of the case. I have heard learned counsel for the parties.

3. The Appellant was employed with a firm known as Rukmini Rubbers whose industrial establishment is situated at Wagle Estate, Thane. On March 9, 1992, the Appellant was working on a Milling Machine. According to the employment injury report which was prepared by the Investigating Officer, the Appellant met with serious accident and, while placing a sheet in the milling machine, his right hand got engaged between the roller of the milling machine and the rubber material. The right hand of the Appellant was crushed between the rollers. The

Appellant was immediately taken to the ESI Hospital at Wagle Estate, Thane. The Appellant was referred to the Medical Board of the Employees' State Insurance Corporation and the medical report contains a reference to the following injuries as having been sustained by the Appellant:

"Loss of two Phalanges RLF RRF RMFRIF. Loss of pulp with tip and bone R. Thumb. All the digits are stuck to each other and with space loss. Only a jog of movement present at MCP Jt.

Practical loss of functions of all fingers and thumb. Wrist is normal. Loss of hand."

The Medical Board assessed the disability of the Appellant at 60 per cent. Aggrieved by the decision of the Medical Board, the Appellant moved the Insurance Court u/s 54-A of the Act. The claim of the Appellant was that due to the extent of the injury in which he had sustained to his right hand, he was not able to carry out the work" which he was performing at the time of the accident. The Appellant, therefore, made a claim to the payment of full compensation and benefits on account of the injuries which had been suffered by him. The Appeal preferred by the Appellant has been rejected by the impugned judgment and order dated August 29, 2000 of the Employees' Insurance Court. The Employees' Insurance Court affirmed the decision of the E.S.I. Corporation and held that the Corporation had rightly assessed the loss of earning capacity of the Appellant at 60 per cent. The Court took notice of the fact that the Appellant was in the employment of the same employer and, "he is practically doing the same work". Having regard to the provisions of Clauses (15-A) and (15-B) of Section 2 read with Item 10 in Part II of the Second Schedule of the Act the Court affirmed the decision of the Corporation.

4. In considering the correctness of the view taken by the E.I. Court, regard must be had to the fact that this is an Appeal u/s 82(2) of the Act which stipulates that an Appeal shall lie to the High Court from an order of an Employees' Insurance Court if it involves a substantial question of law. At the outset, it must be noticed that the Employees' State Insurance Act, 1948 is "an Act to provide for certain benefits to employees in case of sickness, maternity and employment injury". Clause (15-A) of Section 2 defines the expression "permanent partial disablement" in the following words:

"Permanent partial disablement" means such disablement of a permanent nature, as reduces the earning capacity of an employee in every employment which he was capable of undertaking at the time of the accident resulting in the disablement:

Provided that every injury specified in Part II of the Second Schedule shall be deemed to result in permanent partial disablement";

Similarly the expression ""permanent total disablement" is defined by Clause (15-B) of Section 2 as follows:

"Permanent total disablement" means such disablement of a permanent nature

as incapacitates an employee for all work which he was capable of performing at the time of the accident resulting in such disablement:

Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of the Second Schedule or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against whose injuries, amounts to one hundred per cent or more."

The Act constitutes an Employees' State Insurance Fund u/s 26 into which all contributions paid under the Act and all other moneys received on behalf of the Corporation shall be paid. u/s 28 the amounts lying to the credit of the fund are to be expended, inter alia, for the payment of benefits to insured persons. Section 46(1)(c) of the Act provides for the payment of periodical sums of money to an injured person who suffers from a disablement as a result of an employment injury. Section 51 similarly provides for the grant of disablement benefit, inter alia, to an employee who sustains a permanent disablement, whether total or partial. The material provisions of Section 46(1)(c) and Section 51-B are as follows:

"46. Benefits (1) Subject to the provisions of this Act, the insured persons, their dependents or the persons hereinafter mentioned, as the case may be, shall be entitled to the following benefits, namely:

(a) xx xx

(b) xx xx

(c) periodical payments to an insured person suffering from disablement as a result of an employment injury sustained as an employee under this Act and certified to be eligible for such payments by an authority specified in this behalf by the Regulations hereinafter referred to as disablement benefit.

"57. Disablement benefit: Subject to the provisions of this Act -

(a) xx x

(b) a person who sustains permanent disablement, whether total or partial shall be entitled to periodical payment at such rates and for such periods and subject to such conditions as may be prescribed by the Central Government."

Rule 57 of the Employees' State Insurance (Central) Rules, 1950 provides for the payment of disablement benefit in pursuance of the provisions contained in the Act which have been adverted to earlier.

5. In interpreting the provisions of the Employees' State Insurance Act, 1948, the basic premise has to be that this is an enactment of Parliament designed with an emphasis on bringing into being a measure that would provide for social welfare to workmen who suffer, inter alia, sickness and employment injuries. The work place is a source of livelihood for those who work there. Parliament was

conscious of the fact that an injury sustained in the workplace may, in certain situations, affect the earning capacity of the employee and, in more serious situations incapacitate an employee from rendering work which would enable him to earn his livelihood. The Act is a measure of social welfare aimed at providing some monetary recompense to those whose livelihood has been jeopardised by employment injury.

6. Clause (15-A) of Section 3 defines "permanent partial disablement" with reference to the impact of the disablement on the earning capacity of the employee. The disablement though permanent, is partial because it reduces the earning capacity of the employee, in every employment which he was capable of undertaking at the time of the accident which resulted in his disablement. In contradistinction to a permanent partial disablement, a "permanent total disablement" is defined with reference to the incapacity of the employee to render the work which he was capable of performing at the time of the accident. In other words, the emphasis in the concept of partial and total disablement is different. In the case of a partial disablement, the emphasis in the statute is on a reduction of the earning capacity of the employee while in the case of a total disablement, the statute places emphasis on the incapacity of the employee to perform all work which he was capable of performing at the time of accident. Both Clauses (15-A) and (15-B) have each, a proviso. The proviso to Clause (15-A) provides that every injury specified in Part II of the Second Schedule shall be deemed to result in a permanent partial disablement. Similarly a deeming definition is provided in the proviso to Clause (15-B) as to when a disablement is to be regarded as a permanent total disablement. The two provisos to Clauses (15-A) and (15-B) lay down a deeming definition of when a disablement is to be regarded as partial or total. The point to be noted, however, is that the deeming definitions which are created by the two provisos to Clauses (15-A) and (15-B) are not exhaustive of the circumstances in which the disablement is regarded as partial or, as the case may be, total. The first part of each of the two clauses defines when, in the generality of circumstances, a disablement would be regarded as partial or total, as the case may be. The provisos expand upon the ambit of the main provision by creating a statutory fiction as regards the circumstances in which the disablement is regarded by law as partial or, as the case may be, total. Consequently, the fact that an injury is not specified either in Part I of the Schedule is not conclusive of whether the disablement is or is not permanent. If a person sustains an injury specified in Part I of the Second Schedule, the disablement sustained thereby is treated by fiction of the law as permanent and total. However, even if an injury is not specified in Part I of the Second Schedule, the employment injury may be still such as would fall for classification as a permanent total disablement if it is of such a character as incapacitates an employee for all work which he was capable of performing at the time of the accident resulting in such disablement. In other words, if the conditions to the proviso to clause (15-B) are fulfilled, the injury is deemed to be a permanent total disablement. However, even if the injury is not of a class or

nature specified by the proviso it may still constitute a permanent total disablement if the first part of the definition in Clause (15-B) is satisfied.

7. The next important aspect of Clause (15-B) which has to be noticed is that a permanent total disablement is defined as one which "incapacitates an employee for all work he was capable of performing at the time of the accident resulting in such disablement." The meaning and import of Clause (15-B) is not that an employee should be incapacitated from rendering all work whatsoever, but work of the kind and character which he was capable of performing at the time of the accident. In a sense, an employee who, sustains an employment injury may in a large number of cases, be capable of performing some work, however, lowly placed but that would not be an appropriate test to determine whether or not the disablement which he had sustained constitutes a permanent total disablement. If the injury he has sustained precludes an employee from performing the work which he was capable of performing at the time of accident, meaning thereby, of the nature that he was performing at the time of the accident, the disablement constitutes a permanent total disablement.

8. This position in law is now well-settled in view of several judgments commencing with the judgment of the Supreme Court in *Pratap Narain Singh Deo Vs. Srinivas Sabata and Another*, . In the case which was decided by the Supreme Court, the workman there was working as a carpenter. The workman fell down while performing some work in a cinema hall and had to undergo an amputation of his left arm from the elbow as a result of the injury which he sustained. The Commissioner for compensation came to the conclusion that by the loss of his left hand above the elbow, the employee had evidently been rendered unfit for the work of a carpenter since that work could not be done by one hand. The claim for compensation was assessed at 100 per cent of the earning capacity. The Supreme Court affirmed the judgment of the Commissioner with the following observations:

"It has not been disputed before us that the injury was of such a nature as to cause permanent disablement to the respondent, and the question for consideration is whether the disablement incapacitated the respondent for all work which he was capable of performing at the time of the accident. The Commissioner has examined the question and recorded his finding as follows:

"The injured workman in this case is carpenter by profession. By loss of the left hand above the elbow, he has evidently been rendered unfit for the work of carpenter as the work of carpentry cannot be done by one hand only."

This is obviously a reasonable and correct finding."

9. A similar view has been taken in several judgments of the High Courts in our country. A Division Bench of the Kerala High Court considered the question in *E.S.I. Corporation v. Gopi*, reported in 1995 1 CLR 880. Justice K.T. THOMAS (as the Learned Judge then was) speaking for the Division Bench placed the principle in the following words:

"The legal position, according to us, is that it is not necessary that the employment injury should render the employee totally unfit to do any work whatsoever for holding that he is suffering permanent total disablement as understood in the E. S. I. Act, it is enough that he was incapacitated from doing the work which he was capable of doing at the time of accident. In other words it is not the look out of the Insurance Court to find out whether he can be trained to do some other work. If he can do the work which he was performing just before the accident in a reduced form the result is only permanent partial disablement. If he cannot do that work at all then the consequence is total permanent disablement."

10. The same view has earlier been taken by another Bench of the Kerala High Court in *E.S.I. Corporation Vs. Raju*, . The learned counsel appearing on behalf of the Appellant relied upon this judgment of the Division Bench, since it disapproves of the view taken by that Court in an earlier judgment in *E. S. I. Corporation v. Pushkaran* 1993 2 CLR 501 which was sought to be relied upon in para 6 of the judgment of the Insurance Court in the present case.

11. In *Employees' State Insurance Corporation v. B. V. Balanarasaraju* 1985 LIC 216, a learned single Judge of the Andhra Pradesh High Court held that when an employee working in a rubber manufacturing unit lost four of the fingers of his right hand while feeding rubber into the machine, the disablement was a permanent total disablement. In para 3 of his judgment, the Learned single Judge held as follows:

".... Common sense tells us that total loss of four fingers of a workman's right hand including the cutting-off of the three of those fingers could never be held to have resulted only in permanent partial disablement of the workman whose daily work duty consists in feeding rubber into the machine. His daily duty requires the use of those fingers which are now cut off his hand. Many a thing man may or may not do without the aid and employment of his hands. Certainly the feeding of rubber into the machine is almost utterly impossible to be done by an employee without the aid and employment of his hands. For the purpose of such a task, the employee does require the use of his fingers. The total loss of four out of his five fingers cannot but therefore be regarded as total permanent disablement."

A Learned single Judge of the Madhya Pradesh High Court has formulated the test in *Chhotelal v. Regional Director, Employees State Insurance Corporation*, reported in 1995 III LLJ (Supp) 31 as follows at p. 33 :

"A permanent total disablement is to be judged from the nature of the job, which the workman was doing and if the disablement so caused, renders him unfit to do that job, it will be deemed to be total and not partial disablement."

The provisions of the Workmen's Compensation Act, 1923 which are *pari materia* with those of the E.S.I. Act noticed earlier have been interpreted by a Division Bench of the Kerala High Court in *Rukiya Bai Vs. George D'Cruz*, , and by a

learned single Judge of this Court in Ahmed Abdul v. H.K. Sehgal AIR 1965 Bom 62.

12. A Division Bench of the Gujarat High Court construing the provisions of the Workmen's Compensation Act, 1923, held in Punambhai Khodabhai Parmar Vs. G. Kenel Construction and Another, that the concept of permanent total disablement has to be judged from the stand point of the job which the workman was doing. In that case, the workman was engaged as a driver, a job he was unable to perform on account of the permanent disability suffered by him. The Division Bench held that since the employee had become unfit for the work of a driver, being unable to do so with only the left arm, the disablement was total and not partial.

13. A Learned single Judge of the Rajasthan High Court in Executive Engineer, Udaipur v. Narain Lal reported in 1977 LIC 1827 held that the mere fact that the workman had been provided some employment by the employer as a matter of grace or mercy could not be decisive in computing compensation under the Workmen's Compensation Act, 1923. The same view was taken by a Division Bench of the Calcutta High Court which held in Sarat Chatterjee & Cot. (P) Ltd. v. Md. Khalil reported in 1979 LIC 401 that the mere fact that there was no loss of earning capacity by virtue of the fact that the workman had been given some or even a better job under the same employer was not decisive and the material question was whether there was a substantial or real risk that the workman will lose his present job some time before the end of his working life or would be thrown in the labour market more than once because of his disability.

14. Having regard to the well settled principles which have been enunciated in the several judgments referred to above, there can be no doubt that the injury which was sustained by the appellant has resulted in a permanent total disablement. As a result of the disablement, the Appellant had virtually, if not completely, lost the use of his right hand. The injuries which have been sustained by the Appellant have caused a loss of space between all the fingers as a result of which almost all the fingers whatsoever came to be attached to each other. The Medical Board of the E.S.I, noticed that there was a practical loss of function of all fingers and the thumb, though the wrist was normal. The Medical Board concluded that there was indeed a "loss of hand". The Appellant was engaged when the accident took place on a Milling machine though he had been working as a helper earlier. The employer has provided to him some work as a watchman as a matter of grace. That, however, cannot be decisive of the question as to whether or not the disablement was total. Having regard to the fact that the injury in the present case has led to a complete disfigurement of the right hand rendering it impossible for the Appellant to use that hand for any activity at work the disablement in the circumstances of the present case is total. The injury has completely deprived the Appellant in the present case of the use of his right hand. The disablement is, within the meaning of Clause (15-B) of Section 2 a disablement of a permanent nature which has incapacitated the Appellant for all

work which he was capable of performing at the time of accident resulting in such disablement. In the circumstances, the Insurance Court erred in taking the view which it did. The interpretation placed by the Insurance Court on the provisions of Clauses (15-A) and (15-B) of Section 2 is directly contrary to the view taken by the Supreme Court and followed in the judgments of the several High Courts. On the admitted facts as they stand, the Insurance Court was not justified in its conclusion.

15. In the circumstances, this First Appeal is allowed. The Respondent shall compute the benefits payable to the Appellant under the provisions of the Employees' State Insurance Act, 1948 on the basis that as a result of the employment injury which was suffered by him, the Appellant has suffered a permanent total disablement within the meaning of Clause (15-B) of Section 2. The Appellant has been paid certain benefits until date. The difference in the benefits inclusive of arrears shall be computed and paid to the Appellant within a period of six weeks from today. The Appellant has been paid the benefits with effect from February 13, 1995 which was the date on which his injury was assessed by the Medical Board. The computation and payment of arrears shall be made with effect from the said date and shall continue to be made in future in accordance with law. The First Appeal is accordingly allowed. There shall be no order as to costs.

16. Certified copy of the order expedited.

17. Parties to act on an ordinary copy of this order duly authenticated by the Personal Secretary of this Court.