

(2009) 08 OHC CK 0047
In the Orissa High Court

Metal Engineering and Treatment Co. Pvt. Ltd. (METCO)	APPELLANT
Vs	
Commissioner for Workmen's Compensation-Cum-Deputy Labour Commissioner and Another	RESPONDENT

Date of Decision : 11-08-2009

Acts Referred:

Employees State Insurance Act, 1948 — Section 53

Citation : (2010) 109 CLT 100 : (2010) 1 OLR 715 Supp

Hon'ble Judges : B.K. Patel, J

Bench : Single Bench

Final Decision : Allowed

Judgement

B.K. Patel, J.—In this writ application filed under Articles 226 & 227 of the Constitution of India the Petitioner seeks to quash the Order Dated 8.1.2007 passed by the Commissioner for Workmen's Compensation-cum-Assistant Labour Commissioner, Cuttack in W.C. Case No. 325-D of 2005, instituted by the Opposite Party No. 2-workman under the Workmen's Compensation Act, (for short, "the W.C. Act").

2. Petitioner's case in brief is that the Petitioner is a private limited company registered under the Companies Act, 1956 & engaged in execution of works under contract in the establishment of the principal employer M/s Utkal Manufacturing & Service Ltd., Choudwar (for short, "the UMSL") The Opposite Party No. 2 while working in the establishment of the Petitioner sustained injuries on 1.9.2005 for which he was treated at the expenses of the Petitioner. Though the Opposite Party No. 2 did not report for work since the month of October, 2005, he filed W.C. Case No. 325-D of 2005 for compensation. On receipt of notices, the Petitioner as well as the principal employer filed written statements challenging maintainability of the proceeding on the ground of bar contained u/s 53 of the Employees' State Insurance Act (for the short "the E.S.I Act") stating that establishment of the principal employer is covered under the E.S.I Act & contribution for the employees is paid by the Petitioner. The issue relating

maintainability of the claim proceeding under the W.C. Act due to bar contained u/s 53 of the E.S.I Act was taken up as a preliminary issue. By the impugned order Learned commissioner held that as he was not convinced that the claimant-workman was covered under the E.S.I Act, proceeding for compensation under the W.C. Act is maintainable. It is contended that there being no dispute that the establishment of the principal employer is covered under the E.S.I. Act, the order passed by the Learned Commissioner for Workmen's Compensation is based on wrong conception of law.

3. In the counter affidavit filed by the Opposite Party No. 2-workman it is admitted that he was engaged to work for the principal employer through contractor & in course of such employment he sustained injuries on 01.09.2005. It is also not disputed that the Petitioner & the principal employer filed written statements in W.C. Case No. 325-D of 2005 asserting that they are covered under the E.S.I. Act. However, it is averred in the counter affidavit that Opposite Party No. 2 had never submitted any application seeking coverage under the E.S.I. Act & that documents relied upon by the Petitioner & Principal Employer in support of the contention that Opposite Party No. 2 is covered under the E.S.I. Act are not genuine. According to the Opposite Party No. 2 the best evidence of coverage under the E.S.I. Act is the certificate granted from the authority under the E.S.I. Act. It is further averred that the W.C. Act does not contemplate adjudication of the issue of maintainability of a proceeding as a preliminary issue.

4. In view of nature of controversy raised in this writ application, a copy of the Writ Petition was served on Sri P.P. Ray, Learned Counsel appearing for the Employees' State Insurance Corporation (for short "the Corporation") upon which the Corporation filed an affidavit & also an additional affidavit. In the affidavit it has been categorically admitted that the principal employer is covered under the E.S.I. Act. However, in the affidavit as well as additional affidavit the Corporation has made averments to the effect that Opposite Party No. 2 was not covered under the E.S.I. Act on the date of the alleged accident.

5. Sri S. Mishra, Learned Counsel appearing for the Petitioner submitted that contentions raised on behalf of Opposite Party No. 2 as well as the Corporation are irrelevant & legally unsustainable. It is submitted that Section 53 of the E.S.I. Act provides that the 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 Workmen's Compensation Act, 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 the E.S.I. Act. An insured person within the meaning of the E.S.I. Act employee in respect of whom not only contributions are paid to also in means a person who is or was an employee in respect of whom contributions are or were payable under the E.S.I. Act. The E.S.I. Act does not contemplate that an employee should be covered under the Act. Rather, the E.S.I. Act contemplates that in order to get the benefit, an establishment of the employee is to be

covered under the E.S.I. Act. On the basis of such submissions, it was argued that there being no dispute by Opposite Party No. 2 that he was employed under the Petitioner & he sustained injuries in course of such employment, proceeding under the W.C. Act is not maintainable in view of bar contained u/s 53 of the E.S.I. Act. In this context, Learned Counsel for the Petitioner relied upon the decision of the Hon'ble Supreme Court in Bharagath Engineering Vs. R. Ranganayaki and Another, .

6. Sri B. Pujari, Learned Counsel appearing for the Opposite Party No. 2 sought to defend the order impugned in this writ application by contending that when the Corporation disowns the Opposite Party No. 2 to be covered under the E.S.I. Act, he should not be left remediless. Sri Pujari also contended that no identity card or any other document was ever issued to Opposite Party No. 2 indicating that he was covered under the E.S.I. Act.

7. Sri P.P. Ray, Learned Counsel appearing for the Corporation also in course of argument did not dispute that the principal employer is covered under the Act. However, attempt was made to raise factual controversy regarding employment of Opposite Party No. 2 in the establishment of the Petitioner which is a contractor for the principal employer.

8. Issue raised by the Petitioner & the principal employer before the Commissioner for Workmen's Compensation is an Issue relating to maintainability of the proceeding for compensation in view of statutory bar contained u/s 53 of the E.S.I. Act. Therefore, Learned Commissioner rightly proceeded to decide the Issue of maintainability at the threshold. Section 29 of the Workmen's Compensation Rules provides that when issues both of law & of fact arise in the same case, & the Commissioner is of opinion that the case may be disposed of on the issues of law only, he may try those issues first, & for that purpose may, if he thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. It is needless to observe that in case issue of bar to the proceeding u/s 53 of the E.S.I. Act is answered in the affirmative, the proceeding itself would be disposed of without subjecting the parties to resort to futile exercise & the W.C. Act which shall ultimately be found to be incompetent in view of provision u/s 53 of the E.S.I. Act. Section 53 of the E.S.I. Act reads as follows:

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 Workmen's 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.

9. Question raised in this writ application is as to whether Petitioner's establishment is covered under the E.S.I. Act. The Opposite Party No. 2 as well

as the Corporation seek to trivialize the issue by raising factual controversy to the effect that Opposite Party No. 2 is not covered under the Act. However, the E.S.I. Act casts a statutory obligation on the employer to insure the employees. Opposite Party No. 2 having admitted his employment with the Petitioner which is a contractor under the principal employer, there is no escape from the conclusion that he is an insured person under the E.S.I. Act. The position has been lucidly explained in *Bharaggath Endangering* (supra) wherein it has been held:

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 & who is, by reason thereof, entitled to any of the benefits provided by this Act.

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 employer's obligation to pay the contribution. In *Employees State Insurance Corporation Vs. M/s. Hotel Kalpaka International*, was held that the employer cannot be heard to contend that since he had not deducted the employee's contribution on the wage 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. Harrisons 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.

The scheme of the Act, the rules & the Regulations clearly spell out that the insurance covered under the Act is distinct & 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 & "contribution period" are defined in Section 2(23) of the Act, Rule 2(1C) & Rule 2(2-A) of the Rules. Rule 58(2) 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 & 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 & before the expiry of the first wage period.

Rule 58(2)(b)(ii), insofar as it is relevant, reads as follows:

Dependants' benefits.

2(b) Where an employment injury occurs before the commencement of the first benefit period in respect of a person, the daily rate of dependant's benefit shall be:

(i) xxx xxx xxx.

(ii) where a person sustained employment injury before the expiry of the first wage period in the contribution period in which the injury occurs, the rate, forty per cent more than the standard benefit rate, rounded off to the next higher multiple of five paise corresponding to the group in which wages actually earned or which would have been earned had he worked for a full day on the date of accident/fall.

When considered in the background of statutory provisions, noted above, the payment or non-payment of contributions & action or non-action prior to or subsequent to the date of accident is really inconsequential.

10. There is no dispute among the injured employee, the Petitioner establishment & the principal employer that the insured employee was in employment of the Petitioner contractor, working for the principal employer. In the written statements filed before the Commissioner for Workmen's Compensation principal employer admits the Petitioner to be its contractor & the Petitioner admits employment of Opposite Party No. 2 with him as a helper. The Corporation admits the coverage of principal employer under the E.S.I. Act. Therefore, the injured employee is clearly an "insured person" as defined under the E.S.I. Act. Therefore, by operation of Section 53 of the E.S.I. Act, proceeding under the W.C. Act are statutorily excluded.

11. In view of the above, proceeding for compensation instituted by Opposite Party No. 2 before the Commissioner for Workmen's Compensation-Cum-Deputy Labour Commissioner, Cuttack in W.C. Case No. 325-D of 2005 is not maintainable. Order Dated 08.01.2007 at Annexure-5 to the Writ Petition passed by the Commissioner for Workmen's Compensation-Cum-Deputy Labour Commissioner, Cuttack in W.C. Case No. 325-D of 2005 is, therefore, quashed.

It is made clear that it is open for Opposite Party No. 2 to approach the E.S.I. Court for redressal of his grievances within, one month, in which event the proceeding initiated under the E.S.I. Act shall be disposed of on merit in

accordance with law.

The Writ Petition is, accordingly, allowed. No cost.