

(2019) 04 BOM CK 0130

In the Bombay High Court

Case No : First Appeal No. 4297 Of 2016

Munmahesh Ramkhilawan Gupta

APPELLANT

Vs

Ashish Nemichand Katariya Occupier M/S Sheet Shapers (I)
Pvt. Ltd. And Anr

RESPONDENT

Date of Decision : 24-04-2019

Acts Referred:

Workman's Compensation Act, 1923 — Section 3, 4, 22

Employees' State Insurance Act, 1948 — Section 2(14), 38, 53

Citation : (2019) 04 BOM CK 0130

Hon'ble Judges : Sunil K. Kotwal, J

Bench : Single Bench

Advocate : S.N. Lute, S.S. Vidwauns

Judgement

1. This appeal is directed by original claimant in W.C.No.04.2013, against the judgment passed by Commissioner in Employees' Compensation Act, 1923 Aurangabad. Respondent Nos. 1 and 2 in the appeal are original respondent Nos. 1 and 2 respectively in W.C. No.04/2013. Facts leading to institution of this appeal are that :

2. The claimant was engaged by respondent No. 2 for respondent No.1 as casual labour. On 02.09.2011 at about 6 hours while working on "Power Press Machine, the claimant sustained injury, resulting into amputation of his four fingers of left hand. According to claimant the accident occurred because respondent No. 2 forced the claimant to work at power press machine though he was not skilled workman to run the power press machine. According to claimant due to disability, he cannot do any work. Therefore, he filed application under Section 22 read with Sections 3 and 4 of the Workman's Compensation Act, 1923 (hereinafter referred as (EC Act) Employees' Compensation Act).

3. By filing written statement (Ex.C-7), the respondent No.1 admitted that the respondent No. 2 contractor employed the claimant for casual work at respondent No.1. He admitted that the claimant sustained injury and he was

hospitalized in the hospital governed under Employees' State Insurance Act, 1948 (hereinafter referred as E.S.I. Act). He contended that injury sustained by claimant were minor.

The respondent No.1 contended that the claimant and respondents are governed under E.S.I. Act and therefore, the application is not tenable under Employees' Compensation Act, 1923.

4. Even respondent No. 2 filed written statement C-10 and denied the claim of claimant but he has admitted that the applicant was engaged on 01.09.2011 as casual labour. He has also raised objection that the applicant is covered under E.S.I.Act and the contribution to the E.S.I. was already deposited.

5. After considering the evidence placed on record, the Tribunal held that the application for compensation filed under E.C.Act is not maintainable in view of bar under Section 53 of E.S.I.Act.

6. Heard Mr.S.N. Lute, learned counsel for appellant and Mr. S.S. Vidwauns for respondent No.1.

7. Learned counsel for the appellant submits that though claimant was in the employment of respondents since 01.09.2011, the accident occurred on 02.09.2011 at 6.00 a.m. and respondent paid contribution and registered the claimant under E.S.I.Act on 02.09.2011 at 10.00 a.m. i.e. after the accident. Thus, learned counsel for the appellant submits that the bar under Section 53 of E.S.I.Act is not applicable in the case at hand.

8. Learned counsel for respondent No.1 submits that the petition under E.C.Act for compensation is not maintainable as such proceeding is barred under Section 53 of E.S.I.,Act. He submits that once the claim is registered under E.S.I., Act, the remedy available for the claimant is only under E.S.I., Act. He submits that when claimant admits his employment since 01.09.2011, the payment of contribution under E.S.I., Act by employer after the occurrence of accident is irrelevant. To substantiate his contention he placed reliance on National Insurance Company Limited Vs. Hamida Khatoon and others in Civil Appeal No.3324 of 2009 decided by Supreme Court on 06.05.2009.

9. Undisputedly, provisions of E.S.I., Act are applicable to respondent No.1 establishment. Therefore, under Section 38 of the E.S.I., Act, it is the obligation of respondent No.1 - employer to insure its all employees in the manner provided by this Act. Section 2(14) of E.S.I., Act defines "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. Thus, a bare glance of Section 2(14) of the E.S.I., Act makes it clear that once the employee is insured person, in respect of whom contributions are paid by employer, he is entitled for the benefits provided by this Act, irrespective of date of which contribution is paid. Even in National Insurance Co. Ltd. Vs. Hamida Khatoon (Supra) Apex Court in para 12 of the judgment

observed that "when considered in the background of statutory provisions, noted above, the payment or non-payment of contribution and action or non-action prior to or subsequent to the date of accident is really inconsequential."

10. Even in *Bharagath Engineering Vs. R. Ranganayaki and Anr* reported in [(2003) 2 SCC 138], the Apex Court held that:-

"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 *ESI. Corpn. v. Harrisson Malayalam Pvt. Ltd.*, [1993] 4 S.C.C. 361, 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 *ESI. Corpn. v. Hotel Kalpaka International*, [1993] 2 SCC 9, it was held that the employer cannot be heard to contend that since he had not deducted the employee's contribution on the wages of the employees or that the business had been closed, he could not be made liable. Said view was reiterated in *Employees' State Insurance Corporation v. Harrisons Malayalam Limited*, [1998] 9 SCC. 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 employee concerned."

11. In the case at hand, the temporary identity certificate issued by employees State Insurance Corporation, shows that the claimant was registered as insured person on 02.09.2011. The employment of the claimant with respondent No.1 since 01.09.2011 is an admitted fact in between the parties. The only contention of claimant is that because the contribution was paid on 02.09.2011 after the occurrence of the accident in the morning hours, the claimant is not covered under E.S.I., Act as at the time of accident he was not insured employee. However, this defense of claimant holds no substance in view of law settled by Apex Court in *National Insurance Corporation Vs. Hamida Khatoon* (supra) and *Bharagath Engineering Vs. R. Ranganayaki* (supra). As claimant was in the category of insured employee, in view of bar under Section 53 E.S.I., Act, the claimant is not entitled to recover compensation from his employer under the Workman's Compensation Act, 1923 (E.C.,Act), in respect of a employment injury sustained by him. Therefore, the learned Commissioner is fully justified while dismissing the claim petition. I hold that this appeal being devoid of merits deserves to be dismissed with liberty to the claimant to avail appropriate remedy under employees State Insurance Act, 1948. Accordingly, First Appeal No.4297/2016 is dismissed. The appellant is at liberty to avail appropriate remedy under the Employees' State Insurance, Act, 1948. Parties to bear their respective costs of the appeal.