

(2012) 03 GUJ CK 0089

In the Gujarat High Court

Case No : F.A. No. 449 of 2012 with C.A. No. 1451 of 2012

Regional Director, Employees State Insurance

APPELLANT

Vs

Nileshkumar Jasubhai

RESPONDENT

Date of Decision : 12-03-2012

Acts Referred:

Employees State Insurance Act, 1948 — Section 82, 82(2)

Citation : (2013) 1 LLJ 221

Hon'ble Judges : Rajesh H Shukla, J

Bench : Single Bench

Advocate : Hemant S. Shah, for the Appellant; Asha H. Gupta, for the Respondent

Judgement

Rajesh H. Shukla, J.—The present First Appeal has been filed by the appellant-Corporation (original opponent) being aggrieved and

dissatisfied with the impugned judgment and order passed by the ESI Court in Second Appeal No. 24 of 2009 dated 8.12.2011 assessing the

disability at 40% on the grounds stated in the memo of Appeal contending inter alia that the lower Court has erred in not considering the disability

assessed by the panel doctors in Medical Appellate Tribunal, which is acceptable by Corporation. It is also contended that if the decision was not

acceptable then it has to remand to the Tribunal for re-assessment but the Court has no jurisdiction to enhance the disability. Heard learned

counsel, Mr. Hemant S. Shah for the appellant-Corporation and learned counsel, Ms. Asha Gupta for the respondent.

2. Learned counsel, Mr. Hemant Shah has referred to the papers as well as details of evidence and submitted that the Medical Board had

assessed to 10% and the appellate Tribunal consisting of the medical doctors has

increased it to 18%. However, learned counsel, Mr. Shah

submitted that ESI Court has assessed the disability at 40% without any basis or justification. He submitted that the medical evidence on

assessment of the disability by the doctor or the Tribunal would be justified and the Court cannot substitute its findings. He strenuously submitted

that it ought to have been remanded to the Board or the Tribunal for reassessment. Learned counsel, Mr. Shah has also referred to and relied upon

the judgment of this Court case of Mohamed Abdulla Vs. Employees' State Insurance Corporation, Ahmedabad and submitted that as observed,

the substantial question of law is involved in appreciation of evidence, which has not been properly appreciated. He, therefore, submitted that the

present Appeal may be allowed and at the most, it may be remanded back for the assessment of the disability.

3. Learned counsel, Ms. Asha Gupta, however, referred to the papers including the medical papers and pointedly referred to Exhibit 6 and others

papers with regard to the injury as well as the assessment and submitted that as stated in detail in this medical case papers, there is a specific note

made in case papers as well as subsequently by the Tribunal, which is produced at Exhibit 5. She submitted that he has stated that ""Operated: R/u.

& Humerus with restriction of elbow mov. & supination/pronation forearm (r) side. MB 10% + MAT 8% = 18%. Eighteen percent.

4. Therefore, it was submitted that the Court has considered the impact of the disability and has enhanced the disability, which has not been

considered for the purpose of functional disability. She therefore submitted that the respondent herein is a labour, who has stiffness and it can bend

upto 145 degree and, therefore, it will be difficulty for him to do any work and, therefore, the assessment of the disability is just and proper.

5. Learned counsel, Ms. Gupta has also submitted that there is no substantial question of law involved and unless there is substantial question of

law involved, this Court may not interfere with the findings. In support of her submission, she has referred to and relied upon the judgment of the

Hon'ble Apex Court in case of Hotel New Nalanda Vs. Regional Director, E.S.I. Corporation, and submitted that against the finding of fact,

which is not perverse, no Appeal may be entertained.

6. In view of these rival submissions, it is required to be considered, whether the

present First Appeal can be entertained or not.

7. As can be seen from the material and evidence and case papers including Exhibit 5 and also other papers, the opponent had suffered injury

while operating machine and there is a permanent disablement. In spite of 180% (sic 80%), left hand had multiple fracture resulting into stiffness and

movement is restricted and instead of 180 degree, it is restricted upto 135 degree. Admittedly, the assessment made by the Medical Board has not

found acceptable in the Tribunal and on the basis of the case papers and other medical evidence has increased the disability to 18%. Therefore,

some justification in the claim is made with regard to the functional disability. As can be seen from the note made in detailed that he had stiffness

where the opponent is required to handle heavy weight and the left arm, which has been affected, cannot bend, which is leading to some kind of

difficulty in his work. There is also finding in the note that wherever he has to lift any heavy weight, he cannot do such work and, therefore, the

Court has after considering the papers enhanced the percentage of the disability considering the aspect of functional disability. It is well accepted

that the percentage of disability is not to be counted in abstract form or percentage but has to have relevance with the functional capability of the

injured.

8. Therefore, there is no doubt that if the evidence is not properly appreciated, it would be remanded considering the substantial question of law as

observed by the Hon"ble Apex Court in case of Mohamed Abdulla v. Employees" State Insurance Corporation, Ahmedabad (supra). However,

in the facts of the present case, it cannot be said that the evidence has not been appreciated. The submission made by learned counsel, Mr. Shah

that the Court cannot substitute his finding and it has to be remanded back cannot be readily accepted in view of the fact that it is a function of the

Court to consider the evidence and decide whether the percentage of disability assessed based on the material and evidence is justified or not with

reference to the nature of work, functional disability etc. Therefore, considering the judgment of the Hon"ble Apex Court, which has been referred

to by the learned counsel, Ms. Gupta, it cannot be said that the findings recorded by the ESI Court is perverse.

9. The provisions of Section 82 of the Employees" State Insurance Act, 1948

provides for an Appeal clearly lays down the limitation with regard to the entertainment of such Appeal, which reads as under:

82. Intimation of decision regarding dependants' benefit As soon as possible after the expiry of the period during which claims can be submitted in terms of the notice issued under regulation 81, the appropriate Regional Office shall intimate by registered post the decision of the Corporation in regard to the claim of each of the dependants in writing to the dependants concerned or to his legal representative, or, in the case of a minor, to his guardian.

10. In other words, Section 82(2) of the said Act provides that Appeal shall lie to the High Court from the order of ESI Court if it involves

substantial question of law. As discussed, it cannot be said that there is any substantial question of law involved merely because the Court has

come to a different conclusion on the assessment of appreciation of evidence.

11. It is required to be appreciated that social piece of legislation with an object of providing the general welfare and, therefore, approach in such

cases has to be balanced with humanity and mere arithmetic like calculation of percentage of disability with reference to the realities is not permissible.

12. A useful reference can be made to the observations made by the Hon'ble Apex Court interpreting the provisions of this very Act in a judgment

in case of Transport Corporation of India Vs. Employees' State Insurance Corpn. and Another, , wherein it has been quoted from the earlier

judgment in case of The Buckingham and Carnatic Co.Ltd. Vs. Venkatiah and Another, as under:

It is a piece of social legislation intended to confer specified benefits on workmen to whom it applies, and so, it would be inappropriate to attempt

to construe the relevant provisions in a technical or a narrow sense. This position cannot be disputed. But in dealing with the plea raised by Mr.

Dolia that the Section should be liberally construed, we cannot overlook the fact that the liberal construction must ultimately flow from the words

used in the Section. If the words used in the Section are capable of two constructions one of which is shown patently to assist the achievement of

the object of the Act, Courts would be justified in preferring that construction to the other which may not be able to further the object of the Act.

13. It has also been again quoted as under:

Before parting with the discussion on this point, it is necessary to keep in view the salient fact that the Act is a beneficial piece of legislation

intended to provide benefits to employees in case of sickness, maternity, employment injury and for certain other matters in relation thereto. It is

enacted with a view to ensuring social welfare and for providing safe insurance cover to employees who were likely to suffer from various physical

illnesses during the course of their employment. Such a beneficial piece of legislation has to be construed in its correct perspective so as to fructify

the legislative intention underlying its enactment.

14. Thereafter in a subsequent judgment in case of Regional Provident Fund Commissioner Vs. The Hooghly Mills Company Ltd. and Others, ,

the Hon"ble Apex Court has referring to the Provident Funds Act made observation as under:

Under the Directive Principles the State has the obligation for securing just and humane conditions of work which includes a living wage and decent

standard of life. The said Act obviously seeks to promote those goals. Therefore, interpretation of the said Act must not only be liberal but it must

be informed by the values of Directive Principles. Therefore, an awareness of the social perspective of the Act must guide the interpretative

process of the legislative device.

15. It is well accepted principles regarding the interpretation about the breach in such cases. In Seaford Court Estates Ltd. v. Asher, (1949) 2 All

ER 155 (CA), LORD Denning, advised a purposive approach to the interpretation of a word used in a statute and observed:

A Judge should ask himself the question how, if the makers of the Act had themselves come across this rock in this texture of it, they would have

straightened it out? He must then do so as they would have done. A Judge must not alter the material of which the Act is woven, but he can and

should iron out the creases.

16. Therefore, bearing in mind the legislative intent and the fact that it is a beneficial piece of legislation intended for a social welfare, the

submissions made by learned counsel, Mr. Shah cannot be accepted.

17. Therefore, the present First Appeal cannot be entertained and deserves to be dismissed and accordingly stands dismissed.

18. In view of the dismissal of main First Appeal, Civil Application does not survive and stands disposed of accordingly.

19. After the judgment was dictated, learned counsel, Mr. Shah requested to stay of the operation of the order to enable the appellant-

Corporation to approach the Hon'ble Supreme Court. In the facts and circumstances and considering the fact, which is benevolent legislation as a social piece of legislation, such a request cannot be entertained and stands rejected accordingly.