(2014) 01 DEL CK 0400

In the Delhi High Court

Case No : FAO No. 244 of 2010

Sushil Goyal APPELLANT

Vs

Luckson Siddique and Others RESPONDENT

Date of Decision : 27-01-2014

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(14) 2(23) 2(8) 26 38
Penal Code, 1860 (IPC) — Section 304A
Workmens Compensation Act, 1923 — Section 30

Citation : (2014) 3 AD 372 : (2014) 2 AnWR 12 : (2014) 141 FLR 1078 : (2014) 1 LLJ 709 : (2014) LLR 465

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Pardeep Gupta, for the Appellant; Abhay Singh, Ms. Veena Singh, Ms. Vindhya Singh, Advocates for Respondent Nos. 1 to 5, Mr. Hari Kishan, H.S. Kohli, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—By this first appeal filed u/s 30 of the Workmen''s Compensation Act, 1923 challenge is laid to the judgment of the Employees Commissioner dated 20.5.2010 by which the Commissioner allowed the compensation claim filed by respondents herein, and who were the legal representatives/dependents of the deceased workman Sh. Aftab Alam. The Commissioner by the impugned judgment has upheld the relationship of employer and employee between the appellant/employer (respondent before the Commissioner) and the deceased Sh. Aftab Alam who on 12.7.2007 was working as the supervisor/operator while discharging his duties under the electricity pole at B-2521, DSIDC Industrial Area Narela, Delhi. The deceased Sh. Aftab Alam died because an iron pipe hit the electricity line and the same resulted in electrocution of Sh. Aftab Alam, who died on the spot. An FIR bearing no. 384/2007 was also registered with the Police Station at Narela, Delhi u/s 304A IPC.

2. Appellant admitted that the deceased Sh. Aftab Alam was his workman, however, it was claimed that the appellant was not liable, but that the liability was of ESIC. The argument urged on behalf of the appellant is crystallized in the admission order of this appeal on 13.10.2011 and which reads as under:

CM No. 11616/2010

Interim orders are made absolute till the disposal of the appeal.

CM stands disposed of.

FAO No. 244/2010

Admit.

It is urged by learned counsel for the appellant relying upon Bharagath Engineering Vs. R. Ranganayaki and Another, that once the establishment of the appellant was covered/registered under the Employees'' State Insurance Act, 1948 (in short ''ESI Act''), then employees will be entitled to the benefits from the ESI Corporation, even assuming the contributions to the corporation are not paid by the appellant. Reliance is also placed upon Section 53 of the Employees'' State Insurance Act, 1948, which states that once an establishment is covered under the ESI Act, then the provisions of Employee''s Compensation Act, 1923 would not apply. Accordingly, it will therefore be necessary to issue notice to the ESI Corporation which is added as respondent no. 6 in this appeal. Amended memo of parties be filed within two weeks along with the process fee for service.

Notice now be issued to the respondent no. 6/ESI Corporation, on filing of process fee, both in the ordinary method as well as by registered AD post, returnable on 27th January, 2012.

Copy of this order be sent along with the notice.

3. Before me, learned counsel for the appellant/employer refers to various paragraphs of the judgment of the Supreme Court in the case of Bharagath Engineering Vs. R. Ranganayaki and Another, to argue that once the employee was an insured person from his date of employment, consequently, even if insurance premium is not paid, the liability will be of ESIC and not of the appellant. Reliance is placed by learned counsel for the appellant on paras 9 to 12 of the said judgment which read as under:

9. 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, 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 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 cases 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.

10. The scheme of the Act, the Rules and the Regulations clearly spell out that the insurance covered under the Act is distinct and different from the contract of insurance in general. Under the Act, the contributions go into a Fund u/s 26 for disbursal 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'' and ''contribution period'' are defined in Section 2(23) of the Act, Rule 2(1C) and Rule 2(2-A) of the Rules. Rule 58(2)(b) 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 and 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 and before the expiry of the first wage period.

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

Dependent''s 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 dependent''s benefit shall be:

(i) 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.

12. When considered in the background of statutory provisions, noted above, the

payment or non-payment of contributions and action or non-action prior to or subsequent to the date of accident is really inconsequential. The deceased employee was clearly an ''insured person'', as defined in the Act. As the deceased employee has suffered an employment injury as defined u/s 2(8) of the Act and there is no dispute that he was in employment of the employer, by operation of Section 53 of the Act, proceedings under the Compensation Act were excluded statutorily. The High Court was not justified in holding otherwise. We find that the Corporation has filed an affidavit indicating that the benefits under the Act shall be extended to the persons entitled under the Act. The benefits shall be worked out by the Corporation and shall be extended to the eligible persons.

4. On the basis of the aforesaid paras it is contended that for payment or non-payment of the contributions, an action or non-action prior to or subsequent to the date of the accident is really inconsequential, and that once the employer is registered with ESIC, liability will be of ESIC and not the appellant.

5. I may note that in this case ESIC was added as a respondent vide the aforesaid admission order dated 13.10.2011. ESIC as respondent no. 6 has filed an affidavit in this Court stating that Form No. 16 with respect to deceased-employee Sh. Aftab Alam was filed only after one year of the accident and that the appellant has neither submitted the contract for employment and nor the name of the deceased was shown in the register of the employees. Therefore, the claim made by the dependents under the ESIC Act was rejected. In essence what is contended by ESIC is that a fraud cannot be played upon it by asking it to incur the liability under the Act when the deceased-employee was actually not an employee of the employer on the date of the incident/accidental death.

6. In my opinion, in the facts of this case, the argument urged on behalf of the appellant placing reliance on the judgment of the Supreme Court in Bharagath Engineering (supra) case is misconceived because the judgment in the case of Bharagath Engineering proceeds in a factual basis where an employee is in fact an employee and his name is shown in the register of employees as duly registered with ESIC. It is not the law as per Bharagath Engineering (supra) case that even if a person is not shown in the register of employees and is not an employee on the date of the accident, even then ESIC still incurs liabilities for an employee who is not in the register and who is not registered with ESIC as per the returns filed by the employer. Section 44 of the ESIC Act talks of filing of returns with ESIC, and, maintenance of a register of employees by the employer. Contributions are to be made therefore with respect to specified employees existing on the employment register whose total number have to be specified in the returns made as per the register. A mere registration of an employer under ESIC Act cannot and does not mean that such registration applies with respect to un-specified number of employees inasmuch as registration is applicable only for specific employees and specified number of employees. There cannot be any other interpretation of the liability of ESIC Act under the provisions of the Act

otherwise it will be very easy for an employer to give a lesser number of employees in the employment register, pay lesser contribution, and then after happening of an accident seek to include employees who have suffered as a result of the accident, by filing returns with ESIC thereafter, and thereby deny its/ employers'' liability by seeking to fasten the liability upon ESIC. If the employer is permitted in such a case to plead that it is not liable then it will be as if to permit a fraud to be played upon ESIC, and which interpretation of the provisions of the Act I cannot subscribe to. I cannot permit the argument as urged on behalf of the appellant to succeed because admittedly in the documents filed with ESIC by the employer of the previous year of the accident the deceased Sh. Aftab Alam was not shown as an employee and he was sought to be shown as an employee only by filing returns after one year. Registration with ESIC is valid only with respect to such employees who are employees as duly shown in the returns with ESIC and also in the employees'' register maintained by the employer for being covered under the ESIC Act. If I permit the argument urged on behalf of the appellant to succeed then grave fraud can be played upon ESIC because a person would not be an employee covered under ESIC and yet, liability would be thrown on ESIC. The object of the observations of the Supreme Court in the case Bharagath Engineering (supra) is to ensure that once an employer with a particular number of specified employees with details is registered with ESIC, then, even when premiums are not paid by the employer, ESIC would still be liable to the dependents of the deceased, inasmuch as, it is the duty of ESIC to recover the premiums and other amounts recoverable under the ESIC Act from the employer. The argument, therefore, urged on behalf of the appellant/ employer is rejected and the liability in the present case falls upon the appellant and not upon ESIC. In view of the above, there is no merit in the appeal, and the same is dismissed with costs of Rs. 20,000/-. At this stage, learned counsel for the appellant prays for waiver of costs and, therefore, on request, costs imposed are waived.

