

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO No. 177/2012 & CM No. 7366/2012**

% **16th April, 2014**

EMPLOYEES STATE INSURANCE CORP. & ANR.

.....Appellants

Through: Mr. K.P.Mavi, Adv.

VERSUS

SMT. POONAM SHARMA & ORS.

..... Respondents

Through: Mr. Amiet Andley, Adv.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal is filed under Section 82 of the Employees' State Insurance Act, 1948 (in short 'the Act') by the ESI Corporation impugning the judgment of the ESI court below dated 27.9.2011. By the impugned judgment, the ESI court has relied upon the provision of Section 51(E) of the Act to hold that an accident occurring to an employee while commuting either to and fro from the place of duty, will be deemed to have arisen out of and in the course of employment.

2. The only issue which is argued before this Court is whether the benefit of Section 51(E) of the Act is available to such an employee who suffers an accident prior to coming into force of Section 51(E) of the Act which was brought in by Act 18 of 2010 w.e.f 1.6.2010. In the present case, the accident happened on 10.12.1992 i.e before Section 51(E) of the Act came into force.

3. Section 51E of the Act reads as under:-

“51E.Accidents happening while commuting to the place of work and *vice versa*.- An accident occurring to an employee while commuting from his residence to the place of employment for duty or from the place of employment to his residence after performing duty, shall be deemed to have arisen out of and in the course of employment if nexus between the circumstances, time and place in which the accident occurred and the employment is established.”

4. For interpretation of Section 51(E) as to whether its application is to be taken prospectively i.e to accidents happening after 1.6.2010 or that this Section is only declaratory or clarificatory, reference will be necessary to the main provision of Section 2(8) of the Act which defines employment injury. This provision reads as under:-

2(8) “employment injury” means a personal injury to an employee or an occupational disease arising out of and in the course of his employment, being an insurable

employment, whether the accident occurs or the occupational disease is contractual within or outside the territorial limits of India;”

5. A reading of the aforesaid provision being Section 2(8) of the Act shows that for an employee to claim benefit of the provision of the Act, the injury to the employee must be caused by the accident arising out of and in the course of employment.

6. The Supreme Court in the case of *Saurashtra Salt Manufacturing Co. Vs. Bai Valu Raja, AIR 1958 SC 881* held that when an employee is travelling to and fro from his place of work, if an accident is caused while commuting to and fro from the place of work, the accident cannot be said to arise out of and in the course of employment because the accident does not happen within the premises of the employer. This judgment of the Supreme Court was of a Division Bench of three Judges and the ratio of this judgment was to an extent changed by the Constitution Bench judgment of the Supreme Court in the case of *G.M.,B.E.S.T Undertaking, Bombay Vs. Mrs. Agnes, (1964) 3 SCR 930*. The Constitution Bench of the Supreme Court in the *B.E.S.T Undertaking's (supra)* has held that since the service rules required the employees of the B.E.S.T Undertaking to use official transport while going to and fro from

work, the accident which happened to an employee while commuting to and fro from the place of work would be an accident arising out of and in the course of employment. So far as appellant authority is concerned, the issue is covered in its favour that injury caused to an employee while commuting to and fro from the place of work is not included in the employment injury as per the judgment of the Supreme Court in the case of ***Regional Director, E.S.I. Corporation And Anr. Vs. Francis De Costa and Anr. (1996) 6 SCC 1***. The judgment of the Supreme Court in the case of ***Francis De Costa (supra)*** does not deal with Section 51(E) of the Act, and obviously that could not be so, inasmuch as, the provision of Section 51(E) came into force by virtue of the Act 18 of 2010.

7. In my opinion, the provision of Section 51(E) was brought in to clarify and to remove any confusion with regard to the issue as to whether an employee to whom the accidental injury is caused while commuting to and fro from the place of work, such an employee would be entitled to claim that the injury is an employment injury as per Section 2(8) of the Act. In a way, the provision of Section 51(E) of the Act has been brought in contrary to the ratios of the decisions in the judgments in the cases of ***Francis De Costa (supra)*** and ***Saurashtra Salt Manufacturing Co.(supra)***. I must hasten to

observe that bringing in of Section 51(E) can be read as if it was to lay down the law which is contrary to the judgments of the Supreme Court in the cases of *Francis De Costa (supra)* and *Saurashtra Salt Manufacturing Co.(supra)* , however, really the amendment does not intend to do that, although the consequence of bringing in of Section 51(E) will be to define the expression ‘arising out of and in the course of employment’ which would be different than as held by the Supreme Court in the judgments passed till the bringing in of Section 51(E). It is however an established position in law that legislature does have the necessary powers to lay down the law, and merely because laying down of the law may have the effect of the law being taken to be different than as has been interpreted by the Supreme Court in its judgments, enactment by the legislature cannot be interpreted to mean that the legislature was not competent to bring in such an appropriate statutory provision.

8. The issue therefore to be decided is as to whether the provision of Section 51(E) is prospective or it is only declaratory and clarificatory so far as definition of employment injury as found in Section 2(8) of the Act is concerned i.e the clarification in Section 51(E) of the definition of

employment injury does or does not apply to accidents before Section 51(E) was enacted.

9. Learned counsel for the appellant placed very strong reliance on the judgment of the Supreme Court in the case of *C. Gupta Vs. Glaxo-Smithkline Pharmaceuticals Ltd. (2007) 7 SCC 171* to argue that the provision of Section 51(E) must be held to be prospective i.e it does not apply to accidents which happen before bringing in of this amendment w.e.f 1.6.2010 ie if accidents are caused to the employee while commuting to and fro from the place of work if they occur before 1.6.2010, then, such accidents should not be included in the expression 'employment injury' as per Section 2(8) of the Act. Reliance is placed upon para 21 of the judgment in the case of *C.Gupta (supra)* and which reads as under:-

“21. In the present case, we find that for determining the nature of amendment, the question is whether it affects the legal rights of individual workers in the context that if they fall within the definition then they would be entitled to claim several benefits conferred by the Act. The amendment should be also one which would touch upon their substantive rights. Unless there is a clear provision to the effect that it is retrospective or such retrospectivity can be implied by necessary implication or intendment, it must be held to be prospective. We find no such clear provision or anything to suggest by necessary implication or intendment either in the amending Act or in the amendment itself. The amendment cannot be said to be one which affects procedure. In so far as the amendment substantially changes the scope of the definition of the term "workman" it cannot be said to be merely declaratory or clarificatory. In this regard we find that entirely new category of persons who are doing "operational" work was introduced first time in the definition and the words "skilled" and "unskilled" were made independent categories unlinked to the word "manual". It can be seen that the Industrial Disputes (Amendment) Act, 1984 was enacted by

Parliament on 31.8.1982. However, the amendment itself was not brought into force immediately and in Sub-section (1) of Section 1 of the Amending Act, it was provided that it would come into force on such day as the Central Government may be Notification in the official Gazette, appoint. Ultimately, by a Notification the said amendment was brought into force on 21.8.1984. Although this Court has held that the amendment would be prospective if it is deemed to have come with effect on a particular day, a provision in the amendment Act to the effect that amendment would become operative in the future, would have similar effect.” (underlining added)

10. In order to appreciate the ratio of the Supreme Court judgment in the case of *C.Gupta (supra)*, the facts of that case are required to be examined. The facts of that case were that the employee was appointed as an Industrial Relations Executive. The service of such person could be terminated by virtue of Clause 17 of the appointment letter without assigning any reason with notice period. This employee claimed that he was a workman and that accordingly he was governed by the provisions of Industrial Disputes Act, 1947. And once the said Act was applied, his termination of service was pleaded to be illegal because as per Section 25-N of the Industrial Disputes Act, 1947, no notice or retrenchment compensation had been paid to him. The employee relied upon the definition of workman which was amended by Parliament by Act 46 of 1982 which came into effect on 21.8.1984 and whereby in the definition of the workman, delinking took place of the words ‘skilled’ and ‘unskilled’ from the word ‘manual’ and by adding the word ‘operational’. Employee pleaded

that he was entitled to the benefit of the amended provision of Section 2(s) of the Industrial Disputes Act because his work was of ‘skilled, technical and clerical in nature apart from it being operational’. It is in this context that the Supreme Court made observations in para 21 of its judgment which is reproduced above, and as per which, a provision comes into effect only from the date from which it is brought in.

11. Learned counsel for the appellant also in support of his arguments placed reliance upon the amending Act 18 of 2010 by which Section 51(E) was added and argued that since there were different dates for bringing into effect different provisions of the Act by virtue of the Amending Act , and Section 51(E) was brought into operation w.e.f 1.6.2010, the observations of the Supreme Court made in para 21 in ***C.Gupta’s case (supra)*** apply that the employee in this case cannot take benefit of the provision of Section 51(E) because the accident in this case happened in 1992 i.e before 1.6.2010 when Section 51(E) was brought into the statute book.

12. I am unable to agree with the arguments urged on behalf of the appellant because para 21 of the judgment in the case of ***C.Gupta (supra)*** before making observations with respect to date of coming into effect of an

amended provision, has specifically observed that the position would be different when the amending provision is merely declaratory and clarificatory. Clarifying this further, the Supreme Court said that in the facts of *C.Gupta's case (supra)* the definition of 'workman' was specifically amended by adding expression 'operational' for the first time in the definition and the expression 'skilled' and 'unskilled' were made independent categories unlinked to the word 'manual'ie the amendment hence touched substantive right which changed because of the amendment. When we see the provision of Section 2(8) of the Act, which defines the 'employment injury', we find that there is no amendment carried out to this provision in that any words have been taken away from the said provision which would have taken away vested rights. The amendment is declaratory or clarificatory and not stated by its language to be prospective. For example, let us take a case where statutorily the definition provided that a person who commutes to and fro from place of work when he suffers an accident is excluded, and then such an accident does not arise out of and in the course of employment. If these words are sought to be removed by amendment by bringing in Section 51(E) by simultaneously deleting these expressions if were found in Section 2(8), then, of course, it could have been argued that originally by the definition itself of employment injury, accident

taking place while commuting to and fro from the place of employment though was earlier excluded specifically, and which is sought to be included by amendment, and consequently by its very nature amendment will be prospective because the amendment is not clarificatory or declaratory but there is a substantive amendment of the definition of employment injury by removing specific words and adding specific words hence affecting substantive rights. This however is not so. Therefore, in my opinion, Section 51(E) is merely declaratory and clarificatory of the expression 'employment injury' and by virtue of the Section 51(E) it is only clarified that an injury which takes place on account of an accident outside the premises of the employment but when the employee is commuting to and fro from the place of work, the accident will be included in the expression 'accident arising out of and in the course of employment'. In my opinion, the fact that the provision of Section 51(E) uses the expression 'deemed' also shows that the provision of Section 51(E) is clarificatory and declaratory so far as definition of 'employment injury' as found in Section 2(8) of the Act is concerned. Merely because the Section is brought into effect on a particular date will not take away the effect of the Section being declaratory or clarificatory, and once the Section is only clarificatory and declaratory with respect to the accident arising out of and in the course of

employment, then in such a case the date of bringing into operation of the Section cannot in any manner change the aspect that the amendment is only declaratory and clarificatory and is not a substantive amendment affecting substantive rights.

13. It is required to be noted that this Court is dealing with a social welfare legislation. It is necessary that in an interpretation being given of a provision of Social Welfare Legislation, courts do not lose sight of the fact that interpretation which otherwise furthers the intention of the legislature must be adapted and not that the intention of the legislature is in any manner scuttled. It must be noted that after all it is not as if the appellant ESI Corporation did not receive the necessary ESI contribution from the employer at the time of the accident, but the issue is only as to whether such an employee should or should not be denied the benefit of the provisions of the Act merely because the accident has taken place outside the premises of the employer. Therefore, I would like to take a progressive and purposive interpretation of the provision of Section 51(E) for holding that the same is only declaratory and clarificatory and the same would apply to the accidents caused even before 1.6.2010 when the provision of Section 51(E) was brought into operation.

14. In view of the above, I hold that the provision of Section 51(E) of the Act is only declaratory and clarificatory to the definition of employment injury contained in Section 2(8) of the Act and benefit will be given of the provision of Section 51(E) to an employee even if accident happens before 1.6.2010 when the provision of Section 51(E) of the Act was brought in.

15. In view of the above, there is no merit in the appeal, and the same is therefore dismissed, leaving the parties to bear their own costs.

APRIL 16, 2014
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VALMIKI J. MEHTA, J.