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

% **DECIDED ON: 12.09.2017**

LPA 166/2017, CM APPL.9557/2017

MOHINDER PAL SINGH Appellant
Through: Mr. Narottam Vyas, Advocate.

versus

UPENDER PASWAN & ORS Respondents
Through: Mr. Hari Kishan with Mr. Harshbir
Singh Kohli, Advocate for Resp-1.
Mr. Saurabh Chadda, Advocate for Resp-
2&3.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SUNIL GAUR

S.RAVINDRA BHAT, J. (ORAL)

1. The appellant is aggrieved by an order of the Single Judge rejecting its writ petition. The order of the Commissioner, Employees' Compensation made under the Employees State Insurance Act, 1948 which directed the appellant to pay ₹10,07,616/- to its workman who had suffered an employment injury, was challenged.

2. The facts are that the respondent (hereafter referred to as 'workman') was employed with the appellant. In an injury that occurred on 15.02.2013, the workman lost his right hand which was cut from the rest by the machine in his employment premises. This led to the registration of the First Information Report against the

appellant alleging commission of offence under Section 287/338, IPC. The workman applied for compensation from the Commissioner, Employees' Compensation, which was allowed. In the meanwhile, the appellant compounded the FIR registered against him before the concerned Magistrate on 14.12.2015 and paid ₹1 lakh to the workman. The compensation amount determined by the Commissioner was challenged. In the writ proceedings, the petitioner had urged that he was not liable to pay the compensation determined and that rather the Corporation (set up under the Act) was to pay the workman even though the establishment availed the benefit of registration under the Act subsequently after 25.02.2013; the accident had occurred on 15.02.2013. It was contended on the strength of Section 2 (12) of the ESI Act, 1948 and other provisions as well as Section 63 rendered the Corporation liable and not the employer even though the registration of the establishment was subsequent to the accident. The Single Judge, however, declined to exercise jurisdiction after noting *inter alia* that the impugned order of the Commissioner could not be faulted. It was also noted by the Single Judge that an alternative remedy by way of an appeal was available. The grounds of appeal were reiterated by the learned counsel. Besides relying on the provisions of the Act, he also relied upon the judgment reported as *National Insurance Company Ltd. v. Hamida Khatoon & Ors.* 2009 (13) SCC 361 and *A. Trehan v. Associated Electrical Agencies* 1996 (4) SCC 255. In *Hamida Khatoon (supra)*, while examining another previous judgment, the Supreme Court stated as follows: -

10. *The Workmen's Compensation Act was enacted by the legislature in 1923 with a view to provide for the payment by certain classes of employers to their workmen compensation for injury by accident. Section 3(1) of the Act provides that if personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions contained in that Act. Under Section 2(1)(c) the word compensation is defined to mean compensation as provided for by the Act. The definition of the workman under the Act is as under:*

"2. (1)(n) 'workman' means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is--

*(i) * * **

(ii) employed in any such capacity as is specified in Schedule II,

whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing; but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to a workman who has been injured shall, where the workman is dead includes a reference to his dependants or any of them."

11. *A comparison of the relevant provisions of the two Acts makes it clear that both the Acts provide for*

compensation to a workman/employee for personal injury caused to him by accident arising out of and in the course of his employment. The ESI is a later Act and has a wider coverage. It is more comprehensive. It also provides for more compensation than what a workman would get under the Workmen's Compensation Act. The benefits which an employee can get under the ESI Act are more substantial than the benefits which he can get under the Workmen's Compensation Act. The only disadvantage, if at all it can be called a disadvantage, is that he will get compensation under the ESI Act by way of periodical payments and not in a lump sum as under the Workmen's Compensation Act. If the legislature in its wisdom thought it better to provide for periodical payments rather than lump sum compensation its wisdom cannot be doubted. Even if it is assumed that the workman had a better right under the Workmen's Compensation Act in this behalf it was open to the legislature to take away or modify that right. While enacting the ESI Act the intention of the legislature could not have been to create another remedy and a forum for claiming compensation for an injury received by the employee by accident arising out of and in the course of his employment.

12. In this background and context we have to consider the effect of the bar created by Section 53 of the ESI Act. Bar is against receiving or recovering 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. The bar is absolute as can be seen from the use of the words 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" and "under the Workmen's Compensation Act, 1923 (8 of 1923), or any other law for the time being in force or otherwise". The words "employed by the legislature" are clear and unequivocal. When such a bar is created in clear and express terms it would neither be permissible nor proper to infer a different intention by referring to the previous history of the legislation. That would amount to bypassing the bar and defeating the object of the provision. In view of the clear language of the section we find no justification in interpreting or construing it as not taking away the right of the workman who is an insured person and an employee under the ESI Act to claim compensation under the Workmen's Compensation Act. We are of the opinion that the High Court was right in holding that in view of the bar created by Section 53 the application for compensation filed by the appellant under the Workmen's Compensation Act was not maintainable."

3. This Court is of the opinion that the discretion under Article 226 of the Constitution of India in this case is not *per se* unreasonable. Effective and alternative remedy of appeal exists which the appellant should exhaust. The examination of the merits as to whether injury prior to the coverage of the Act itself (as opposed to the payment of contribution in the case of a registered or enrolled employee) should not be subject matter of writ proceedings as is sought to be urged. In the cases cited, the Supreme Court had to deal with the circumstances where the facts were analyzed and decided by the lower authorities in accordance with law.

4. In these circumstances, the appeal is dismissed; however the appellant's remedy to challenge the Commissioner's order is kept open. In case, he avails remedy of appeal within four weeks, the period spent in availing the writ remedy and the present appeal shall be excluded for the purposes of limitation.

5. The appeal is dismissed in the above terms.

**S. RAVINDRA BHAT
(JUDGE)**

**SUNIL GAUR
(JUDGE)**

**SEPTEMBER 12, 2017
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