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IN THE HIGH COURT OF JUDICATURE AT MADRAS

[Reserved on : 16.04.2018]

[Pronounced on : 09.10.2018]

CORAM:

THE HONOURABLE Mrs.JUSTICE S.RAMATHILAGAM

C.M.A.No.2994 of 2011
and C.M.P.No.253 of 2016

The Regional Director,
Employees State Insurance Corporation,
Pondicherry .. Petitioner/ Appellant

Vs.

Chinnathambi ..Respondent/Respondent

Prayer : Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988 against the order of the Employees State Insurance Court (II ADJ) at Pondicherry dated 13.01.2010 and made in ESIOP No.12 of 2005 to set aside the same.

For Appellant : Mr.G.Bharadwaj

For R1 : Mr.N.U.Prasanna

JUDGMENT

The appellant/Employees State Insurance Corporation has preferred this appeal against the order passed in ESIOP No.12 of 2005, on the file of the Employees State Insurance Court (II ADJ) at Pondicherry dated 13.01.2010 and set aside the same.

2. The brief facts leading to the Claim Application is as follows:-

i) The petitioner's son by name Palani was working in Appasamy Ocular Devices (P) Ltd., as Electrician for the past 1½ years. Since there was no canteen facility in the said Company, his son used to come home for lunch and go back for work.



ii) On 6.5.2005, as usual, the said Palani went home and after taking his lunch, he was returning in his motorcycle to his Company and at that time, one lorry dashed against him and he died. The said Palani was a member in ESI Corporation and also died during the course of his employment. The petitioner also sent a letter to the respondent, claiming the dependent benefits. But, the respondent refused to sanction the same by stating that the accident could not be deemed to have arisen during the course of employment. Hence, the petition was filed claiming dependent benefits from the employer.

iii) The appellant herein, as the respondent therein, in the counter statement stated that the road accident occurred while returning to the factory after taking lunch and the same is not deemed to have arisen during the course of the employment sought for the dismissal of the petition.

3. The Tribunal, after analyzing the documents and based on earlier decisions given a finding that the petitioner's son is deemed to have died, while on duty and the petitioner is entitled to get the dependent benefits from the respondent.

4. Aggrieved against the said order, the E.S.I Corporation has preferred this appeal.

5. In the grounds of appeal, it has been stated that the case law referred by the respondent is no way concerned with the case. The grievance of the appellant herein is that the E.S.I Court failed to verify the judgments of the Supreme Court relied on by the Corporation. It is further stated that the employee had gone for lunch on his own, as there is no canteen inside the factory.

6. In such circumstances, the employee must have been aware that there is no obligation for the employer to provide a canteen when the strength of the employees is below 250, which applied to the employer in the present case. Therefore, the employee has to make his own arrangement for the lunch within the factory. If the employee had gone out on his own accord and when an accident had occurred at that time, it cannot be construed as an " employment injury " within the meaning of Section 2(8) of the ESI Act. The claimant has failed to establish the fact that the accident only occurred during the employment.

7. It is further averred that only on his own risk, the employee went out for lunch without considering the distance from the place of occurrence to the place of work. Hence, the road accident cannot be construed as arisen out of employment injury. Hence, the appellant/ESI Corporation states



the reasons assigned by the E.S.I Court are un-sustainable.

8. Heard both sides.

9. On the side of the appellant, it is argued that it is the own admission of the claimant that his son Palani, while he was returning from his house after taking lunch to the work met with the accident by the hit of the lorry and hence, he claimed the dependent benefits from the appellant. The appellant/ E.S.I Corporation rejected the claim by stating that the accident is not the result of employment injury. Hence, aggrieved against the said order, the claimant preferred the proceedings in the E.S.I Court. The E.S.I Court based on the arguments and relied on the case law placed by claimant LLJ 1996 Page 867 as Ex.A6, wherein the Hon'ble Supreme Court has held as follows:-

"When a workman dies in an accident while proceeding to the place of his duty from home or returning from the place of his duty to home, he should be deemed to have died while on duty".

10. The E.S.I Court by observing the same stated that the decision arrived in the said case is squarely applicable to this case and has given a finding that the respondent is entitled to get the dependent benefits from the appellant.

11. On the other hand, it is vehemently argued by the appellant by quoting the Section 2(8) of the Employees State Insurance Act regarding the meaning of employment injury. It is argued by the appellant that it is even the own admission of the claimant himself that his son went out of the Company to his home for taking lunch and he met with an accident after returning from the house to the Company. The fact that he went to the house for taking lunch would very much prove that in the accident had not occurred during the course of employment. Further it is argued that by the appellant's counsel by quoting the case law in 1996 (6) SCC [Regional Director, E.S.I. Corporation and another Vs. Francis De Costa and another] wherein, it has been held as follows:-

11. Construing the meaning of the phrase "in the course of his employment", it was noted by Lord Denning that the meaning of the phrase had gradually been widened over the last 30 years to include doing something which was reasonably incidental to the employee's employment. The test of "reasonably incidental" was applied in a large number of English decisions. But, Lord Denning pointed out that in all those cases the workman was at the premises where he or she worked and was injured while on a visit to the canteen or other place for a break. Lord Denning, however, cautioned that the words "reasonably incidental" should be read in that context and should be



limited to the cases of that kind. Lord Denning observed:

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"Take a case where a man is going to or from his place of work on his own bicycle, or in his own car. He might be said to be doing something 'reasonably incidental' to his employment. But, if he has an accident on the way, it is well settled that it does not 'arise out of and in the course of his employment'. See *Alderman V. Great Western Rly.Co*, *Netherton V.Coles*. Even if his employer provides the transport, so that he is going to work as a passenger in his employer's vehicle (which is surely 'reasonably' incidental to his employment), nevertheless, if he is injured in an accident, it does not arise out of and in the course of his employment: see *Vandyke V.Fender*. It needed a special 'deeming' provision in a statute to make it 'deemed' to arise out of and in the course of his employment.

12. This is precisely the case before us. Here also, we have a case of a person going from his home to his place of work. But he suffers injury in an accident on the way. It cannot be said that the accident arose out of and in the course of his employment. It was faintly suggested by Mr.Chacko, appearing on behalf of the respondent, that the bicycle was bought by taking a loan from the employer. That, however, is of no relevance. He might have borrowed money from his Company or from somewhere else for purchasing the bicycle. But the fact remains that the bicycle belonged to him and not the employer. If he meets with an accident while riding his own bicycle on the way to his place of work, it cannot be said that the accident was reasonably incidental to the employment and was in the course of his employment. The deeming provision of Section 51-C which came into force by way of an amendment effected by the Employees' State Insurance (Amendment) Act of 1966 (Act No.44 of 1966), enlarged the scope of the phrase "in the course of employment" to include travelling as a passenger by the employer's vehicle to or from the place of work. The legal fiction contained in Section 51-C, however, does not come into play in this case because the employee was not travelling as a passenger in any vehicle owned or operated by or on behalf of the employer or by some other person in pursuance of an arrangement made by the employer.



12. In this case, the employee while going to his place of employment met with an accident at a place which was about 1 kilometre away from the factory. The accident occurred at 4.15 p.m while duty shift was to commence at 4.30 p.m. As a result of the accident, the respondent sustained fracture injury. The question before the Supreme Court was whether the said injury amounted to employment injury within the meaning of Section 2(8) of the Employment State Insurance Act, 1948 entitling the respondent to claim benefit.

13. It has been discussed in the said case that to claim such benefit, the employee must prove that the injury had arisen out of and in the course of his employment. It has been further discussed that a road accident which happened on the way at any time, cannot be said to have arisen out of employment, unless it is shown that the employee was doing something incidental to his employment. Section 2(8) says the words "indicate that the injury must be caused by an accident which had its horizon in the employment". A mere road accident while an employee was on his way to his place of employment cannot be said to have its horizon in his employment in the factory. Hence, in this case, the accident has no connection with the employment and noway connected with the work he was doing in the factory. In this case, it is also argued that the accident had not occurred during his employment. Hence, when it is not proved that the death was caused out of and in the course of his employment, the employer further is not obligated to compensate the respndent. Hence, a mere road accident while an employee was on his way to the place of employment cannot be said to have a horizon in his employment in the factory, as there is no connection between the accident and employment.

14. Further, the appellant side also argued by quoting the case in 2017(III) LLJ 411 (Guj) in the High Court of Gujarat [Latikaben Vs.Regional Director, Employees State Insurance Corporation] holding that:

9. As observed while recording the rival submissions, it is not in dispute that the workman had attended his work and his presence was marked. However, during the recess, when he had gone out for the food and was returning, he received some injury and resulting in tetanus and ultimately he died. Therefore, the word "employment injury" as defined in Section 2(8) suggesting casual connection between the injury and his employment which has to be established. The word "during the course of employment" which has been interpreted liberally and which may include the injury received by the workman, will have to be examined. The reliance placed by learned advocate Shri Shah on a judgment of the



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Hon'ble Apex Court reported in AIR 1997 SC 432 has considered this aspect and has clearly observed:

"unless an employee can establish that the injury was caused or had its origin in the employment, he cannot succeed in a claim based on Section 2(8) of the Act. The words "accident arising out of his employment" indicated that any accident which occurred while going to the place of employment or for the purpose of employment, cannot be said to have arisen out of his employment. There is no casual connection between the accident and the employment.

15. In this case also it has been clearly stated that the employee had gone out for lunch and while was returning home received some injury and resulting in tetanus and ultimately he died. Unless an employee established that the injury was caused on its horizon in the employment, he cannot succeed in a claim based on Section 2(8) of the Act.

16. In view of the above said facts, in this case also, it is only the deceased Palani who went for lunch according to his own convenience and while, he returned to the factory after lunch, he met with the accident which in no way related to the fact that he met with the accident during the course of his employment.

17. In view of the findings and discussions made by the appellant's counsel and also with regard to the decisions cited in this case, the accident did not arise out of the employment and there is no horizon of employment also. Hence, the finding of the Tribunal is liable to be set aside. Accordingly, this Civil Miscellaneous Appeal is allowed and the order of the Tribunal is set aside. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To

The Employees State Insurance Court (II ADJ) at Pondicherry

+lcc to Mr.G.Bharadwaj , Advocate SR.No.

+lcc to Mr.Sai Bharath, Advocate SR.No. 694306990

Copy to

The section officer,

VR Section, High court, Madras

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and C.M.P.No.253 of 2016

A.SK(24/01/2019)