

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 05.04.2019

CORAM :
THE HON'BLE MR. JUSTICE N.KIRUBAKARAN

C.M.A.No.1432 of 2015
and
M.P.No.1 of 2015
against
ESIOPI No.1 of 2013

- 1.The Regional Director
Employees State Insurance Corporation
Puducherry-605 004.
- 2.The Chairman
ESI Medical Board-cum-Director
Health and Family Services
ESIC, Puducherry. ...Appellants/Respondents 1 & 2

Vs.

- 1.S.Senthil @ Sakthivel
S/o.Sankaradoss
Chettichavadi Village
Karattai Postmortem
Vanur Taluk, Villupuram District.
- 2.M/s.Hindustan National Glass and Industries Ltd.
Formerly known as Owens Brockway (India) Ltd
Rep by its Factory Manager
Thongadamanatham
Vazhudavoor (S.O.)
Puducherry-605 502.

- 3.The Union of India
Represented by its Secretary
Ministry of Labour and Employment
New Delhi.

- 4.The State of Tamil Nadu
Represented by its Secretary
Labour and Employment Department
St. George Fort, Chennai.

...Respondents

[R3 & R4 suo motu impleaded as respondents as per court order
dated 22.03.2018.

Prayer : Civil Miscellaneous Petition filed under Section 82(2) of ESI Act, to set aside the order dated 28.02.2014 passed in ESI Act No.1/2013 on the file of the ESI Court, Puducherry.

For Appellant : Mr.G.Bharadwaj

For Respondents: Mr.D.Ravichander [For R1]

Mr.V.Kadhirvelu
Special Government Pleader for R4

Mr.G.Karthikeyan
Assistant Solicitor General for R3

JUDGMENT

The 1st respondent/workman was a skilled labour doing plumbing works in the 3rd respondent Company on daily wages of Rs.100/- per day. On 13.07.2000, while the 1st respondent was doing his routine employment in the 3rd respondent factory fitting pipes on the external wall of the company, which was about 20 feet above the ground, the supporting angle broke away and the 1st respondent/workman fell down from such height and sustained injuries on his abdomen region. On the same day, he was admitted in JIPMER Hospital, Puducherry. He underwent major operation and his left kidney was removed as it was damaged completely. On account of loss of one kidney, the 1st respondent contended that he lost his earning capacity due to injury sustained by him during the course of employment. Therefore, the 1st respondent filed the claim petition under the Workmen's Compensation Act in W.C.No.59 of 2004 before the Workmen's Compensation Commissioner-II, Chennai. The said claim petition was dismissed for default and thereafter, the workman filed I.A.No.53 of 2008 to restore the W.C. In deciding I.A.No.53 of 2008, the Commissioner for Workmen's Compensation held in his order dated 13.01.2009 that the claim of compensation for employment injury cannot be claimed before the Workmen's Compensation Authority in view of the prohibition contained under Section 53 of Employees' State Insurance Act and directed the workman to approach the ESI Corporation for accident benefits. Thereafter, the 1st respondent/workman approached the Regional Director, ESI Corporation, Puducherry, the 1st appellant herein and applied for accident benefits for permanent disability suffered by him. On receipt of the representation of the workman, the 1st appellant, vide letter dated 17.11.2009, referred the workman to Indira Gandhi Government General Hospital for assessment of his disability. The workman was examined by Urologist at JIPMER Puducherry. On 19.11.2010, the 1st appellant issued a letter to the workman along with a copy of

the decision of the 2nd appellant that the assessment of permanent disability of the workman based on the assessment of General Hospital and JIPMER is Nil and therefore, the disability suffered by the workman was reported to be nil and the 1st appellant declined to pay any disablement benefit to the 1st respondent/workman. Aggrieved by the decision of the appellants herein, the 1st respondent/workman approached the Employees' State Insurance Court at Pondicherry, by way of an appeal in E.S.I.A. No.1 of 2013.

2. After hearing both the parties, the ESI Court, found that the 1st respondent/workman had sustained grievous injury and one of his kidneys had been removed and that the 1st respondent/workman had received Temporary Disablement Benefit (TDB in short) from the ESI Corporation. The ESI Court, while stating that though the Medical Board had opined that loss of one kidney was not a disability and the said decision of the Medical Board was not at all challenged by the workman, was of the view that loss of part of the body is a disability and if one kidney is removed and the other kidney is expected to do the work of both kidneys, there may be some complications to the existing kidney and so it is disability. Taking into consideration the fact that the workman had spent lot of money towards treatment due to the employment injury sustained by him and also that he would have undergone immense pain, suffering and mental agony, directed the 1st appellant to pay a sum of Rs.2 lakhs as compensation for the loss of one kidney, mental agony and pain and sufferings. Paragraph Nos.9 and 10 of the said judgment are extracted hereunder:

"9. On the side of the respondent, it is admitted that there was an accident in which the appellant sustained grievous injury, it is proved through medical record, that one of the kidney was removed. The respondent has stated that the appellant received the TDB but the disability and the loss of earning capacity is different from each other. In the present case, it is stated by the Medical board that there was Nil permanent disability. So, the appellant is not entitled for temporary disablement benefit at the rate of 50 per cent but the appellant has suffered loss of one kidney and he had spent lot of money for the treatment and he had undergone pain and sufferings and mental agony. So, he is entitled for compensation for those factors.

10. In the result, the appeal is partly allowed and the 1st respondent is hereby directed to pay a compensation of Rs.2,00,000/- for the loss of one kidney, mental agony and pain sufferings together with cost of the proceedings."

Challenging the said order passed by the ESI Court, the present appeal has been preferred by the appellants raising following substantial questions of law:

"(a) Whether the ESI Court is correct in awarding Rs.2 lakhs as compensation when the Medical Board had certified that the first respondent had no disability?

(b) Whether the ESI Court can overrule the finding of the Medical Board and award compensation beyond the scope of the Act and Rules?

(c) Whether the impugned order is sustainable when the ESI Corporation had clearly established that the disability of the first respondent is not related to the injury sustained during employment and duly assessed the loss of earning capacity as Nil?"

3. Since the contention of the appellants is that as per the provisions of ESI Act, the employment injury sustained by the workman, which resulted in loss of left kidney, cannot be termed as a disability, it would be appropriate to extract Sections 2(15A) and 2(15B) and Part I of Schedule II of the said Act:

Section 2 :

(15A) "permanent partial disablement" means such disablement of a permanent nature, as reduces the earning capacity of an employee in every employment which he was capable of undertaking at the time of the accident resulting in the disablement:

PROVIDED that every injury specified in Part II of the Second Schedule shall be deemed to result in permanent partial disablement;]

(15B) "permanent total disablement" means such disablement of a permanent nature as incapacitates an employee for all work which he was capable of performing at the time of the accident in such disablement:

PROVIDED that permanent total disablement shall be deemed to result from every injury specified in Part I of the Second Schedule or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred per cent or more;"

SCHEDULE II
[Section 2(15A) and (15B)]

PART I : LIST OF INJURIES DEEMED TO RESULT IN
PERMANENT TOTAL DISABLEMENT

Sl. No.	Description of injury	%age of loss of earning capacity
1.	Loss of both hands or amputation at higher sites	100
2.	Loss of a hand and a foot	100
3.	Double amputation through leg or thigh, or amputation through leg or thigh on one side and loss of other foot.	100
4.	Loss of sight to such an extent as to render the claimant unable to perform any work for which eyesight is essential.	100
5.	Very severe facial disfigurement	100
6.	Absolute deafness	100

Section 2(15A) speaks about "Permanent Partial Disablement" and Section 2(15B) speaks about "Permanent Total Disablement".

4. A perusal of the above Sections and the Schedule would go to show that the Schedule speaks about external organs only like, hands, hand and foot, facial disfigurement, absolute deafness, loss of eyesight, etc. But the Schedule does not speak about loss of internal organs like kidneys, liver, lungs, etc. The human body, as a whole, is a composition of both internal as well as external organs and its wellbeing depends on whether all the organs are intact and are functioning normally. If there is any damage caused or if there is malfunctioning of any of the organs, may be internal or external, then it would definitely disable a person from being normal. Section 54 of the ESI Act speaks about determination of question of disability by constituting a Medical Board while Section 54A deals with references to Medical Boards and Appeals to Medical Appeal Tribunals and Employees Insurance Courts. In this case, though the workman had lost his left kidney, both Indira Gandhi Government General Hospital as well as JIPMER, Pondicherry, had opined that there was no disablement as the right kidney was functioning normally. Though the opinion of the Medical Board appears to be correct, what is to be seen is whether there will not be any unwanted pressure on the lone kidney, which is

functioning. If one kidney is performing the functions of both the kidneys, then, obviously, its work would be doubled, for which, it will have to function for a longer time.

5. This Court doubting the opinion given by the JIPMER Hospital that there is no disablement for loss of left kidney, as the right kidney was functioning normally, this Court under Section 54-A of the ESI Act, by an order dated 14.03.2018 directed the Head of the Institution/Officer on Special Duty, Tamil Nadu Multi Super Specialty Hospital, Omandurar Government Estate, Anna Salai, Chennai, to constitute a Medical Board consisting of Neurologist, Nephrologist, General Physician and other experts to assess the first respondent/workman's medical condition on his ability to work normally, in view of the loss of one kidney and consequent disability sustained by him and the consequences of such disability. The following queries were raised by this Court to be answered by the Medical Board and they are as follows:-

- (i) Whether the loss of one kidney would not amount to loss of an organ?
- (ii) What is the consequence of loss of one kidney?
- (iii) Whether the right kidney has to work or function more than what is required to be done by it as the left kidney of the workman has been removed?
- (iv) Whether the unnecessary pressure of work on the right kidney would result in the only available kidney getting damaged in due course of time?
- (v) In case, if the available kidney is lost or damaged, merely because, loss of kidney has not been shown as a schedule injury under the ESI Act, could it not be called as "disablement"?

6. The Medical Board constituted as per the order of this Court has given the following opinion namely,

"As of now the patient has sufficient renal function. He however has future risk of deterioration in renal function as the single available kidney has to work more."

7. Further, the department of clinical Psychology, Institute of Mental Health, Kilpauk, Chennai, opined that he has moderate level of depression.

8. From the above, it is clear that the first respondent/workman has lost one kidney and he has got a future risk of deterioration in renal function as the single available kidney has to work more. The first respondent had sustained injury in the abdomen which has resulted in the damage of one kidney and hence, he had to undergo surgery for the removal of the damaged kidney. A manual labour cannot be accepted to work normally after a surgery, that too for removal of damaged kidney

and he has to take precaution even while working, in view of the surgery and loss of kidney and therefore, it is impossible for the first respondent/workman to work normally, that too as a manual labour as a plumber. Hence, what has been suffered, viz., loss of a kidney, has to be treated as "permanent partial disablement".

9. Earlier the first respondent approached the Workman Compensation Commissioner claiming compensation under the Workman Compensation Act in W.C.No. No.59/2004 and the same was dismissed by the Workman Compensation Commissioner in view of the prohibition contained under Section 53 of the Employees' State Insurance Act, 1948. Therefore, the first respondent was compelled to approach the Employees' State Insurance Court.

10. A perusal of Schedule II of ESI Act would give the list of injury deemed to result in 'Permanent Total Disablement' and almost all speak about only loss of external organs and no injury caused to the internal organ has been listed in the Schedule II. The schedule III only speaks about the occupational diseases.

11. Taking into consideration the monthly salary of the workman as plumber, this Court determines Rs.4,000/-. As the Act does not speak about injury to kidney or loss of kidney, this Court determines the loss of a kidney as permanent partial disablement as equivalent to the loss of one eye, without complication, the other being normal as 40 has given in serial no.31 of Part II of the Schedule II of the ESI Act and the loss of compensation as calculated as follows:

$$60/100 \times 4000 \times 40/100 \times 224 = 2,15,040$$

12. The ESI Court taking into consideration of the opinion of the Medical Board that permanent disability as "NIL" held that the first respondent is not entitled for temporary disablement benefit at the rate of 50%. However, on equity it granted Rs.2,00,000/- for loss of one kidney and the pain and sufferings under gone by the first respondent workman and the said sum of Rs.2,00,000/- awarded on equity is deleted as this Court awards Rs.2,15,040/- towards compensation treating the loss of a kidney as "permanent partial disablement". The questions of law are answered in the above manner.

13. From the nature of injury mentioned in Part I Schedule II of the Act, it seems that policy makers during 1948 concentrated only on external organs and the eventuality of injuries to internal organs, like what has happened in this case, has not been taken into consideration. Therefore, the Act needs to be amended, so as to incorporate the injuries to internal organs/parts and the consequential disablement, so that the workmen would be benefited.

14. Further, International Labour Organisation, in its report dated 20-08-2018, "India wage report : wage policies for decent work and inclusive growth" states that India's economy in the past two decades has seen an average GDP rate of 7%. National Sample Survey Organization (NSSO) estimate indicates that daily average wage has doubled between the period 1993-94 and 2011-12. Wages have seen a faster growth for the most vulnerable categories including workers in rural areas, informal employment, casual workers, female workers and low-paid occupations. ILO report also highlights the need for sustainable wage policies that would promote inclusive growth in the country. Based on NSSO 2011-12 date, ILO estimates that of the total 402 Million workers, 51.4% (206 Million) were self employed and 46.6% (195 Million) were wage employees including regular/salaried employees (74 Million) and casual workers (121 Million). When such is the number of workers employed in India, they are bound to suffer injuries both external and internal injuries in the course of employment and therefore, the Government has to take into consideration the same and amend the Employees's State Insurance Act as well as the Employees's Compensation Act, 1923, to cover even internal injuries as it has not been defined so far.

15. Accordingly, this Court expects the Central Government - third respondent herein, to amend the Employees's State Insurance Act as well as the Employees's Compensation Act, 1923, to include "injuries sustained to internal organs, like, kidneys, lungs, liver, etc., as schedule injuries" and "consequent disablement as schedule disablement".

16. In the result, the award of the Tribunal is modified to the extent indicated above and this Civil Miscellaneous Appeal is disposed of, accordingly. No costs. Consequently, connected M.P.No.1 of 2015 is closed.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

The ESI Court,
Puducherry.

Copy To:

1.The Secretary,
Union of India,
Ministry of Labour and Employment,
New Delhi.

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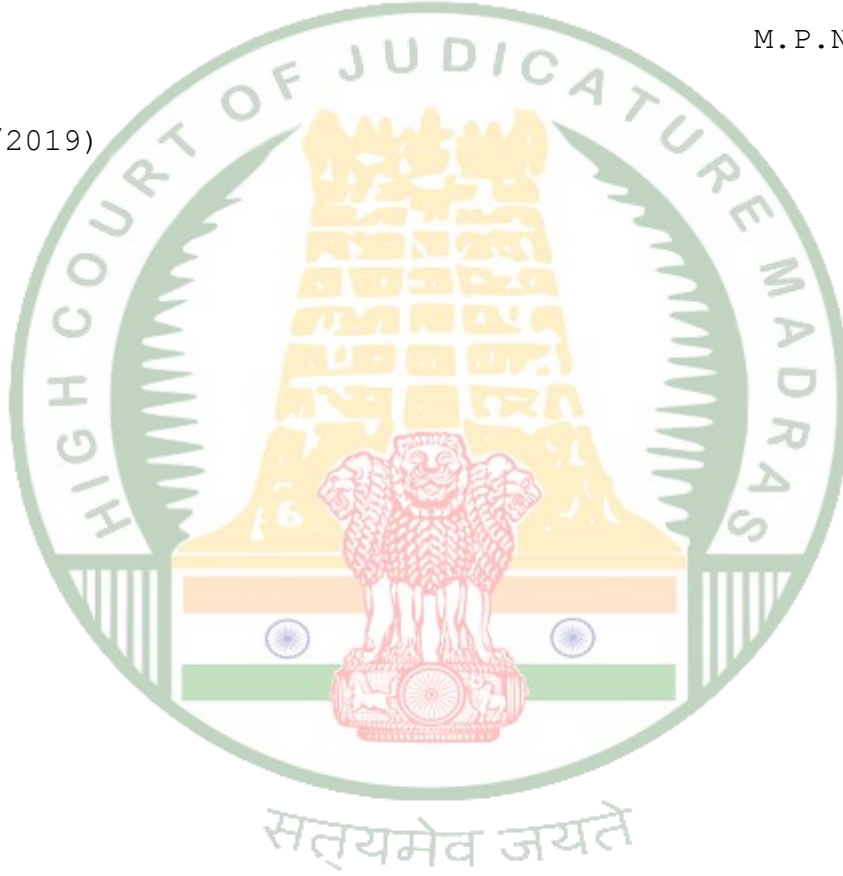
2.The Secretary,
State of Tamil Nadu,
Labour and Employment Department,
St. George Fort,
Chennai.

+1cc to M/s.D.Ravichander, Advocate, S.R.No.33701
+1cc to M/s.G.Bharadwaj, Advocate, S.R.36413
+1cc to M/s.G.Karthikeyan, Advocate, S.R.34449

C.M.A.No.1432 of 2015
and
M.P.No.1 of 2015

RK (CO)

RRS (24/06/2019)



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