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

\+ FAO(OS) 52/2019

MALCOLM JOHAN CAMPBELL ..... Appellant

Through Mr.C.Mohan Rao with Mr.Lokesh Kumar Sharma, Advs.

versus

ROBBINS TUNNELLING & TRENCHLESS TECHNOLOGY (INDIA) PVT LTD ..... Respondent

Through Mr.R.R.Luthra with Mr.Naresh C.Sharma, Mr.Ajay Sharma, Advs.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MS. JUSTICE REKHA PALLI

O R D E R

% **12.03.2019**

CM No. 11631-32/2019

Exemption allowed, subject to all just exceptions.

FAO(OS) 52/2019 & CM No.11630/2019

The appellant assails the order dated 13.12.2018 passed by the learned Single Judge in I.A. No.8969/2018 preferred by the appellant/plaintiff under section 4 A of the Employee's Compensation Act, 1923 (hereinafter referred to as Act) seeking interim compensation from the defendants. The learned Single Judge has also disposed of the I.A.No.15676/2018 preferred by the defendant seeking examination of the plantiff by a Medical Board.

A perusal of the order dated 13.12.2018 shows that so far as the first application is concerned i.e. I.A. No.8969/2018, the plaintiff withdrew the same, in the light of the learned Single Judge pointing out that he could not invoke section 4 A of the Act, since he had opted to file a civil suit to claim damages from his employer/defendant. In this regard, the learned Single Judge placed reliance on section 3(5) of the said Act. It was also noticed by the learned Single Judge that the defendant had not admitted any part of the claim made by the plaintiff and consequently, in any event, no order could be passed under section 4 A of the said Act, as prayed for by the plaintiff.

The learned Single Judge has also observed that ***Gangwani and Co. V. Saraswati*** *2001 LAB I.C. 2637* relied upon by the plaintiff, in fact, went against the plaintiff's contention, as it was held therein that the employee's remedy under the Act and under the common law were mutually exclusive. Since the plaintiff had invoked the common law remedy by preferring a suit, he could not claim the remedy under the Act.

So far as the I.A. No. 15676/2018 is concerned, the defendant had preferred the said application to seek examination of the plaintiff by a Medical Board, in view of the fact that he had allegedly suffered an injury in the year 2015 and after going back to the United Kingdom, where the appellant belongs, he had sought to rely upon medical certificates issued by doctors in the United Kingdom.

The impugned order shows that the plaintiff/appellant recorded his no objection and in fact offered himself for medical examination at the cost and expense of the defendant.

The submission of Mr.Rao, learned counsel for the appellant, is that since the Act is a welfare legislation, its provisions are not excluded even when a civil suit is preferred to claim the damages in common law. We are not inclined to get into this issue for the reason that the plaintiff/appellant himself withdrew his application i.e. I.A. No.8969/2018. Moreover, even in terms of the section 4 A of the Act, the plaintiff/appellant could not point out any admitted liability on the part of the defendant.

Mr.Rao submits that under the cover of the order passed in I.A.No.15676/2018, the defendants are not leading their evidence, and the trial is stalled. Admittedly, the plaintiff has yet not been examined by the Medical Board at Safdarjung Hospital, New Delhi. It goes without saying that the report of the Medical Board would be essential for the defendant to decide the evidence that is required to be led by them.

In our view, the present appeal is completely misplaced. In both the applications, orders were passed after recording the concession/statement of the learned counsel. In fact, so far as the order in I.A.No.8969/2018 is concerned, it shows that the plaintiff withdrew the same after realising the lack of merit therein. We accordingly dismiss the appeal alongwith the pending application, with costs of Rs.10,000/- to be deposited with the Prime Minister's National Relief Fund within four weeks.

VIPIN SANGHI, J

REKHA PALLI, J

MARCH 12, 2019
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