

A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

MACA No.75 of 2021

***The Divisional Manager, M/s. National
Insurance Company Ltd.***

.... ***Appellant***
Mr. P.K. Mahali, Advocate

-versus-

***Anushaya @ Anasuya Biswal and
Others***

.... ***Respondents***

Mr. S.C. Swain along with K.C. Nayak,
counsel for Respondents 1-3

**CORAM:
SHRI JUSTICE B. P. ROUTRAY**

**ORDER
16.9.2022**

Order No.

05. 1. The matter is taken up through hybrid mode.
2. Heard Mr. P.K. Mahali, learned counsel for the insurer-Appellant and Mr. S.C. Swain along with Mr. K.C. Nayak, learned counsel for claimant – Respondents 1 to 3.
3. Present appeal by the insurer is against the impugned judgment dated 16th March, 2020 of the learned 3rd MACT, Cuttack passed in MAC Case No.697 of 2017 wherein compensation to the tune of Rs.23,22,648/- along with interest @ 7% per annum from the date of filing of the claim application, i.e. 12th September, 2017 has been granted on account of death of deceased Anil Kumar Biswal in the motor vehicular accident dated 19th July, 2017.
4. Mr. Mahali, learned counsel submits on behalf of the insurer that involvement of the offending vehicle, i.e. OD 05 E 4173 is

doubtful in view of delayed lodging of F.I.R. and there is every possibility that the said vehicle has been subsequently implanted to manage compensation.

5. Admittedly, the police upon investigation has submitted charge-sheet against the driver of the vehicle and all the witnesses including the eye witnesses, viz., P.W.3 & 4 have supported the contentions of the claimants regarding death of the deceased involving the offending vehicle. Therefore, by mere delay in lodging the F.I.R., which has been explained in the contents thereof, no such point arises in favour of the insurer to doubt involvement of the offending vehicle in the accident. Accordingly said contention of the insurer – appellant is rejected.

6. The other ground raised by Mr. Mahali, which is the main ground in the appeal, is that, the deceased namely Anil Kumar Biswal was an employee covered under the Employees' State Insurance Act, 1948 (hereinafter referred as 'the ESI Act') and therefore, in view of the bar under Section 53 and 61 of the said Act, the claim filed under Section 166 of the Motor Vehicle Act (hereinafter referred as 'the MV Act') is not maintainable.

7. In support of his contention Mr. Mahali relies on the decisions rendered by Hon'ble Supreme Court in the case of ***National Insurance Co. Ltd. v. Hamida Khatoon & Others*** [AIR 2009 SC 2599] ***Dhropadabai and Others v. Technocraft Toolings*** [(2015) 14 SCC 454], and order dated 21st August, 2015 of this court passed in MACA No.297 of 2015, and order dated 24th September, 2016 in MACA No.91 of 2015.

8. On the other hand it is submitted on behalf of the claimant – Respondents that, though the deceased is admittedly an insured person under the ESI Act, but his death in the accident involving a motor vehicle is neither arising out of nor in course of his employment and therefore, the bar prescribed under the ESI Act is not applicable to this case to deprive him from getting compensation under the MV Act.

9. In support of such submission, the decisions of various High Courts Viz. *Shridevi and Others v. S. Sarojini and Another*, 2011 (2) TAC 258 (Kant.) of Karnataka High Court, *New India Assurance Company Ltd. v. Ravula Shanker @ Shanker Goud and Another*, 2020 (3) TAC 508 (Telan.) of Telengana High Court, *Ashok Yadav v. Shakur Mohammad*, (2021) 2 CgL.J 362 of Chhatisgarh High Court, *United India Insurance Company Ltd. v. Vaneeta and Others*, 2020 (1) T.A.C. 170 (P&H.) of Punjab and Haryana High Court and *Ruma Raha Roy and Others v. United India Insurance Co. Ltd. and Another*, 2020 (1) TAC 909 (Cal.) of Calcutta High Court have been relied on.

10. Before going for further discussions, the requisite facts need to be mentioned here are that, the deceased was aged about 27 years, serving as a Sea man in Sadhab Shipping Pvt. Ltd., Paradeep. On the date of accident he was on leave (as per the admission in the cross-examination of P.W.2). At the time of accident he was going in a motor cycle bearing registration number OD 05 H 6807 and the offending auto rickshaw bearing registration number OD 05 E 4173 dashed it from behind resulting the injuries and consequent death. The

deceased died on 20th August, 2017 in the hospital while undergoing treatment.

11. Section 53 of the ESI Act, which prescribes bar against receiving compensation or damages under any other law, reads as follows:

“53. Bar against receiving or recovery of compensation or damages under any other law.- An insured person or his dependents 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 under the Workmen’s Compensation Act, 1923 (8 of 1923), or any other law for the time being in force or otherwise, in respect of an employment injury sustained by the insured person as an employee under this Act.”

‘Insured Person’ means, as defined under Section 2(14), that, a person who is or was an employee in respect of whom contributions are or were payable under the ESI Act and who is, by reason thereof, entitled to any of the benefits provided by the Act.

‘Employment injury’ means, as defined in Section 2(8) that, a personal injury to an employee caused by accident 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 contracted within or outside the territorial limits of India.

12. Section 61 of the ESI Act prescribes the bar of getting benefits under other enactments, which reads as follows:-

“61. Bar of benefits under other enactments.- When a person is entitled to any of the benefits provided by this Act, he shall not be entitled to receive any similar benefit admissible under the provisions of any other enactment.”

13. It is clear from the language employed in Section 53 and 61 of the ESI Act that, if a person is entitled for the benefits under the ESI Act, he or his dependents shall not be entitled to receive compensation under any other law in respect of the same employment injury. Therefore, it needs to be considered that, when an injury to an employee will be treated as ‘arising out of and in course of employment’ ?

14. The definition of ‘employment injury’ as stated above is clear and unambiguous. It is true that an injury arising out of and in course of the employment includes incidental injuries too. Further, if an injured or his dependants admit the injury as an injury ‘arising out of and in course of employment’ and raises his claim under the ESI Act in appropriate forum, he is of course debarred from raising his claim under other enactments including the MV Act.

15. The Supreme Court in the case of *Hamida Khatoon* (supra) has referred to the earlier decisions in *A. Trehan v. Associated Electrical Agencies*, 1996 (4) SCC 255, *Bharagath Engg. V. R. Rangamayaki*, 2003 (2) SCC 138, *ESI Corporation v. Harrison Malayalam (P) Ltd.*, 1993 (4) SCC 361, and *Regional Director, ESI Corporation and Anr.*

v. Francis De Costa and Anr., 1993 Suppl. (4) SCC 100 and held that, “Above being the position in law, the appeal deserves to be allowed. The entitlement shall be worked out by the concerned MACT by taking note of Section 53 of the Act”.

The cases of **A. Trehan, Francis De Costa, and Bharagath Engineering** (supra) are all concerning compensation under the EC Act. In the case of A. Trehan, it has been held that an application under Section 22(2) of the Employee’s Compensation Act, 1923 (hereinafter referred as ‘the EC Act’) attracts the bar under Section 53 of the ESI Act.

The case of **Dhropadabai and Others** (supra) is also under the EC Act, where the deceased suffered chest pain when working in his workplace. In the said case, the Supreme Court has held at paragraph 12 that once an employee is an “insured person” under Section 2(14) of the ESI Act, 1948, neither he nor his dependents would be entitled to get any compensation or damages from the employer under the EC Act, 1923, and the plain language used in the Act clearly conveys so.

16. Karnataka High Court in the case of **Shridevi and Others** (supra) have held as follows:

“5. No. doubt, the accident has occurred in the course and out of employment. The petitioners have not made any claim against the employer in the petition. The claim is against the offending lorry and the insurer of the lorry. The insurer of the lorry has issued policy under the terms of the Motor Vehicles Act. The deceased would be a third party as against the insurer of the offending vehicle. The prohibition under Section 53 of the ESI Act would come into play only

when compensation is claimed against the employer of the deceased.”

17. Telangana High Court in the case of ***Ravula Shanker*** (supra), after discussing the case of A. Trehan (supra) and other decisions, came to hold as follows:-

“35. In the result, the appeal is dismissed confirming the order and decree, dated 27.10.2015, passed in O.P. No.363 of 2013 by the Tribunal, with the following findings:

- i) An application filed under MV Act claiming compensation by injured/legal representatives of deceased is maintainable even if the injured/deceased is covered under ESI Scheme as per the provisions of the ESI Act;
- ii) Injured/Legal Representatives of deceased are entitled for compensation under the provisions of the MV Act.
- iii) Bar under Section 53 of the ESI Act will apply only if claimant received compensation in respect of an employment injury as defined under Section 2 (8) of the ESI Act; and
- iv) Injured/Legal Representatives of deceased cannot claim amounts under the provisions of MV Act which were claimed and received by them towards reimbursement under the provisions of ESI Act.”

18. Both the cases of Karnataka High Court and Telangana High Court were claims under Section 166 of the MV Act.

19. In the case of *Vaneeta and Others* (supra) of Punjab and Haryana High Court, the accident took place in the factory and the deceased was present at the gate. Punjab and Haryana High Court upon discussion of many decisions including the case of *Francis De Costa* (supra), have held as follows:-

“(B) The second issue is as to whether it was an employment injury.

17. Admittedly, the injury as a result of the accident on account of the truck bearing No.UA-08E-9577 which occurred on account of the negligence of the driver of the said truck who hit into the deceased while reversing it. The negligence of the driver has been upheld beyond doubt. The duty of the respondent was not on the truck or with the truck. He had nothing to do with the truck in question. The only thing was that he was on duty at the work place when the incident occurred. Hence, it cannot be said to be an employment injury although the liability of ESI too cannot be diluted just because it is not an outcome of employment injury as long as it was in the work place where the injured was present in his capacity as an employee.

(C) The fact that the claim under the Motor Vehicles Act would amount to claim against the third party and, therefore, maintainable in spite of the bar under Section 53 of the ESI Act stands answered by the Division Bench of Kerala High Court in the judgment rendered in the case of *K.P.Kuriakose Vs. G.Santhosh Kumar & others, 2010 ACJ*

662 by following the judgment rendered in the case of *Regional Director ESI Corporation Vs. Francis De Costa* as under:-

We are persuaded to agree that the decision in *Regl. Director, E.S.I.C., v. Francis De Costa*, (supra) covers the specific issue raised in this case. Claim is raised against a stranger to the contract of employment for compensation on the basis of negligence for causing the accident. The claim is not for compensation for employment injury and in these circumstances the observations in para 44 of *Regl. Director E.S.I.C. V. Francis De Costa* must be preferred. Following the dictum therein we accept that a claim for compensation in tort against a stranger can coexist with a claim for benefits under the E.S.I. Act. The use of the words "any person" in Section 53 of the E.S.I. Act which we extract below cannot take within its sweep the claim in tort against the stranger/tort fearer under Section 166 of the M.V. Act for compensation for the loss suffered in a motor accident caused by negligence.

Bar against receiving or recovery of compensation or damages under any other law. - An insured person or his dependents 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 under the Workmen's Compensation Act, 1923 (8 of 1923), or any other law for the time being in force or otherwise, in respect of an employment injury sustained by the insured person as an employee under this Act. (emphasis supplied).

The expression "any other person" in Section 53 can take within its sweep only such other person who is sought to be made liable, under or on the basis of the contract of employment, to compensate the employee for the 'employment injury' suffered by him. If an injury is suffered to a motor accident and such injury is an employment injury also, Section 53 does not bar the claim in tort under Section 166 of the M.V. Act against the stranger tortfeasor. But bars the claim against the employer under any other law. As held by Supreme Court in *Francis De Costa* the insurance coverage under the Act is in addition to and not in substitution of the other remedies against a stranger."

18. The object of Section 53 as held in the case of *Mangalamma (supra)* was not to burden the Employer twice, whereas, the Motor Vehicles Act is totally separate from ESI and independent, a stranger.

19. Thus, the above mentioned conditions being satisfied in the case in hand, Section 53 of ESI Act would not come in his way to claim the compensation under the Motor Vehicles Act in the facts of the present case."

20. The Calcutta High Court in ***Ruma Raha Roy's*** case (supra), where the deceased while walking on the road of Kolkata was knocked down by a TATA Sumo vehicle from behind, upon discussion of various decisions including ***Hamida Khatoon*** (supra) observed as follows:-

“13. None of the above decisions involved interpretation of the 1988 Act, and, therefore, are not decisions which would have a bearing on the issue that we are called upon to decide. In our opinion, the decision relevant for the purpose of deciding this appeal is the one in *Francis De Costa* (supra). There, it was a reverse case where the employee insured under the 1948 Act had laid a claim before the relevant court under Section 75 thereof, whereupon the Court held him to be entitled to the benefits under the 1948 Act. A point was raised before the Supreme Court that since the insured employee had suffered injury as a result of an accident caused by a motor vehicle, he should have moved the relevant tribunal under the 1988 Act. The relevant paragraphs from such decision read as follows:-

"17. The next contention that the Motor Vehicles Act provides the remedy for damages for an accident resulting in death of an injured person and that, therefore, the remedy under the Act cannot be availed of lacks force or substance. The general law of tort or special law in Motor Vehicles Act or Workmen's Compensation Act may provide a remedy

for damages. The coverage of insurance under the Act in an insured employment is in addition to but not in substitution of the above remedies and cannot on that account be denied to the employee. In *K. Bharathi Devi v. G.I.C.I, AIR 1988 A.P. 361*, the contention that the deceased contracted life insurance and due to death in air accident the appellant received compensation and the same would be set off and no double advantage of damages under carriage by Air Act be given was negatived.

18. It falls foul from the mouth of the appellant, a trustee *de son tort* who collected the premium from the employee and employer with a promise to expend it for disability, to attempt to wriggle out from the promise or to deprive the employee the medical benefit for employment injury covered by the insurance on the technicalities. It is estopped to deny medical benefit to the insured employee. We are conscious of the fact that the plea of estoppel was not raised by the respondent but it springs from the conduct of the appellant."

14. It is clear from a reading of the aforesaid extract that the remedy under the 1948 Act is in addition to but not in substitution of the remedies available under the 1988 Act or the 1923 Act and on that account, benefits cannot be denied to an insured employee.

15. For the purposes of the present appeal, we may only note that none of the decisions as aforesaid have any application since it was not proved at the trial that the victim suffered injury in the course of his employment, which is the *sine qua non* for a claim to be laid under the 1923 Act or the 1948 Act, as the case may be.

16. We place on record that Mr. Banik relied on the decision of a learned Judge of the Kerala High Court dated February 18, 2009, in *Kuriakose v. Santosh Kumar*. The view that we have taken is in line with the view expressed in such decision. We, therefore, hold that the point raised by Mr. Singh that the claim application was not maintainable is absolutely without merit.”

21. Our High Court, by order dated 21st August, 2015 in MACA No.297 of 2015, where it was admitted that the claimant had already received reimbursement and compensation for the injuries sustained by him in the accident under the ESI Act, held that the claim application filed under Section 166 of the MV Act is not maintainable in view of the law laid down by the apex court in *Hamida Khatoon (supra)*, as per the bar contained in Section 53 of the ESI Act.

22. In MACA No.91 of 2015, where it was conceded on behalf of the deceased that his death is covered under the ESI Act and no claim for compensation is maintainable under the MV Act, this court by order dated 24th September, 2016 observed that, keeping in view the provisions under Section 53 and 61 of the ESI Act, the claim application filed by the claimants under Section 166 of the MV Act is

not maintainable. The relevant extract of the said order is reproduced below:

“This appeal by the Insurance Company is directed against the judgment/award dated 30.10.2014, passed by the learned 4th Motor Accident Claims Tribunal, Mayurbhanj, Baripada, in MAC Case No.52/189 of 2013-11, awarding an amount of Rs.6,17,436/- as compensation along with interest @ 6% per annum with effect from 20.12.2013, till payment.

Learned counsel for the appellant – Insurance Company submits that as the deceased Narendra Mohanta was working as a labourer in M/s. Utkal Lamp Works Pvt. Ltd., Takatpur, Baripada, and was covered under E.S.I. Scheme, having Account No.677198 and E.P.F. Account No.OR/1984/31, he is entitled to the benefits under the E.S.I. Act and therefore, the claim application filed by him under Section 166 of the MV Act is not maintainable. In this regard, it is submitted that Sections 53 and 61 of the E.S.I. Act creates a bar against receiving or recovery of compensation or damages under any other enactments. Accordingly, it is submitted that as the deceased workman was covered under the E.S.I. Act and is entitled to the benefits available under the said Act, the impugned award is liable to be set aside.

Learned counsel for the claimants fairly concedes to the legal position that the deceased being covered under the E.S.I. Act, no claim for compensation is maintainable under the M.V. Act. Learned counsel for the claimants submits that the claimants be granted liberty to move the E.S.I. authority for grant of compensation.

Considering the submissions made and keeping in view the provisions of Sections 53 and 61 of the E.S.I. Act, the claim application filed by the claimants under Section 166 of the M.V. Act is not maintainable. Accordingly, the impugned award is set aside and the claim application of the claimants is dismissed.

It is open for the claimants to move the E.S.I. authority for compensation and / or any other benefits, as are available to them under the E.S.I. Act.”

23. Mr. Mahali further places reliance in the case of ***K. S. Vasantha and Others v. Karnataka State Road Transport Corporation, (1982) ACJ 259***. It is a decision rendered by a Division Bench of Karnataka High Court and the injured at the time of accident was going in a bus arranged by the employer to reach the factory in time. The division Bench of Karnataka High Court have thus held it as an employment injury and observed that the claim for compensation is under the ESI Act.

24. Switching back to the facts of the present case, as stated earlier, this is a case for compensation under Section 166 of the MV Act. Admittedly the deceased was on leave on the date of accident and the cause of accident was due to negligent driving of the driver of the offending vehicle. In the instant case the accident has no connection with the employment of the deceased either directly or incidentally. So as per the language employed in Section 53 and 61 of the ESI Act read with the definitions prescribed under Section 2(8) and 2(14), it implies that if the cause of accident is unrelated to the employment of the injured or the deceased, then the bar will not be applicable. The prohibition under the ESI Act is not in respect of any injury sustained

by the insured person irrespective of its connection to his employment. In a case of compensation either under the ESI Act or EC Act or under the MV Act, all such laws, which are beneficial legislations, are to be interpreted to the benefit of the victim of accident. The Supreme Court in the case of ***Bharat Singh Vs- Management of New Tuberculosis Center, (1986) 2 SCC 614*** has taken the view that, welfare legislation should be given a purposive interpretation safeguarding the rights of the have-nots rather than giving a literal construction and in case of doubt the interpretation in favour of the worker should be preferred. It would not be proper to say that all such injuries, which are not connected to the employment, are arising out of or in course of his employment to attract the beneficial provisions of the ESI Act.

25. In the context of compensation, two foremost conditions *sine qua non* for getting benefits under the ESI Act are, first, the injured must be an insured person and secondly, the injury must be an 'employment injury'. Employment injury includes such incidental injury arising out of and in course of his employment. The interpretation cannot be stretched to the extent that whatever injury sustained by an insured employee at wherever place unconnected to his employment would attract the bar under the ESI Act against the claim of compensation before any other forum. The restriction is never meant to prohibit the victim of accident to get benefits suitably under any other law. The object of creating the bar for compensation under other enactments is for the purpose that the employee should not be compensated twice. It is in the benefit of the employer that no one should get compensation twice from the same employer for the

same cause. Therefore, when the accident is purely a motor vehicular accident arises by use of a motor vehicle and is completely unconnected to the nature of the employment of the injured, the claim for compensation under Section 166 of the MV Act is definitely maintainable. In such case, the bar prescribed under the ESI Act is not attracted.

26. As stated earlier, the statutes like the ESI Act, EC Act and MV Act, which are containing beneficial provisions for the poor victim, are to be interpreted for the benefit of the poor victim. It would be harsh to send the victim of a motor vehicular accident or his dependents to the ESI court only for the reason that he is/was an insured person under the ESI Act and not under any other suitable forum even if the cause of injury is completely unconnected to the nature of employment.

27. In view of the discussions made above it is held that the claim application in the instant case by the claimants under Section 166 is maintainable and the contention of the insurer to the contrary is rejected.

28. Next coming to the quantum of compensation, it is submitted by Mr. Mahali that the same has been assessed excessively. The main contention of Mr. Mahali is that the monthly income taken by the tribunal to the tune of Rs.14,374/- of the deceased is excessive. However, after perusal of the evidence of P.W.2 as produced in course of hearing and Ext.11 – the salary statement, no merit is seen in the contention of Mr. Mahali to disbelieve such amount assessed by the tribunal. As such, the same is rejected.

29. In the result no merit is seen in the contentions of the insurer to interfere with the impugned award. The appeal is dismissed.

30. The Appellant – insurer is directed to deposit the entire compensation amount as directed by the tribunal along with interest @ 6% per annum from the date of filing of the claim application, i.e. 12th September, 2017 before the tribunal within a period of three months from today; where-after the same shall be disbursed in favour of the claimant – Respondents on same terms and proportion as contained in the impugned award.

31. The statutory deposit made by the insurer - Appellant before this court along with accrued interest be refunded to the Appellant - insurer on proper application and on production of proof of deposit of the awarded amount before the tribunal.

32. An urgent certified copy of this order be issued as per rules.

(B.P. Routray)
Judge