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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.04.2022

CORAM

THE HON'BLE MR. JUSTICE P.D. AUDIKESAVALU

W.P. No. 24030 of 2018
and
W.M.P. No. 27995 of 2018

M/s. NLC India Limited,
Represented by its Chief General Manager,
Thermal Power Station - II,
Neyveli.

... Petitioner

-vs-

1. S.Amirtham

2. M/s. TMP Constructions,
No. C-23, Thiruvallur Road, Block - 12,
Neyveli.

3. The Deputy Labour Commissioner - 2,
DMS Campus,
Teynampet,
Chennai - 600 006.

4. The Branch Manager,
ESI Corporation,
No. 2/9, Bhadrachalam Street,
Manjakuppam,
Cuddalore - 607 001.

... Respondents

(R4 suo-motu impleaded vide order dated 01.10.2018)

Prayer:- Writ Petitions filed under Article 226 of the Constitution of India, 1950, praying to issue a Writ of Certiorari, calling for the records of the Third Respondent pertaining to the impugned order in Aa1/887/18 (W.C. No. 109/2018) dated 12.04.2018 and quash the same as illegal.

For Petitioner : Mr. N.Nithianandam

For Respondents : Mr. R.Rajasundaram (for R1)

Mr. V.Rajeshbabu (for R2)

Mr. Vadivelu Deendayalan,



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Additional Government Pleader
(for R3)

Mr. S.P.Srinivasan (for R4)

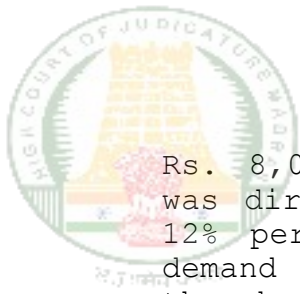
O R D E R

Heard Mr. N.Nithianandam, Learned Counsel for the Petitioner, Mr. R.Rajasundaram, Learned Counsel for the First Respondent, Mr. V.Rajeshbabu, Learned Counsel for the Second Respondent, Mr. Vadivelu Deenadayalan, Learned Additional Government Pleader appearing for the Third Respondent and Mr. S.P.Srinivasan, Learned Counsel for the Fourth Respondent and perused the materials placed on record, apart from the pleadings of the parties.

2. One K.Shankar had been engaged as contract labour through the Second Respondent in the establishment of the Petitioner and he had died on 16.06.2017 in its premises. It is the case of the Petitioner that in view of the coverage of its establishment under the Employees' State Insurance Act, 1948 (hereinafter referred to as 'the ESI Act' for short), it stands excluded from the purview of the Employee's Compensation Act, 1923 (hereinafter referred to as 'the EC Act' for short) as per Section 53 of the ESI Act, which reads as follows:-

"53. Bar against receiving or recovery of compensation or damages under any other law.- An insured person or his dependants 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."

The First Respondent had made a representation dated 12.12.2017 to the District Collector, Cuddalore seeking an enquiry into the death of her husband, the said K.Shankar and on receipt of its copy by the Third Respondent, it was treated as if it was a claim for compensation made under the EC Act and a notice for appearance for the hearing on 19.02.2018 was issued to the Petitioner and the First and Seconds Respondents. After the matter was adjourned by the Third Respondent to 08.03.2018 and 23.03.2018 for filing counter, the Petitioner claims that it had not been intimated of any subsequent date of hearing and surprisingly, an order dated 12.04.2018 was received on 03.08.2018 stating that in the enquiry conducted on 12.04.2018, the First Respondent had proved the claim for compensation of



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Rs. 8,02,600/- with the documents produced and the Petitioner was directed to remit that amount with interest at the rate of 12% per annum from 16.07.2017 till actual payment by way of demand draft in favour of the Third Respondent. Aggrieved thereby, the Petitioner has filed this Writ Petition.

3. This Court during the hearing on 01.10.2018 had suo motu impleaded the Branch Manager, ESI Corporation, Cuddalore as the Fourth Respondent in this Writ Petition taking into account the contention of the Petitioner that the First Respondent would be entitled only to the benefits under the ESI Act from the Fourth Respondent, and the Petitioner cannot be fastened with any liability to pay compensation under the EC Act.

4. Having due regard to the express mandate of Section 53 of the ESI Act, it is now beyond cavil that the provisions of the EC Act could not have been invoked in the present case, which is fortified by the decision of the Hon'ble Supreme Court of India in Bharagath Engineering -vs- R.Ranganayaki [(2003) 2 SCC 138], where the legal position has been explained as follows:-

"7.What is contemplated under Section 38 of the Act, which is a statutory requirement, is to insure all the employees.

8. Section 2(14) of the Act, which is the pivotal provision, reads as follows:

" 'Insured person' means a person who is or was an employee in respect of whom contributions are or were payable under this Act and who is, by reason thereof, entitled to any of the benefits provided by this Act."

9. It is to be noted that the crucial expression in Section 2(14) of the Act is "are or were payable". It is the obligation of the employer to pay the contribution from the date the Act applies to the factory or the establishment. In ESI Corpn. -vs- Harrison Malayalam (P) Ltd. [(1993) 4 SCC 361 : 1994 SCC (L&S) 1] the stand of the employer that employees are not traceable or that there is dispute about their whereabouts does not do away with the employer's obligation to pay the contribution. In ESI Corpn. -vs- Hotel Kalpaka International [(1993) 2 SCC 9 : 1993 SCC (L&S) 305] it was held that the employer cannot be heard to contend that since he had not deducted the employee's contribution on the wages of the employees or that the business had been closed, he could not be made liable. The said view was reiterated in ESI



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Corpn. -vs- Harrison's Malayalam Ltd. [(1998) 9 SCC 74 : 1998 SCC (L&S) 1174]. That being the position, the date of payment of contribution is really not very material. In fact, Section 38 of the Act casts a statutory obligation on the employer to insure its employees. That being a statutory obligation, the date of commencement has to be from the date of employment of the employee concerned.

10. The scheme of the Act, the Rules and the Regulations clearly spell out that the insurance covered under the Act is distinct and different from the contract of insurance in general. Under the Act, the contributions go into a fund under Section 26 for disbursement of benefits in case of accident, disablement, sickness, maternity etc. The contribution required to be made is not paid back even if an employee does not avail any benefit. It is to be noted that under Regulation 17-A, if medical care is needed before the issuance of temporary identification certificate, the employer is required to issue a certificate of employment so that the employee can avail the facilities available. "Wage period", "benefit period" and "contribution period" are defined in Section 2(23) of the Act, Rule 2(1-C) and Rule 2(2-A) of the Rules. Rule 58(2)(b) is a very significant provision. For a person who becomes an employee for the first time within the meaning of the Act, the contribution period under Regulation 4 commences from the date of such employment from the contribution period current on that day and the corresponding benefit period shall commence on the expiry of the period of nine months from the date of such employment. In cases where employment injuries result in death before the commencement of the first benefit period, Rule 58(2)(b)(ii) provides the method of computation of dependant's benefits. It provides for computation of dependant's benefits in the case of an employee dying as a result of employment injuries sustained before the first benefit period and before the expiry of the first wage period.

11. Rule 58(2)(b)(ii), insofar as it is relevant, reads as follows:

"58. Dependant's benefits.—(1) * * *
2(b) Where an employment injury occurs before the commencement of the first benefit period in respect of a person, the daily rate of dependant's benefit shall be—



the EC Act before this Court. It has been observed by the Hon'ble Supreme Court of India in Whirlpool Corporation -vs- Registrar of Trade Marks, Mumbai [(1998) 8 SCC 1] that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion and that in an appropriate case, inspite of availability of alternative remedy, the High Court may still exercise its discretionary powers in some contingencies, one of which is where the impugned proceedings are wholly without jurisdiction, as in this case.

7. In that view of the matter, the impugned Order No. Aa1/887/18 (W.C.No. 109/2018) dated 12.04.2018 passed by the Third Respondent, which cannot be sustained, is quashed. The First Respondent shall be at liberty to work out her rights to claim the benefits under the ESI Act in accordance with law.

In fine, the Writ Petition is ordered on the aforesaid terms. Consequently, the connected Miscellaneous Petition is closed. No costs.

Sd/-

Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

vjt

To

1. The Deputy Labour Commissioner - 2,
DMS Campus,
Teynampet,
Chennai - 600 006.

2. The Branch Manager,
ESI Corporation,
No. 2/9, Bhadrachalam Street,
Manjakuppam,
Cuddalore - 607 001.

+1cc to Mr.S.R.Srinivasan, Advocate, S.R.No.23117
+1cc to Mr.V.Rajesh Babu, Advocate, S.R.No.28329
+1cc to Mr.N.Nithyanandan, Advocate, S.R.No.28472
+1cc to the Government Pleader, S.R.No.28648

W.P. No. 24030 of 2018

RGN(CO)
SB(26/05/2022)