



C.M.A.No.2836 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	05.02.2024
Pronounced on	16.02.2024

CORAM

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI,J.

C.M.A.Nos.2836 of 2021

and C.M.P.No.16255 of 2021

The Managing Director,
Shevaroy's Textiles Pvt. Ltd.,
Kurukkampuram Village,
Andagalur gate near Rasipuram Taluk,
Namakkal District.

...Appellant

Vs.

1. Valli
2. Payayee
3. Thangayee
4. Minor Ramya
5. Minor Suganya
6. Minor Manikandan

(The Respondents 4 to 6 are minors
and represented by their Mother and
Guardian Thangayee)

...Respondents

Prayer: This Civil Miscellaneous Appeal is filed under Section 151 of Civil Procedure Code, to set aside the award dated 06.07.2020 made in



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E.C.No.1012 of 2015 passed by the Workmen Compensation Commissioner,
Coonoor.

For Appellant : Ms.N.Mohanapriya
for Mr.E.P.Senniyangiri
For Respondents : Mr.Ma.P.Thangavel

JUDGMENT

This Civil Miscellaneous Appeal is directed by the ESI Corporation against the order dated 06.07.2020 made in E.C.No.1012 of 2015 passed by the Workmen Compensation Commissioner, Coonoor.

2. According to the appellant, the claimants in E.C.No.1012 of 2015 are the legal heirs of deceased Sengottaiyan, a casual contractor who was engaged to replace piece of asbestos sheet in the factory of the appellant, which is a spinning mill covered under Employee's State Insurance Act, 1948 vide Code No./63/73491/18 issued by the Employees State Insurance Corporation. Hence, the deceased Sengottaiyan becomes an automatic covered employee and an insured person. Therefore, the insured person or his dependants shall not be entitled to receive or recover, whether from the



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employer of the insured person or from any other person, any compensation or damages under the Workmen's Compensation Act, 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-vide Section 53 of the Employee's State Insurance Act, 1948. Besides, the dependants are not entitled to get compensation from the appellant by virtue of Section 61 of the ESI Act. Hence, the order passed by the Workmen's Compensation Commissioner in E.C.No.1012 of 2015 dated 06.07.2020 is liable to be set aside.

3.The facts leading to filing of E.C.No.1012 of 2015 by the claimants are that, the deceased Sengottaiyan sustained injury during his course of employment in the appellant factory and succumbed to the injuries sustained by him. The claimants as dependants filed an application before the Workmen's Compensation Commissioner in E.C.No.1012 of 2015 for compensation for the death of the deceased Sengottaiyan. By filing the counter statement, the appellant resisted the claim on the ground that since the deceased Sengottaiyan is insured under the ESIC, the claimants are governed under the ESI Act and therefore, the application is not tenable under Employee's Compensation Act, 1923.



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4. After considering the evidence placed on record, the Commissioner awarded compensation to the tune of Rs.3,94,120/- to the claimants.

5. Heard the learned counsel Ms.N.Mohanapriya for the appellant and the learned counsel Mr.Ma.P.Thangavel for the respondents.

6. The learned counsel appearing for the appellant would submit that the deceased Sengottaiyan is an “insured person” under Section 2(14) of the ESI Act. As per Section 38 of the Act, there is a statutory obligation on the employers to insure its employees. The learned counsel for the appellant would further submit that the petition under E.C.Act for compensation is not maintainable as such proceeding is barred under Section 53 & 61 of the ESI Act. He submits that by virtue of Ex.B2 code number dated 08.05.2007 issued by the Employee's State Insurance Corporation, the remedy available for the claimants is only under the ESI Act.



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7. On the other hand, the learned counsel appearing for the respondents would submit that the witness examined on the side of the appellant as R.W.1 in E.C.No.1012 of 2015, has categorically admitted that the deceased Sengottaiyan did not possess any E.S.I Policy at the time of his death. The same was considered by the Commissioner, Workmen's Compensation and the impugned award was passed accordingly. The appellant had also deposited the award amount of Rs.3,96,620/- along with 12% interest for the period from 10.08.2007 to 01.09.2012 to the tune of Rs.6,37,620/-.

8. The further contention of the learned counsel is that through its letter dated 15.07.2020 the appellant requested the Deputy Commissioner of Labour to withhold Rs.3,96,620/- without prejudice to his appeal and to refund the balance amount of Rs.2,41,000/- with interest in the appellant's bank account, since the interest was not levied by the Commissioner in the contested order passed in E.C.No.1012 of 2015 dated 06.07.2020. Therefore, the appellant is now precluded from claiming the petition as not maintainable under the Workmen's Compensation Act.



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9. Heard on both sides, records perused.

10. Undisputedly, under Section 38 of the ESI Act, it is the obligation of the appellant/employer to insure all its employees in the manner provided by this Act. Section 2(14) of the ESI Act defines “insured person” which means a person who is or was an employee in an 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. Thus, a bare glance of Section 2(14) of the ESI Act makes it clear that once the employee is a insured person in respect of whom contributions are paid by employer, he is entitled for the benefits provided by this Act, irrespective of date of which contribution is paid.

11. In *Bharagath Engineering Vs. R.Ranganayaki and anr.* [(2003) 2 SCC 138] which is also referred in *Munmahesh Vs. Ashish Nemichand Katariya* [2019 SCC Online Bom 700], the Hon'ble Supreme Court held that:-

"It is to be noted that the crucial expression in Section 2 (14) of the Act is "are or were payable". It is the



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obligation of the employer to pay the contribution from the date the Act applies to the factory or the establishment. In ESI. Corpn. v. Harrisson Malayalam Pvt. Ltd., [1993] 4 S.C.C. 361, 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. Corporation v. Hotel Kalpaka International, [(1993)2 SCC 9], 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. Said view was reiterated in Employees' State Insurance Corporation v. Harrisons Malayalam Limited, [1998] 9 SCC 74]. 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."

12. In the case on hand, the date of accident is on 10.08.2007 is an admitted fact between the parties. The only contention of the respondent is that, at the time of accident, the deceased was not an insured employee, therefore the claimant was not covered under ESI Act. However, this defence



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of the respondent holds no substance, in view of the law settled by the Hon'ble Apex Court in *National Insurance Company Limited Vs. Hamida Khatoon and ors. [Civil Appeal No.3324 of 2009 dated 06.05.2009]* as the claimant is in the category of injured employee, in view of the bar under Section 53 of the ESI Act, the claimant is not entitled to recover compensation from his employer under Workmen's Compensation Act, 1923, in respect of employment injuries sustained by him, since section 38 of the Act casts 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.

13. Moreover, the crucial expression under Section 2 (14) of the Act is “are or were payable”. Therefore, it is the obligation of the employer to pay the contribution from the date of the Act applies to the factory or the establishment. That being the position, the factum that the deceased employee was not a insured person and payment of contribution is not done is really not very material. The Hon'ble Supreme Court in *Bharagath Engineering Vs. R.Ranganayaki and another [2003 (2) SCC 138]*, held as follows the relevant paragraphs are extracted hereunder:-



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“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(l-C) are 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 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 results in death before the commencement of the first benefit period. Rule 58(2)(b)(ii) provides the method of computation of dependent benefit. It provides for computation of dependent benefits in the case of an employee dying as a result of



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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: Dependants' s benefits. 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: (i)*** (ii) Where a person sustained employment injury before the expiry of the first wage period in the contribution period in which the injury occurs, the rate, forty per cent more than the standard benefit rate, rounded off to the next higher multiple of five paise corresponding to the group in which wages actually earned or which would have been earned had he worked for a full day on the date of accident/fall."*

12.When considered in the background of statutory provisions, noted above, the payment of non-payment of contributions and action or non-action prior to or subsequent to the date of accident is really inconsequential. The deceased employee was clearly an 'insured person', as defined in the Act. As the deceased employee has suffered an employment injury as defined under Section 2(8) of the Act and there is no dispute that he was in employment of the employer, by operation of Section 53 of the Act, proceedings under the



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Compensation Act were excluded statutorily.”

In the judgment of *Employee's State Insurance Corporation Vs. Harrison Malayalam Pvt. Ltd. [(1993) 4 SCC 361]*, the Hon'ble Supreme Court held that:-

“It is for this reason that the Act envisages automatic obligation to pay the contribution once the factory or the establishment is covered by the Act, and the obligation to pay the contribution commences from the date of the application of the Act to such factory or establishment. The obligation ceases only when the Act ceases to apply to the factory/establishment.”

14. Therefore, under the Act, it was the duty of the appellant/factory to get the necessary details of the workmen employed by the contractor at the commencement of the contract since the primary responsibility of payment of the contribution is on the principal employer. When considered in the background of statutory provisions, noted above, the payment of non-payment of contributions and action or non-action prior to or subsequent to the date of accident is really inconsequential. The deceased employee was clearly an 'insured person', as defined in the Act. As the deceased employee has



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suffered an employment injury as defined under Section 2(8) of the Act and there is no dispute that he was in employment of the employer, by operation of Section 53 of the Act, proceedings under the Compensation Act were excluded statutorily. Furthermore, to pay the contribution commences from the date of the application of the Act to such factory or establishment. The obligation ceases only when the Act ceases to apply to the factory/establishment.

15. For the above said reason, the impugned order passed in E.C.No.1012 of 2015 passed by the Workmen Compensation Commissioner is liable to be set aside. Accordingly, this Civil Miscellaneous Appeal is allowed but in the said circumstances, without any order as to costs. Consequently, connected miscellaneous petition is closed.

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mac/vsn

Internet: Yes/No

Index: Yes/No

Speaking/Non-speaking order



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K.GOVINDARAJAN THILAKAVADI, J.

mac/vsn

To

- 1.The Workmen Compensation Commissioner, Coonoor.
2. The Section Officer,
VR Section,
High Court, Madras.

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