Bombay High Court
Associated Electrical Agencies vs Commissioner For Workmen'S ... on 4 August, 1994
Equivalent citations: 1994 ACJ 1078, 1995 (2) BomCR 82, (1994) 96 BOMLR 39, 1995 (70) FLR 749, (1995) ILLJ 368 Bom, 1995 (1) MhLj 379
Author: Pendse
Bench: M Pendse, N Vyas

JUDGMENT Pendse, J.

1. M/s. Associated Electrical Agencies is a partnership concern carrying on business in electronic goods. Respondent No. 2 was employed for carrying out repairs of television sets on a monthly salary of Rs. 1,000/-. On July 17, 1987, while carrying out repairs of a television set, a component of the set resulting into inquiry to the face of respondent No. 2. Respondent No. 2 lost vision of the left eye. Respondent No. 2, at the time of the incident, was 27 years old.

2. The Legislature enacted the Employees' State Insurance Act, 1948 (for short 'the ESI Act') to provide for certain benefits to employees in case of sickness, maternity in case of female employees, employment injury and to make provision for certain other matters in relation thereto. The ESI Act came into force on April 19, 1948. The provisions of the Act apply to all the factories other than seasonal factories and the State Government, with the approval of the Central Government, is authorised to make the provisions of the Act applicable to any other establishment or class of establishments. Section 38 of the ESI Act provides that all employees in factories or establishments to which the Act applies shall be insured in the manner provided by the Act. Section 39 provides that the contribution payable in respect of an employee shall comprise contribution payable by the employer and contribution payable by the employee and it shall be paid to the corporation created under the Act. The employers are required to pay contribution at the rate of 4% of the total wages and the employees are required to pay at the rate of 1.5% of the total monthly wages. Failure to pay contribution leads to levy of damages and prosecution and once the establishment is covered by the provisions of the ESI Act, then the is no option either to the employer or to the employee to claim exemption from contribution. Chapter V of the Act deals with the benefits available to the insured persons or their dependants, as the case may be. Section 46(1)(c) of the Act provides for benefit of periodical payments to an insured person suffering from disablement as a result of an employment injury sustained. The expression 'employment injury' is defined under Section 2(8) and means '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". The expression 'insured person' is defined under Section 2(14) and means 'a person who is or was as employee in respect of whom contributions are or were payable under the Act'. Section 51 of the Act, inter alia, sets out that a person who sustains permanent disablement, whether total or partial, shall entitled to periodical payment at such rate and for such period and subject to such conditions as may be prescribed by the Central Government.

In exercise of powers conferred under Section 96 of the ESI Act, the Government has framed rules known as the Employees' State Insurance (Central) Rules, 1950. Rule 54 classifies the employees

into 11 categories depending upon the quantum of daily wages drawn by the employees. The workers covered by these categories are provided standard benefit in terms of rupees set out in the Rules. Second Schedule to the Act sets out description of various kinds of injuries and the percentages of loss or of incapacity. Item 331 in the Second Schedule refers to loss of one eye, without complications, the other being normal, and the percentage of loss of earning capacity is prescribed at 40%.

3. The establishment of the appellant is covered by the provisions of the ESI Act. Respondent No. 2, who is an insured person, approached the corporation for receipt of benefits on account of injury suffered on July 17, 1987. It is not in dispute that the corporation granted the benefit as claimed by respondent No. 2 and the respondent No. 2 is paid a sum of Rs. 289.90 per month.

On September 4, 1991, respondent No. 2 served notice upon the appellant claiming that the injury was caused during the course of employment and respondent No. 2 is entitled to claim composition for the loss of vision of one eye. Respondent No. 2 demanded a sum of Rs. 7 lakhs and threatened to adopt appropriate proceedings in case the amount so demanded was not paid within seven days of the receipt of the notice. The notice was followed by Application No. 108/C-18 of 1992 before the Workmen's Compensation Commissioner at Bombay. The application was filed in accordance with provisions of Section 22(2) of the Workmen's Compensation Act, 1923, and the sum demanded was Rs. 1,06,785/- with penalty, penal interest and costs.

4. On November 27, 1992, the appellant company appeared before the Commissioner and filed an application, inter alia, claiming that the application filed by respondent No. 2 was not maintainable in view of provisions of Section 53 of the ESI Act. The Commissioner for Workmen's Compensation, by order dated April 29, 1993 passed below Exhibit 'C-5'. Overruled the objection about maintainability of the application filed by respondent No. 2 by holding that the Workmen's Compensation Act is a beneficial and social piece of legislation and placing reliance upon a Full Bench decision of Kerala High Court. The Appellant, thereupon, approached this Court by filing Writ Petition No. 1406 of 1993 under Article 226 of the Constitution of India, but the learned single Judge, by order dated August 2, 1993, summarily dismissed the writ petition by observing that there is an alternate remedy by way of first appeal as provided under Section 30 of the Workmen's Compensation Act. The summary rejection of the petition has given rise to the present appeal.

5. This appeal was set down for hearing alongwith a group of other appeals where validity of Section 53 of the ESI Act was challenged. In some of the appeals, notice was issued to the Attorney General as vires of a Central Legislation was under challenge. As the question required to be determined in this appeal is of considerable importance, the learned Advocate General was requested to assist the Court. We must express out appreciation for the assistance rendered by the learned Advocate General.

6. Section 53 of ESI Act, prior to its amendment, inter alia, read as follows :

"53. Disablement and dependent's benefits. - When an insured person is or his dependents are 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, or otherwise, in respect of an employment injury sustained by the insured person as an employee under this Act, then the following provisions shall apply, namely :-

(i) The insured person shall, in lieu of such compensation or damages, receive the disablement benefit provided by this Act, (but subject otherwise to the conditions specified in the Workmen's Compensation Act, 1923) from the Corporation and not from any employer or other person.

(ii).....

(iii).....

(iv).....

(v) Save as modified by this Act the obligations and liabilities imposed on an employer by the Workmen's Compensation Act, 1923, shall continue to apply to him."

The Parliament substituted Section 53 of the ESI Act by Act No. 44 of 1966 with effect from January 28, 1968 and the substituted section reads as follows :

"53. 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, 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."

Section 61 of the Act reads as follows :

"61. 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."

The controversy in this appeal is whether Section 53 of the ESI Act deprives an employee from seeking compensation or damages under the Workmen's Compensation Act and, if so, whether the Parliament had legislative competency to enact Section 53 of ESI Act. It is also claimed that even if the Parliament had legislative competency, still this section should be struck down as being violative of fundamental rights guaranteed under Article 14 of the Constitution of India. The gravamen of the complain made on behalf of respondent No. 2 is that the right conferred upon the workmen to seek compensation under the Workmen's Compensation Act cannot be taken away by the subsequent legislation enacted as a measure of social security. It was claimed that the right to seek compensation or damages flows from common law for the tortious wrong done to the employee and the liability flowing from such wrong does not amount to any of the benefits provided by the ESI Act. The contention of the appellant, on the other hand, is that once the establishment is covered by the provisions of the ESI Act, then there is no option either to the employer or to the employer to decline to make contribution and then the employee is not entitled to receive, whether from the employer or from any other person, any compensation or damages under the Workmen's

Compensation Act or any other law for the time being in force or otherwise. In view of these rival contentions, the first question, which requires determination, is the true ambit and scope of Section 53 of the ESI Act.

7. A plain reading of Section 53 makes it clear that the right to seek compensation or damages by insured person in respect of an employment injury under any law including Workmen's Compensation Act is taken away. The bar created under Section 53 is absolute. It is not in dispute that respondent No. 2 is an insured person and has secured disablement benefit under Section 51 of the ESI Act in respect of the employment injury. The appellant claims that the application filed by respondent No. 2 to seek compensation under the Workmen's Compensation Act is clearly bared in view of Section 53 of the ESI Act. The contention was controverted on behalf of respondent No. 2 by claiming that the claim for compensation made by respondent No. 2 under Workmen's Compensation Act is de hors the contractual liability any such claim cannot be defeated by reference to the bar under Section 53 of the ESI Act.

The submission cannot be accepted, because the bar created under Section 53 is not limited only to contractual obligation but covers every obligation to pay compensation or damages under any law including Workmen's Compensation Act. The use of the expression "any other law for the time being in force or otherwise" clearly sets out the intention of the Parliament that the insured person is not entitled to any claim in respect of an employment injury beyond what is provided under ESI Act. A reference was made to some of the observations in the decision of the Supreme Court reported in 1992 II Current Civil Cases 167 The Regional Director, ESI Corporation & Anr. v. Francis De Costa & Anr. though it was very fairly stated that the observation were in different context. Indeed, the case before the Supreme Court was heard by Bench of two Judges and the Judges differed and the matter was directed to be placed before a larger Bench. The observations in paragraph 17 of the judgment of Mr. Justice K, Ramaswamy are to the following effect :

"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. Bharati Devi v. G. I. C. I. 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."

The question before the Supreme Court was whether the injury caused by an accident on a public road while an employee was on his way to join duty can be held as arising out of or in the court of his employment within the meaning of Section 2(8) of ESI Act. The reliance on the observations in the decision of the Supreme Court is not accurate. The Supreme Court was not examining the bar under Section 53 of ESI Act and the observations were made in the context as to whether the injury received while proceeding towards the place of employment can be treated as an employment injury.

It is urged on behalf of respondent No. 2 that the statement of objects and reasons of substituting section 53 of ESI Act is silent as to the reason which prompted the Parliament to deprive the employees of the benefit under Workmen's Compensation Act. The counsel wondered why the right,

which was available prior to amendment of Section 53, was withdrawn when the object of ESI Act was to provide benefits to the employees in case of employment injury. Mr. Advocate general urged that assumption that such right was available prior to amendment is not accurate but even otherwise introduction of bar cannot be faulted. The reason for creating a bar under Section 53 of ESI Act is not difficult to find. The statement of objects and reasons, inter alia, sets out that the experience of the administration of the Act had disclosed certain difficulties in its working and the object of the amendment was to remove such difficulties and to make the administration of the Act simpler. The Amending Act provided for raising the wage limit for coverage of employees and widening the existing definition of the term 'employee' to bring in administrative staff engaged in sale, distribution and other allied functions. The category of dependents was also widened and provision was made for grant of funeral benefit and the maternity benefits were enlarged. The counsel appearing on behalf of the Attorney General tendered affidavit sworn by Deputy Regional Director, Employees' State Insurance Corporation, and the affidavit sets out that the present limit of coverage of the employees under ESI Act is of those employees whose wages per month are not more than Rs. 3.000/-. The affidavit further sets out that an employee who is drawing Rs. 1,000/- as wages per month will be entitled to a permanent total disablement benefit in the sum of Rs. 840/- per month whereas the employees drawing Rs. 2,000/- per month and Rs. 3,000/- per month would be entitled to Rs. 1,512/- and Rs. 2.226/- per month respectively. In addition, the employee, during the period from the date of sustaining injury and rejoining the employment, would be entitled to 50% of the wages. As insured employee under the Act is also entitled to the medical assistance free of charge. The medical benefit is available even after the employee ceases to be in service on payment of sum of Rs. 10/- per month. The object of the Parliament in enacting ESI Act was to provide insurance cover to the employees of the establishments registered under the Act. The Act demands contribution both from the employer and the employee and contribution is not optional but compulsory. Once the establishment is covered by the provisions of the Act, then the employer is liable to contribute both the employer's contribution and the employee's contribution by deduction from the wages payable. The object of the Parliament was to provide social security to an employee who suffers employment injury. The experience and the collective wisdom of the legislature may have indicated that the benefits available under the ESI Act are equal, if not better, then those available under Workmen's Compensation Act or any other law. It is true that the compensation or damages payable under the Workmen's Compensation Act is paid in lumpsum, but such a payment may not give long term benefits to the employee or to the dependants. The employee is also required to file application before the Commissioner for Workmen's Compensation and often that leads to considerable litigation requiring substantial expenses and which litigation is also time consuming. The Parliament, while creating bar under Section 53 of ESI Act, was entitled and justified in taking into consideration all these facets. The counsel for respondent No. 2 could not deny that the benefits available under ESI Act are substantial, but urged that the benefit of receiving compensation under Workmen's Compensation Act should be in addition to the benefit under the ESI Act. The Parliament, by substituting Section 53 of ESI Act, was obviously preventing the employee from seeking double benefit; one under ESI Act and the order under Workmen's Compensation Act. Once insurance cover is available to an employee and when the insurance premium is contributed substantially by the employer and partly by the employee, then the Legislature was justified in creating a bar for employees seeking benefit outside the benefits available under the ESI Act. Section 61 of ESI Act, therefore, specifically provides that when a

person is entitled to any of the benefits provided by the act, then he shall not be entitled to receive any similar benefits admissible under the provisions of any other enactment.

8. The Workmen's Compensation Act, 1923, was enacted to provide for the payment by certain classes of employers to 'in workmen towards compensation for injury caused by accident. The Act came into force on March 5, 1923 and Section 3 provides that when a personal injury is caused to a workman by accident arising out of or in the course of his employment, the employer shall be liable to pay compensation in accordance with the provisions of Chapter II. Section 4 sets out the amount of compensation payable and in respect of permanent total disablement resulting from the injury the amount payable is equal to 50% of the monthly wages of the injured workman multiplied by the relevant factor, or an amount of Rs. 24,000/- Whichever is more. The Explanation further provides that where the monthly wages of a workman exceed Rs. 1,000/-, then the monthly wages for determining the amount payable shall be deemed to be Rs. 1,000/- only. In other words, the amount of compensation payable is to be calculated on the basis that the monthly wages are only Rs. 1,000/-. The compensation is payable in a lumpsum and is available to the dependents only in the case of fatal accident. The Workmen's Compensation Act did not provide for any insurance coverage or periodical payments or medical benefits and which are obviously the additional and better features prescribed by the subsequent legislation, i.e., the ESI Act. The Parliament was fully conscious of the limited benefit available under the Workmen's Compensation Act and, consequently, ESI Act was enacted with a view to provide better social security to the employees and the dependants. Bearing this factor in mind, it is obvious that the Parliament had sound reasons for creating a bar for the employees to seek benefits under Workmen's Compensation Act or any other law other than ESI Act. Section 46 of the ESI Act provides for payments to an insured person in case of sickness, to a female employee in cases of confinement or miscarriage or sickness arising out of pregnancy and periodical payments to the dependants of an insured person in addition to the medical treatment. These benefits available under the insurance cover are enjoyed by an employee and, consequently, withdrawal of the advantage of seeking compensation under the Workmen's Compensation Act, can, by no stretch of imagination, be said to be unreasonable to due to non-application of mind.

9. Reference was made to decisions Mangalamma & Ors. v. Express Newspapers Ltd. & Ors. 1982 (60) FJR 118 (Karn. H. C.) K. S. Vasantha & Ors. v. Karnataka State Road Transport Corpn. & Ors. 1971 (41) FJR 667 (P. & H. H. C.) Lakshmi Oil Mills, Ambala City v. Thakur Dass & Ors. 1984 LIC 1355 (Karn. H. C.) Smt. Annapurna & Ors. v. General Manager, Karnataka State Road Transport Corporation, Bangalore & Ors. Where it was held that Section 53 bars claim made under Motor Vehicles Act or claim under the provisions of Workmen's Compensation Act.

The discordant note was sounded by Full Bench decision of Kerala High Court P. Ashokan v. Western India Plywoods Ltd., Cannanore. Reference was made to the Full Bench as a Division Bench of the Kerala High Court, in a judgment reported in 1985 Ker. L. T. 104 Abad Fisheries v. Commr. for Workmen's Compensation had held that Section 53 of ESI Act bars claim under the Workmen's Compensation Act. In the case before the Full Bench, the employee had received benefit from the Employees' State Insurance Corporation. The employee then filed a suit for recovery of Rs. 1,50,000/- and applied for leave to prosecute in forma pauperis. The application was resisted on the

ground that the employee had no cause of action and the suit was barred by virtue of Section 53 of ESI Act. The trial Judge rejected the contention, but refused leave on the ground that the employee had means to pay the Court Fees. The employee carried an appeal before Kerala High Court and the question, which required determination, was whether the employee should be permitted to file suit in forma pauperis. The Full Bench held that the employee had a cause of action. The Full Bench then observed that the legislation was undertaken in the background of expanding industrialisation and strongly emerging trade union organisation. After quoting the observations made by Dr. Ambedkar while introducing the provisions of Employees State Insurance Act, the Full Bench observed that the Court has a positive role to play in relation to the interpretation of statutes and if a section yields two different interpretations, that which leads to an arbitrary or shockingly unreasonable result has to be eschewed. There cannot be any debate as to the accuracy of this observation. The Full Bench then observed that a restricted view of Section 53 should not be taken; otherwise the section is liable to be challenged as violative of fundamental rights. We are afraid we cannot subscribe to several observations made in the judgment and the conclusion reached. The Full Bench, with respect, has not considered various facets of the matter and proceeded to hold that the right to claim damages or compensation under the Workmen's Compensation Act is not barred, in face of clearcut and unambiguous provisions of Section 53 of ESI Act, on consideration that the Act is a piece of benevolent legislation and should be construed liberally. It is undoubtedly true that the Act is a piece of benevolent legislation and should be construed liberally. It is undoubtedly true that the Act is a beneficial piece of legislation; but when the Parliament had enacted the provision, which is unambiguous and crystal clear and which is based on sound principle, then it is not permissible to bypass the bar created under Section 53 of ESI Act on consideration which are not germane to the interpretation of the section. We, are therefore, unable to share the view taken by the Full Bench of Kerala High Court.

10. It was then contended on behalf of respondent No. 2 that the provisions of Section 53 should be struck down as the Parliament was not competent to enact the provision. It was urged that Item 23 in the Concurrent List in the Seventh Schedule to the Constitution of India provides for subjects of social security and social insurance; employment and unemployment while Item 24 deals with welfare of labour including conditions of work, provident funds, employer's liability, workmen's compensation, invalidity and old age pensions and maternity benefits. It was submitted that the parliament was entitled to enact the provisions of ESI Act to confer social security and social insurance upon the employees, but it was not permissible for the Parliament, while doing so, the deprive the employees of a benefit available under the Workmen's Compensation Act. It was submitted that as the Parliament had withdrawn the benefit of Workmen's Compensation Act by substitution of Section 53 of ESI Act, the Parliament had transgressed the limits of legislative competence. It is impossible to accede to the submission. As mentioned hereinabove, the Workmen's Compensation Act, 1923, provided benefits of a limited nature. The parliament enacted ESI Act with object of conferring several more benefits and while conferring those benefits, the Parliament provided that the employees, who are entitled to the benefits under ESI Act, should not secure double benefit by reference to Workmen's Compensation Act. In other words, the provisions of Workmen's Compensation Act stand repealed qua the employers and the employees of the establishments which are covered by ESI Act.

It is futile to suggest that the parliament was not competent to repealed the provisions of the Workmen's Compensation Act in respect of the employees covered under the ESI Act. It was then submitted that Section 53 of ESI Act should be struck down as violative of fundamental rights guaranteed under Article 14 of the Constitution of India. The counsel submitted that the provisions of ESI Act are applicable only to those employees whose monthly wages are not in excess of Rs. 3,000/- and, consequently, the employees who are drawing higher wages and working in the same establishment are entitled to take advantage of provisions of Workmen's Compensation Act and that amounts to invidious discrimination. The submission is merely required to be stated to the rejected. The employees drawing wages in excess of Rs. 3,000/- per month are not covered by the provisions of ESI Act and, consequently, such employees from a class by themselves and are entitled to invoke Workmen's Compensation Act for claiming compensation or damages. It was urged that there is no nexus to the object to be achieved for making such discrimination. We are unable to find any merit in this contention also. It is obvious that the insurance cover is made available to the employees whose wages are below Rs. 3,000/- per month and for whom insurance cover is absolutely necessary. The availability of the insurance covers to the small employees as distinct from the employees drawing higher emoluments cannot be faulted on the ground of discrimination. The object to be achieved is to provide insurance coverage to small employees in respect of employment injuries as well as maternity benefits, medical benefits to the dependants and such object is clearly subserved in respect of small employees who are in need of such cover. A faint attempt was made to urge that the employees of the establishments which are not covered by ESI Act are entitled to approach the authorities under the Workmen's Compensation Act for compensation and damages eves though the monthly wages drawn by such employees are below Rs. 3,000/-. The counsel urged that discrimination is made even between employees drawing wages below Rs. 3,000/- per month. The submission is devoid of merit because the employees of the establishment covered by ESI Act cannot be compared with employees of the establishment not so covered. The two classes of employees are different and distinct and the grievance is without any substance. In out judgment, challenge to constitution validity of Section 53 of ESI Act is required to be rejected.

11. The Commissioner for Workmen's Compensation, by order dated April 29, 1993, rejected the objection raised by the appellant to the maintainability of the application filed by respondent No. 2, in view of the bar under Section 53 of the ESI Act only because of the judgment of Full Bench of Kerala High Court and, consequently, the order of the Commissioner cannot be sustained. The learned Single Judge was not right in summarily dismissing the petition by observing that the appellant has a remedy to file an appeal under Section 30 of Workmen's Compensation Act. The appeal is provided against order awarding compensation and such appeal is of no consequence when the issue raised is about the jurisdiction of the Commissioner for Workmen's Compensation to entertain the application. The issue as to the lack of initial jurisdiction cannot be shout out by directing the appellant to submit to the jurisdiction of the Commissioner and then prefer an appeal. In our judgment, the order of the learned Single Judge declining to entertain petition under Article 226 of the Constitution of India on the ground of availability of efficacious remedy is not correct and cannot be sustained. The application filed by respondent No. 2 before the authority under the Workmen's Compensation Act was not maintainable and is liable to be dismissed.

12. Accordingly, appeal is allowed and order dated August 2, 1993 passed by learned Single Judge in Writ Petition No. 1406 of 1993 as well as order dated April 29, 1993 passed by Commissioner for Workmen's Compensation below Exhibit 'C-5' in Application (WCA) No. 108/C-18 of 1992 are set aside and the application for compensation filed by Respondent No. 2 stands dismissed. In the circumstances of the case, there will be no order to costs.