

A.F.R.

HIGH COURT OF ORISSA: CUTTACK.

M.A.NO.560 OF 1998

From an order dated 4.5.1996 passed by Shri G.Narasingham,
-District Judge -cum-Employees Insurance Court, Cuttack in
E.S.I.Misc. Case No. 2 of 1994.

...

Upendra Jena. ... Appellant

-versus-

Regional Director, Respondents
ESI Corporation, Janapath,
Bhubaneswar & another.

...

For Appellant: M/s.B.K.Sahoo
& K.C.Sahoo

For Respondents: M/s.P.P.Roy,D.P.Roy,
N.Pati & R.R.Bhattacharya
(R-1)

P R E S E N T

THE HONOURABLE MR. JUSTICE B.N.MAHAPATRA

Date of Hearing: 04.9.2009 : Date of Judgment: 15.10.2009

B.N.MAHAPATRA,J. This appeal has been filed under section 82 of
the Employees' State Insurance Act,1948 (hereinafter referred to as
the 'E.S.I. Act') challenging the legality of the order dated 4.5.1996
passed by the District Judge-cum-Employees Insurance Court,

Cuttack (hereinafter referred to as the 'E.I. Court') in E.S.I. Misc. Case No.2 of 1994.

2. The case of the appellant in a nutshell is that the appellant was working under the Orissa Textile Mills, Limited, Choudwar, and was insured under the E.S.I. Act having Insurance No.42946. On 08.04.1983 while the appellant was in his duty in the factory, he met with an accident and sustained injuries on his left side nose and eye. The accident took place due to hit of a shuttle while he was working inside the Mill. Due to such accident, the appellant felt pain on his nose and eye and got admitted in the ESI Hospital, Choudwar on the very day. Thereafter, he was referred to the SCB Medical College and Hospital, Cuttack. After the external injuries were cured, he was declared fit and discharged from the Hospital. A few days thereafter, appellant's brain was affected due to the reasons of such injuries received in the accident and he underwent treatment in the Neurosurgery Department of S.C.B. Medical College and Hospital, Cuttack. He was under the continuous treatment of Dr.Sanatan Rath. The appellant at times was losing his sense and memory. The said injuries made the appellant permanently disabled. Therefore, he approached Respondent no.1, the Regional Director, E.S.I. Corporation, Janapath, Bhubaneswar, number of times to refer his case to the Medical Board to assess the loss sustained by him in the accident,

but his request was turned down on the ground of limitation vide letter dated 17.7.1989. Thereafter on 28.12.1989, he sent a notice through his lawyer to opposite party no.2, the Director General, E.S.I., Corporation. In response to the said lawyer's notice, O.P. No.2 vide letter dated 24/25.6.1993 stated that reference to the Medical Board could not be made because of the fact that such request was not made within the period of twelve months from the date of accident. Being aggrieved by the reply letter dated 24/25.6.1993 of opposite party no.2, the appellant filed E.S.I. Misc. Case No.2 of 1994 on 3.1.1994 before the E.I. Court with a prayer to refer his case to the Medical Board for estimation of the loss. Along with the said Misc. Case, the appellant filed an application for condonation of delay. The learned E.I. Court vide its order dated 04.05.1996 rejected the said application on the ground of limitation. Hence, the present appeal.

3. Shri B.K.Sahoo, learned counsel appearing on behalf of the appellant vehemently argued that the learned E.I. Court has committed a gross error in law by rejecting the application of the appellant on the ground of limitation. There are sufficient reasons for delay in filing the appeal. Since the appellant has claimed for reference of his case to the Medical Board and the claim for benefit comes after assessment of loss by the Medical Board, the limitation prescribed under section 77 of the E.S.I. Act is

not applicable to the present case. The E.S.I. authority has wrongly refused to refer the appellant's case to the Medical Board when the appellant was under the continuous medical treatment and no final certificate has been issued showing closure of the treatment.

4. Mr.P.Roy, learned counsel appearing on behalf of the respondents vehemently contended that in absence of any valid explanation for the delay in presenting the appeal, the E.I. Court has rightly rejected the application of the appellant. The reasons explaining delay as advanced by the appellant are not supported by any evidence.

5. On the rival contentions of the learned counsel for the parties, the question that falls for consideration by this Court is whether the E.I. Court is justified to reject the application of the appellant on the ground of limitation.

6. To deal with the above question, it is necessary to know what is contemplated in Section 77 of the E.S.I. Act. The relevant portion of the said Section is quoted below:-

“77.Commencement of proceedings,-(1) The proceedings before an Employees' Insurance Court shall be commenced by application.

(1A) Every such application shall be made within a period of three years from the date on which the cause of action arose.”

A plain reading of the above Section makes it amply clear that the proceedings before an E.I. Court shall be commenced

by an application filed within a period of three years from the date on which the cause of action arose. In the instant case, the cause of action arose in July 1989, when the Corporation refused to refer his case to the Medical Board. The appellant should have filed an application before the E.I. Court within a period of three years from the date on which the cause of action arose i.e. 17.7.1989 in terms of Section 77(1A) of the E.S.I. Court. No such application was made within the period of limitation, which expired on 16.7.1992. Only after receipt of the letter dated 25.6.1993 from the Corporation wherein the Corporation turned down the lawyer's notice dated 28.12.1989, the appellant preferred an application before the E.I. Court on 3.1.1994. The E.I. Court, which rejected the application of the appellant, observed that the appellant could not explain the delay in presenting the application before it within the time even after receipt of the letter dated 25.6.1993. In paragraph-4 of the petition, the applicant has explained that the delay was caused as he was under the continuous medical treatment after 25.6.1993. The learned E.I. Court did not accept such explanation on the ground that the appellant had not mentioned the exact period during which he was under such treatment. The name of the doctor was also not disclosed by the appellant. No medical certificate was filed in support of his illness for which the E.I. Court rejected the petition on the ground of limitation. The E.I. Court further held that

the appellant was in E.S.I. Hospital from 8.4.1983 to 23.4.1983 and thereafter he was medically fit to resume his normal duty after 11.6.1983. Only on 09.07.1987, i.e., four years after the termination of the temporary disablement, which was beyond the time limit prescribed under Regulation-72 of the E.S.I.(General) Regulation, 1950, the appellant prayed for reference of his case to the Medical Board, which was time barred.

7. Apart from the above, another important aspect of the case is as to whether any power is vested in the E.I. Court to condone the delay in presenting an application under section 77 of the E.S.I. Act. A plain reading of Section 77 of the E.S.I. Act does not show any such power is vested in the E.I. Court. It may be relevant to mention here that while Sub-section(4) of Section 82 contains the provision for condonation of delay in presenting the appeal before the High Court, no such power is vested in the E.I. Court to condone the delay in presenting the application under section 77 of the E.S.I. Act before it. Now the question arises whether in absence of such a power the E.I. Court can condone delay in presenting an application under section 77 of the E.S.I. Act after expiry of three years from the date on which the cause of action arose.

In this context, it would be appropriate to refer to judgment of Hon'ble Supreme Court in ***Singh Enterprisers Vs. Commissioner of Central Excise, Jamshedpur and Ors.***

(2008)3 SCC 70. While considering the provisions of Central excise Act, 1944 the Hon'ble apex Court held:

“The provision to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only up to 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days' period.”

A similar view has been taken by the apex Court in *Commissioner of Customs, Central Excise, Noida Vs. Punjab Fibres Ltd., Noida*, (2008)3 SCC 73, *Goodearth Steels(P) Ltd. Vs. Commissioner of Central Excise, Kanpur*, (2008) 3 SCC 77, *Gopal Sardar Vs. Karuna Sardar*, (2004)4 SCC 252.

8. In view of the above, this Court does not find any reason to interfere with the order passed by the E.I. Court. The appeal is accordingly dismissed.

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B.N. Mahapatra, J.

Orissa High Court, Cuttack,
The 15th day of Oct. '09/Bose.