

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**FIRST APPEAL NO. 758 of 2007****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE R.M.CHHAYA**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
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REGIONAL DIRECTOR EMPLOYEE STATE INSURANCE

CORPN....Appellant(s)

Versus

DALIBEN KISHANSING....Defendant(s)

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Appearance:

MR HEMANT S SHAH, ADVOCATE for the Appellant(s) No. 1

RULE SERVED for the Defendant(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE R.M.CHHAYA**

Date : 28/02/2014

ORAL JUDGMENT

1. This appeal under Section 82(2) of the Employees' State Insurance Corporation Act, 1948 (Act for short) is directed against the judgment and order

dated 20.05.2005 passed by learned Employees' State Insurance Court, Ahmedabad in E.S.I Application No.59 of 2001. This Court (Coram: M.R.Shah, J.) admitted the matter by order dated 07.05.2007 and has passed the following order: -

ADMIT. The following substantial questions of law arise in the present Appeal;

(1) Whether an application under Section 75 of the ESI Act is maintainable after a period of three years as provided in Section 77 of the Act, and whether there are any power with the ESI Court to condone the delay in absence of any express provision under the Act ?

(2) Whether the death of the deceased is due to employment injury in view of Section 2(8) of the ESI Act?"

2. Heard Mr.Hemant Shah, learned counsel for the appellant-Corporation. Though served, no one appears for the respondent. Have perused the Paper-Book as well as the record and proceedings of the trial Court.

3. It appears from the record that the husband of the respondent-Late Shri Kishansing Hirasing was working in the processing department of Sinhal Brothers, situated at Rajapur Patiya, Narol, Ahmedabad. It is the case of the respondent-original applicant before the trial Court that the workman i.e. husband of the respondent was on duty on

10.08.1999 between 8:00 A.M to 4:00 P.M.,and at about 3:00 P.M on the said day, because of stress of work, he complained of chest pain and was immediately admitted to the ESI General Hospital at Bapunagar, Ahmedabad and kept in Intensive Care Unit (I.C.U). That during the treatment, husband of the respondent expired on the same day. The application was preferred for getting benefits under the Act before ESI Court, Ahmedabad, which came to be registered as E.S.I Application No.59/2001.

4. It further appears from the record that the appellant-Corporation filed its written statement/reply at Exh:10 and *inter alia*, contended that the employer has not filled in the accident form to the Corporation. It was further contended that while the husband of the respondent was on service, he applied for leave which was granted. It is also contended that it cannot be said that the husband of the respondent died during the course of his employment. It was further contended by the appellant-Corporation that in fact the husband of the respondent expired after he left the factory/office.

It is also contended that the present appeal is filed after 28 months, and therefore, even on the ground of limitation, the appeal deserves to be dismissed.

5. It further appears that the respondent submitted three documents, which were exhibited as Exhs:16, 17 and 18 and has also produced a letter, written by Sinhal Brothers dated 25.02.2002 to the appellant-Corporation at Exh:15. The respondent applicant has examined at Exh:14.

6. It further appears that learned E.S.I Court, Ahmedabad by impugned judgment and order was pleased to allow the application and directed the appellant-Corporation to give benefits to the respondent-applicant under Section 52 of the Act read with Schedule-1. Being aggrieved by the same, present appeal is filed.

7. Learned counsel for the appellant-Corporation has submitted that the husband of the respondent did not receive any employment injury. He further contended that The learned E.S.I Court has wrongly appreciated the oral as well as the documentary

evidences on record and has erroneously allowed the application. He was relied upon the evidence, which is on record. It was also submitted that the death certificate at Exh:16 also does not indicate the real cause of death. It was further submitted that even on appreciating the oral deposition of the respondent-applicant, it cannot be said that the respondent-applicant expired because of chest pain, which would amount to employment injury defined under Section 2(8) of the Act. It was further contended that in absence of any evidence as to the real cause of death, merely on surmises or conjuncture, the learned E.S.I Court has presumed that the respondent-applicant suffered employment injury in the course of his employment. It was further contended that there is no casual connection with the cause of death and the employment, and hence, the respondent is not entitled for any benefits under the Act, in absence of any evidence. It was also pointed out that the conclusion arrived at by lower Court that the husband of the respondent expired during the course of his employment due to employment injury, is therefore,

erroneous. It was submitted that the appeal deserves to be allowed.

8. As noted herein above, even though the respondent-applicant was served none appears, and therefore, the appeal was heard on merits.

9. On perusal of the record and proceedings, it appears that the respondent-applicant filed an application at Exh:1 on 20.12.2001 and it is averred from the application that on 10.08.1999 while the husband of the respondent was in service at Sinhal Brothers, in the shift beginning from 8:00 am to 4:00 pm. It is contended that at about 3:00 pm, because of work load, the husband of the respondent complained of chest pain and one Jamadar viz. Khimsing Nandasing immediately admitted the husband of the applicant to the ESI General Hospital at Bapunagar and on this factual matrix, benefits under the Act are prayed for the application.

10. It further appears that the respondent-applicant also filed an application for condonation of delay, which came to be allowed vide order dated 17.10.2003

and in the said order, it clearly mentions that the appellant-Corporation has no objection if the said application is allowed and therefore, the application for condonation of delay Exh:3 was allowed. In light of the fact that the consent was given, first substantial question as framed by this Court does not require to be answered in this appeal, keeping vital question of limitation open for adjudication in any other appropriate matter.

11. It may further be noted that the appellant-Corporation has not pressed substantial question No.1 as regards the limitation as provided under Section 71 of the Act before this Court.

12. It further appears from the record that the appellant-Corporation filed its written statement at Exh:10 and it is, *inter alia*, contended that the respondent-applicant has not produced any medical papers in support of the contention raised, more particularly, as regards the contention that the death is due to employment injury over and above the aspect of limitation.

13. It may further be noted that the employer-Textile Processor by communication dated 25.02.2002 addressed to the manager of the appellant-Corporation has mentioned thus:-

In respect with above subject, we would like to inform you that above I.P. Was present in our factory on dt.10/8/99. During his working hours, he complained that he is feeling some uneasiness and asked for to sanction a leave. As per his request, we have sanctioned his leave and he left for home and after that he was died.

In light of above situation, we have not submitted any accident form in L.O Isanpur.

Thanking You,
Faithfully

Yours
For, Sinhal Brothers
Sd/-
Partner/Manager

14. The respondent-applicant has examined at Exh:14 and in her deposition, the respondent has averred that while her husband was at work, at about 3:00 pm he complained of chest pain and therefore, husband of the respondent was admitted to the General Hospital for treatment by Jamadar and one co-workman. It is deposed that he expired on the same day i.e. on 10.08.1999. In cross-examination, the respondent-applicant has stated that when the husband of the respondent expired, she was at her native place and she was informed about the same by the workmen and no

person from the factory had come to the native place. It was further stated that after knowing the same, the respondent came to Ahmedabad and went to the factory, where the husband of the respondent was working and met the Jamadar as well as the workmen, wherein she was informed that the husband of the respondent had informed about the chest pain while he was on work. She has further stated that she is not aware whether on 10.08.1999, her husband was on leave.

15. It may further be noted that by application at Exh:13, the respondent-applicant has produced three documents. First document is the death certificate issued by General Hospital, E.S.I.S., Bapunagar, Ahmedabad where cause of death is not mentioned and even diagnosis is not mentioned. It is pertinent to note that the death certificate indicates that the husband of the respondent was admitted to the casual ward. The notice Exh:17 which was issued by the advocate of the respondent-applicant and similarly Exh:18 is the receipt of the acknowledgment of the said notice having been received by the appellant-

Corporation, except that, there is no evidence on record led by the respondent-applicant.

16. The appellant-Corporation has examined one witness viz. Bipinchandra Kacharabhai Parmar, at Exh:26, who was working as manager at the Isanpur Local Office. It is evident from the deposition of the witness of the appellant that he has stated that the death of the husband of the respondent occurred outside the factory and he was on leave, except that, there is no evidence on record. It is also found that the respondent-applicant has given written arguments at Exh:29. On perusal of the impugned judgment and award itself, it is evident that the learned E.S.I Court has believed that because of load of work, husband of the respondent suffered chest pain and expired during the course of his employment.

17. The learned E.S.I Court has also on basis of the deposition of witness namely Khimsing Nandasing Chaudhary, who was working in Sinhal Brothers as Jamadar, wherein he has stated that the manager filled in the form has come to the conclusion that

the husband of the respondent was taken to the E.S.I hospital and expired on the said day. On basis of such averment made in the deposition of witness at Exh:22, the learned E.S.I Court has believed the deposition of the respondent-applicant at Exh:14 and has come to the conclusion that the husband of the respondent-applicant received employment injury as defined under Section 2(8) of the Act.

18. Relying upon the judgment of the Bombay High Court in the case of Laxmibai Vs. Chairman & Trustee, Bombay Port Trust, reported in 1954(1) LLJ 614, the judgment of the Karnataka High Court in the case of United India Insurance Company Limited Vs. Smt.Sushilaben, reported in 2004 LLR 425 as well as the judgment of this Court in the case of Regional Director, ESIC, Ahmedabad Vs.Batul Bibi & Ors, reported in 1987 (2) GLH 345, the learned E.S.I Court has come to the conclusion that the respondent-applicant is entitled to the benefits under the Act.

19. On perusal of the deposition of Jamadar viz. Khimsing Nandasing Chaudhary at Exh:22, it appears

that in the examination-in-chief he has stated that the accident form was filled in by the Manager. In his cross-examination also, he has stated that the husband of the respondent was not suffering from any heart disease. He has further stated that the Company had filled in the accident form and was given to him, which he had given to Bapunagar Hospital. It is also stated that the husband of the respondent-applicant was machineman helper in the Company. Similarly, on perusal of the deposition of one Durgasing Rajusing Rajput at Exh:24, he has stated that the work to be undertaken by Machinehelper was to bring 500 Kgs. of materials in a lorry from the department. He has stated that he accompanied with the husband of the respondent along with Jamadar while he was being taken to Bapunagar Hospital and that he expired on the same day, where postmortem was also performed. He further stated that there was delay of one hour in taking the husband of the respondent to the hospital and the delay occurred because of filling-up the form. It may be noted that even though two witnesses examined by the respondent applicant have stated that

the Postmortem was performed, no such record is found on the record and in addition to that as discussed hereinabove, in the death certificate at Exh:16 does not even mention the diagnosis and cause of death. There is no medical evidence on record to show the real reason why the husband of the respondent expired.

20. On the contrary, it is clear from the letter written by the employer at Exh:15, which narrates that in the working hours, the respondent-applicant complained that he is feeling some uneasiness and therefore, he asked for the leave, which was granted. It is also mentioned that the Company has not submitted any accident form with the appellant-Corporation office. It appears that the said clarification is issued on inquiry made by the appellant-Corporation after the application was filled in by the respondent-applicant. There is no evidence on record to show as on the day of incident, the deceased Kishansing Hirasing died because of stress and strain. Except the fact that Khimsing Nandasing at Exh:22 (Jamadar) and Durgasing

Rajputsing Rajput (Helper) at Exh:24 have stated in their deposition that the respondent-applicant complained a chest pain, whereas it is evident from the letter at Exh:15 that the respondent-applicant applied for leave which was sanctioned and the facts from the evidence on record reveals that he expired on the day when he was granted leave. Though both the witnesses examined by the respondent-applicant stated that the Postmortem was performed and accident form was submitted but the same is not on record.

21. In absence of any such evidence, the learned E.S.I Court has wrongly come to the conclusion that the deceased sustained employment injury as provided under Section 2(8) of the Act and has wrongly considered that the deceased sustained the injury in course of employment. There is neither any medical evidence nor any other evidence to show that there is casual connection between the accident and the employment.

22. In the instance case, there is no evidence to show the same and the applicant has not proved that

there is casual connection between the employment and injury. Evidence of the applicant clearly shows that she was not present in the town when the incident occurred and she was visited the factory after the incident and on inquiry, she informed that the deceased expired with complaint of chest pain. Even two oral depositions of witness viz. Khimsing Nandasing at Exh:22 (Jamadar) and Durgasing Rajputsing Rajput (Helper) at Exh:24 do not prove that there was casual connection between the injury and the employment, and therefore, in the facts and circumstances of the case, second substantial question is answered in negative i.e. death of the deceased is not due to employment injury in view of Section 2(8) of the Act.

23. The appeal, is therefore, allowed. The impugned judgment and award dated 20.05.2005 passed by learned Employees' State Insurance Court, Ahmedabad in E.S.I Application No.59 of 2001, is hereby quashed. Parties to bear their own costs.

(R.M.Chhaya, J.)

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