PETITIONER:
WESTERN INDIA PLYWOOD LTD.

Vs.

RESPONDENT:
SHRI. P. ASHOKAN

DATE OF JUDGMENT: 19/09/1997

BENCH:
S.B. MAJMUDAR, B.N. KIRPAL

ACT:

HEADNOTE:

JUDGMENT:
THE 19TH DAY OF SEPTEMBER, 1997
Present:
Hon'ble Mr. Justice S.B. Majmudar
Hon'ble Mr. Justice B.N. Kirpal
A.S. Nambiar, Sr. Adv., Ms. Shanta Vasudevan and P.K. Manohar, Adv. with for the Appellant
Manoj Swarup, Ms. Lalita Kohli, Adv, for M/S. Manoj Swarup & Co., Adv. for the Respondent.

J U D G M E N T

The following Judgement of the Court was delivered.

J U D G M E N T

KIRPAL, J.

The sole question which arises for consideration in this appeal is whether the respondent, who is an employee of the appellant, can claim damages from the appellant on account of the injury suffered by him during the course of employment when he was already received the benefit under the provision of the Employees State Insurance Act 1948(herein after referred to as the 'ESI Act'.

Briefly stated the facts are that the appellant is a company owning and operating a plywood factory. The respondent, who was working with the company, met with an accident when he was feeding the DAP compound into the roller mill by pushing it with his own hand. As a result of this accident one of his hands was amputated. Notwithstanding the accident, the appellant allowed the respondent to continue in its service without any reduction in remuneration.

The ESI Act was applicable to the employee of the appellant company, including the respondent. After the aforesaid accident a claim was maid thereunder and as a result thereof the disabled benefit of Rs. 260/- per month on account of permanent/partial disablement was ordered to be paid to the respondent. This decision of the employees State Insurance Corporation to pay the said amount was not challenged. It is the case of the appellant that besides this benefit under the ESI Act, the medical expenses for the treatment of the respondent received the best medical treatment available in that area.

While still in service the respondent filed OP No. 108

of 1981 in the Court of Subordinate Judge, Teilicherry, under Order 33 Rule 1 of the Code of Civil Procedure, seeking Permission of the Court to allow him to file a suit against the appellant herein for Rs. 1,50,000/- as compensation for the injuries sustained by him on a account of the aforesaid accident which had taken place in April, 1980. This application was opposed by the appellant herein, inter alia, on the ground that it was liable to be dismissed under Order 33 Rule 5 (d) and (f) of the Code of Civil Procedure, in view of the provision of Section 53 of the ESI Act, which barred the receiving or recovery of any compensation or damages by an employee under any law other than the Employees State Insurance Act. This Contention of the appellant was upheld and the Subordinate Court dismissed the said application of the respondent.

The respondent thereafter field an appeal before the high Court of Kerala. A division Bench of the High Court doubted the correctness of an earlier Bench the correctness of an Decision on the same question and, consequently, the case was referred to a full Bench. The Full Bench consisting of three learned judges held that the provisions of Section 53 and 61 of ESI Act did not bar an action by an injured employee under tort for compensation against the employer. It accordingly allowed the appeal and directed the application of the trial court on merits Order 33 Rule 1 to be decided by trial court on merits and in accordance with law. Hence this appeal by special leave.

It was submitted by Mr. Nambiar, learned senior counsel for the appellant, that the Employees State Insurance Act is a self contained code and the insured Employees, like the respondent, are entitled to the benefit in case of injury suffered under the provisions of the ESI Act and such employees in the case of an Employment injury are debarred from making any claim under any other act or law. In this connection our attention was drawn to the relevant provisions of the ESI Act. Mr. Manoj Swarup, learned counsel for the respondent, on the other hand, submitted that Section 53 should be constructed in such away that an aggrieved employee is able to receive adequate compensation on account of the injury which is sub stained by him. It was contended that the amount which was paid under the ESI Act could be regarded as an adequate measure of damages suffered by the respondent and, therefore, Section 53 should not be constructed in such a way as to prevent an employee from bringing about an action in tort. In the alternative it was submitted that this court, in exercise of its jurisdiction under Article 136 of the constitution, should not interfere in the present case.

There are only three provisions of the ESI which are relevant for the present case . Section 2(8) defines the term 'employment injury' and reads as follows:

> "Employment injury" means perennial injury to an occupational disease arising out of and in the course of his Employment, being an insurable employment whether the accident occurs or the occupational diseases is contracted within or outside the territorial limits of India.

The two other sections with which we are concerned in this case are Sections 53 and 61 which are follows:

> "53. Bar against receiving or recovery of compensation on damages under any other law:- An insured

person or his depends shall not be entitled to receive or recovery 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) of 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.

61. bar of benefits under other enactments:- 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 aforesaid provisions have been construed by different courts including this Court. Mr. Nambiar first relied upon the decision of the Karnataka High Court in K.S. Vasantha and Ors. Vs. Karnataka State Road Transport Corporation [(1982) 60 FJR 118] wherein it was held, while constructing Section 53 of the ESI Act, that where workmen travelling to work on a transport provided by the employer had suffered injury by an accident caused to the vehicle, it amounted to employment injury and Section 53 was a bar to any claim by the insured under any other law or the Workmen's Compensation Act, 1923. Their remedy, it was held, was only to claim compensation or damages from the Employees State Insurance Corporation. To the same effect is the judgement or the Madras High Court in the case of Mangalamma and Ors. Vs. Express Newspapers Ltd. and Anr. [AIR 1982 madras 223]. While constricting Section 53 the Madras High Court held that the object of Section 53 of the Act was to save the employer from facing more than one claim in relation to the same accident. In Annapurna and Ors. Vs. General Manager, Karnataka State Road Transport Corporation, Bangalore and Ors. [1984 lab. I.C. Journal 1355] a Division Bench of the Karnataka high Court followed its earlier judgement and reiterated that Section 53 created a bar to the recovery of Compensation under any other law in cases where the insured person had received an employment injury

Mr. Swarup, however, relied on the decision in the case of Hindustan Aeronautics Ltd. Vs. P. Venu Perumal and Anr. [Air 1972 Mysore 255]. It was held by the Mysore High Court that the right to sue under the Motor Vehicles Act originates from the substantive law, namely, the law of tort. This law was not an enactment and, consequently, the provisions of Section 61 of the ESI Act could not prohibit an employee from making a claim under section 110 of the Motor Vehicle Act claiming damages on account of injuries suffered in an accident. Through the observations in the said judgement do support the submission of Mr. Swarup but the High Court did not consider in that case the applicability and effect of Section 53, with which are concerned here.

The position with regard to the claim of an employees against his employer on his suffering an employment injury now stands settled with the decision of this Court in A. Trehan Vs. Associated Electrical Agencies and Anr.[(1996) 4 SCC 255]. In that case Trehan, who was an employee of the Respondent, received injuries on his face while he was carrying out repairs of a television in the course of his

employment as a result of which he lost vision in the left eye. After receiving the benefit from the Employees' State Insurance Corporation under the ESI Act he served a notice on the respondent demanding Rs. 7 lacs as compensation of Rs. 1,06,785/-. The employer objected to the maintainable of the same and relied upon Section 53 of the ESI Act. The Commissioner overruled the employer's objection and followed the judgement of the Full Bench of the Kerala High Court in the present case and observed that ESI being a welfare legislation, the Parliament could not have intended to create a bar against the workmen claiming more advantageous benefit under the Workmen's Compensation Act. The single judge of the High court dismissed the writ petition filed by the employer but the Division Bench, in appeal, held that in view of the bar created by Section 53, the application for compensation filed by Trehan was not maintainable. The Court analysed the provisions of Section 53 of the Act and observed at page 260 as follows:

> " In the background and context we have to consider the effect of the bar created by Section 53 of the ESI Act. Bar is against receiving or recovering any compensation or damages under the Workmen's Compensation Act or any other law for the time being in force or otherwise in respect of an employment injury. The bar is absolute as can seen from the use of the word's shall not be entitled to receive or recover, "wheather from the employer of the insured person or from other person", "any compensation or damages" and "under the Workmen's compensation Act, 1923 (8 of 1923) or, any other law for the time being in force or otherwise". The words "employed by the legislature" are clear and unequivocal. When such a bar is created in clear and express terms it would neither be permissible nor proper to inter a different intention by referring to the previous history of the legislation. That would amount to bypassing the bar and defeating the object of the provision. In view of the clear language of the section we find no justification in interpreting or constructing it as not taking away the right of the workman who is an insured person and an employee under the ESI Act to claim compensation under the Workmen's Compensation Act. We are of the opinion that the High Court was right in holding that the view of the bar created by Section 53 of the application for compensation filed by the appellant under the Workmen's Compensation Act was not maintainable."

The judgement under appeal in the present case of the Full bench of the Kerala High Court was considered and it

was observed that "we cannot agree with some of the assumption and observations made by the Kerala High Court. Moreover, the Kerala High Court has taken that view without referring to and considering the effect of the clear and express words used in that section."

In view of the aforesaid observations in Trehan's case, with which we respectfully agrees, it is clear that the respondent could not make a claim for damages. Section 53 disentitles an employee who wads suffered an employment injury from receiving compensation or damages under the Workmen's Compensation Act or any other law for the time being in force or otherwise. The use of the expression "or Otherwise" would clearly indicate that this section is not limited to ousting the relief claimed only under any status but the workings of the section are such that an insured person would not be entitled to make a claim in Torts which has the force of law under the ESI Act. Even though the Esi Act is a beneficial legislation the Legislature had throught it fit to prohibit an insured person from receiving or recovering compensation or damages under any other law, including Torts, in cases where the injury had been substained by him is an employment injury.

The ESI Act has been enacted to provide certain benefits to the case of sickness, maternity and employment injury and make provisions in respect thereof. Under this Act contribution is made not only by the employee but also by the employer . The claim by the employer against the employer where the relationship of the employer and employee exists were meant to be governed by the ESI Act alone. It is precisely for this reason that the Madras High Court in Mangalamma's case (supra) had observed that the object of Section 53 of the ESI Act was to save the employer from facing more than one claim in relation to the same accident. This, in our opinion, is the correct reading of the said provision. This being so the claim of the ESI Act, the trial court was right in dismissing the application under Order 33 Rule 1 of the Code Of Civil Procedure.

The provision in law being clear and concluded by the decision of this Court in Trehan's case (supra) we see no justification for the Court not exercising its jurisdiction counsel. The incorrect decision on a point of law of the High Court has to be corrected.

During the course of hearing it had been argued that Section 53 should not be constructed in such away that an insured person cannot rise a claim against a third party in the event of his suffering an employment injury. It was submitted that though qua the employer only one remedy may available, namely, under the ESI Act but as far as third persons are concerned Section 53 cannot taken up as a defence to an action in tort in a claim being made for damages because the ESI Act creates certain rights as a result of the employment qua the employer and has no application as far as third parties are concerned. In this 'employment injury' in Section 53 relates to a claim which is relatable to the employment of the insured person with his employer.

In our opinion, though there is considerable force in the said submission but it is not necessary for the decision of the present case the claim which was sought to be made was not against the third party but against the third party but against the employer itself. Perhaps this question may require considerable in an appropriate case.

For the aforesaid reasons this appeal is allowed. The judgement of the High Court is set aside that of the trial court dismissing the respondent's application under Order 33

Rule 1 of the Code of Civil Procedure is restored. There will be no order as to costs.