

(2003) 09 BOM CK 0033
In the Bombay High Court
Case No : A.S.F.A. No. 24 of 2003

Abdul Shakur Umar Sahigara and Co.	APPELLANT
Vs	
Regional Director, Employees State Insurance Corporation	RESPONDENT

Date of Decision : 12-09-2003

Acts Referred:

Employees State Insurance Act, 1948 — Section 45A, 75, 82

Citation : (2004) 101 FLR 1126 : (2004) 1 LLJ 921 : (2004) 2 MhLj 441

Hon'ble Judges : V.C. Daga, J

Bench : Single Bench

Advocate : S.M. Dharap, for the Appellant; H.V. Mehta, for the Respondent

Final Decision : Dismissed

Judgement

V.C. Daga, J.—This appeal is directed against the order (Exh. A/62) dated October 18, 2002 passed by the Employees' Insurance Court, Mumbai (E.I. Court for short), whereby an application filed by the applicant/appellant seeking to summon Shri J.R. Patankar, Assistant Regional Director, Employees' State Insurance Corporation as a Court witness came to be rejected on the ground that his evidence was not necessary for deciding the matter in controversy before the Court.

The Facts

2. The facts giving rise to the present appeal are as under:

The appellant (original applicant) is a registered partnership firm operating as commission agent and also engaged in the business of Beetle Nuts, Pepper, Cardamom and other spices. By letter dated July 28, 1980 the Regional Director of the Employees' Insurance Corporation informed the appellant that the appropriate Government extended the provisions of the Employees' State Insurance Act, 1948 ("the Act" for short) to other establishments u/s 1(5) of the Act with effect from November 12, 1978 vide Notification No. ESI/1677/390/PH-15 dated September 18, 1978 and that u/s 2A of the said Act such

establishments are required to be registered under the Act, and that Chapter-IV thereof casts an obligation and responsibility on the principal employer to ensure that he pays his own contribution with that of employees employed directly by him or through immediate employer.

3. By the aforesaid letter dated July 8, 1980, appellant was asked to take immediate steps for registration of their employees by submitting Declaration Forms, preparation of Contribution Cards and payment of contributions, and to comply with other requirements under the Act.

4. It appears that non-compliance of the aforesaid request, resulted in issuance of another notice-cum-letter No. B/INS-IX/31-17574 dated Nil stating therein; that the appellant failed to comply with the requirements of notice-cum-letter dated July 8, 1980 and also failed to furnish particulars of the contribution actually due from the employees and also did not produce ledger and other connected records for the inspection of the insurance inspector, who had visited their establishment on December 30, 1981. Finding no response, it appears that the Assistant Regional Director of the E.S.I. Corporation passed an order on June 2, 1983 u/s 45A of the Act and called upon the appellant to pay contribution in the sum of Rs. 18,522/-for the period November 12, 1978 to July 31, 1982, with interest thereon at the rate of 6% p. a. in default of each day from the date of the said order till payment in full. The appellant did not pay as per this demand.

5. The appellant by its letter dated July 9, 1983 replied to the notice of demand contending that the appellant was not liable to pay contribution as demanded by the respondent and that the establishment of the appellant did not fall within the purview of the Act since the appellant at no point of time had more than 2 employees on their pay roll. The appellant except recording above protest, did not pursue any other remedy available against the order dated June 2, 1983.

6. The appellant came to be served with notice dated September 20, 1984 issued by the Thasildar, of ESIC dues, Bombay and B.S.D. on September 24, 1984, by which he called upon the appellant to deposit the sum of Rs. 22,538.31 with notice fee within 20 days from date of service of the said notice, failing which further coercive action for recovery by attachment of property of the appellant and sale thereof in accordance with law was indicated.

7. The appellant, in order to challenge the order dated June 2, 1983 passed by the Assistant Regional Director u/s 45 of the Act, preferred an application u/s 75 of the Act before the E.I. Court, with a prayer to set aside the order dated June 2, 1983 passed by the Assistant Regional Director of the E.S.I. Corporation. The said application came to be registered as Application (ESIC) No. 128 of 1984.

8. On being noticed, the respondent-Corporation appeared and filed its reply and submitted list of witnesses, in which name of Shri J.R. Patankar, Assistant Regional Director was shown as one of the witnesses. The appellant examined its witness. The respondent also examined one Shri Ghadigaokar, Insurance Inspector as their witness, but did not examine Shri J.R. Patankar. Since the

respondent did not examine Shri Patankar, as their witness, an application (Exh. A/62) came to be moved by the appellant before the E.I. Court with a request to examine Shri Patankar as a Court witness. The said application was opposed by the respondent. The E.I. Court after hearing both the parties, vide its order dated October 18, 2002 rejected the said application for the reasons recorded therein.

9. Being aggrieved by the above order dated October 18, 2002, the present appeal is filed before this Court u/s 82 of the Act being First Appeal No. 24 of 2003. When this appeal came up for admission, this Court was pleased to send for record and proceedings to facilitate disposal to appeal at the stage of admission. Accordingly, after receipt of the record and proceedings, the appeal was set for hearing on admission and parties were heard.

The submissions

10. At the outset, the learned counsel for the respondents raised two preliminary objections to the maintainability of the appeal. Firstly, he contends that the appeal itself is not tenable against the impugned order for want of any formal expression of any decision adjudicating upon the rights of the parties. Secondly, he contends that it involves no substantial question of law which is sine qua non for admission of any appeal filed u/s 82 of the Act. As such, in his submission, this appeal is liable to be dismissed at the threshold.

11. Learned counsel for the appellant, in reply to the aforesaid submission, contends that the order passed by E.I. Court u/s 75 is an order by which it has disposed of the application for summoning witness, as such it is a final order so far as that particular application is concerned. In his submission, it may be an interlocutory order but it has finally rejected the prayer of the appellant. He, therefore, submits Section 82 does not bar appeal against such order. He submits that said Section merely mentions "an order", which includes final as well as an interim or interlocutory order. In such cases, the High Court, in an appeal filed u/s 82, has to hear any challenge thrown to any order passed by the E.I. Court provided it gives rise to a substantial question of law. In this submission, it is always open to the High Court to consider as to whether or not the order impugned in appeal causes any injustice to the party concerned and/or whether or not it is detrimental to the interest of such party. If it is detrimental, the same is open to challenge in appeal.

12. According to the learned counsel for the appellant, the impugned order passed by the E.I. Court suffers from non-application of mind as it failed to notice that the concerned officer while applying provisions of Section 45A of the Act did not consider the relevant record which was necessary before passing any adverse order. In order to demonstrate non-application of mind on the part of the concerned officer, namely, Shri Patankar, his examination as Court witness was necessary. In his submission, the E.I. Court ought to have taken into consideration the communication dated July 9, 1983; wherein the appellant has specifically denied the coverage of its establishment under the Act. Therefore,

the submission is, if the concerned witness is not brought before the Court as a Court witness, the matter would become *fait accompli* and that the appellant will be held liable to bear the liability in question in spite of the fact that the appellant is not within the mischief of the Act. The learned counsel for the appellant thus reiterated that the purpose of calling Shri Patankar as a Court witness is to find out as to what type of material was considered by him before passing the impugned order of coverage against the appellant.

The Issues:

13. After hearing parties following issues arise for consideration:

(1) Whether the order appealed against is open to challenge u/s 82 of the Act. In other words, whether order dated October 18, 1994 is an appealable order?

(2) Whether appeal raises any substantial question of law?

Statutory Scheme

14. Before proceeding to consider the aforesaid issues, it is necessary to have a look to the purpose of the Act. This Act came to be introduced to provide certain benefits in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto.

15. In order to determine the issues involved herein, basically, one has to turn to the provisions of Section 45A and Section 82 of the Act. The said Section 45A reads as under:

"Determination of contributions in certain cases:- (1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of Section 44 or any Inspector or other official of the Corporation referred to in Sub-section (2) of Section 45 is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties u/s 45, the Corporation may, on the basis of information available to it by order, determine the amount of contributions payable in respect of employees of that factory or establishment,"

16. Section 45A of the Act provides for determination of contribution in certain cases. This is one provision which requires the Corporation to pass order on the basis of information available to it and by an order Corporation is required to determine the amount of contribution payable in respect of the employees of that establishment.

17. Sections 45-B to 45-I provide for mode, manner and machinery to recover the amount of contribution determined u/s 45A of the Act. Chapter VI deals with adjudication of disputes and claims. Section 74 in Chapter VI provides for constitution of the Court. Section 76 provides for institution of proceeding before the Court whereas Section 77 lays down how the proceedings before the Court shall commence. Section 78 deals with powers of the E. I. Court and lays down

that the said Court shall have powers of a Civil Court for the purposes mentioned therein and also makes it clear that an order of the E.I. Court shall be enforceable as if it were a decree passed in a Suit by a Civil Court. Section 81 lays down that the Court may submit any question of law for decision of the High Court and if it does so, High Court shall decide the said question pending before it in accordance with such decision. Section 82 lays down that save as expressly provided in that section, no appeal shall lie from an order of the E.I. Court, whereas Sub-section (2) thereof provides an appeal to the High Court from an order of the E.I. Court, if it involves a substantial question of law. Section 83 provides that where the Corporation has presented an appeal against an order of the E.I. Court, that Court may and if so directed by the High Court, shall, pending the decision of the appeal, withhold the payment of any sum directed to be paid by the order appealed against,

18. The scheme of the Act further reveals that determination of contribution u/s 45A, in case of dispute, is open to challenge before the E.I. Court u/s 75 of the Act, whereas order of adjudication made by the E.I. Court u/s 75 is subject to appeal u/s 82 of the Act. In this backdrop of the provisions of the Act, what is open to challenge u/s 82 is the adjudication by which claims or disputes are decided by the E.I. Court by an order made in that behalf. Now, the question is what kind of adjudication by the E.I. Court u/s 75 is contemplated. In order to understand this question one has to turn to the provision of Section 78(1) which makes some of the provisions of the Code of Civil Procedure, 1908 ("C.P.C." for short) referred to therein applicable for conduct of the proceedings under the Act. As stated hereinabove, Section 78(4) of the Act provides that an order of the E.I. Court shall be enforceable as if it were a decree passed in a suit by a Civil Court. It means the order passed by the E.I. Court is not a decree but it has a force of a decree, therefore, it is enforceable as if it is a decree passed in a suit by a Civil Court.

19. The legislature while enacting the provisions of the Act in question seems to have made distinction between decree and order. In the legal parlance orders can be broadly classified in two categories, one being "an order having force of decree" and the other being "an order not having force of decree". In the course of trial, the trial Court is required to pass number of orders; whereby some of the various steps are required to be taken by the parties in prosecution of the suit may be of various routine nature while others may cause inconvenience to one of the parties or other e. g. an order refusing adjournment, an order refusing to condone delay in filing documents after the first date of hearing, an order of costs to one of the parties for default. Such orders are orders not having force of a decree.

20. The order having force of a decree can be defined as an order which possesses the essential characteristic of a decree but not a decree. Amongst other characteristics of a decree the two essentials are contemplated; first, that it adjudicates the rights of the parties and secondly, that such adjudication is

final and conclusive. A decree derives its force from the fact that it is the formal determination of a lis by the competent Court. Adjudicate ability on rights is a feature of a decree. The orders which have the force of a decree might, therefore, be said to be orders which are like decrees, which have the aforementioned twin characteristics of a decree.

21. The above distinction was drawn in Full Bench case of the Lahore High Court in *Official Liquidator, Universal Banks v. M.V. Qureshi*, AIR 1945 Lah. 146. In that case, it was laid down that there is a distinction, both real and practical, and not merely artificial between an order that has by statute the force of a decree and an order that may, by statute be enforced in the same manner as a decree. An order that is given by statute the force of a decree is an order that *proprio vigore* stands as a decree whatever may be the consequences, whereas an order that may by statute be enforced as a decree is an order that may be of little or no effect, *proprio vigore*, and only becomes effective, when executed by the method by which decree passed in a suit may be executed. In other words, it is a mere shadow unless and until life is infused into it by an application for execution.

22. With the understanding of the above distinction if one puts a question as to against which order an appeal lies u/s 82, the logical answer would be that it lies against such order which is enforceable as if it is a decree passed in a suit by a Civil Court. Therefore, an appeal u/s 82 of the Act shall lie against an order which has the characteristics of a decree. Such orders could be only those orders passed u/s 75 of the Act which have flavour of or trappings of determination or adjudication of the rights and obligations of the parties. In my view, only such orders can be said to be appealable u/s 82 of the Act and no other.

23. With the above understanding, if one examines the impugned order passed by the E.I. Court, it will be clear that the E.I. Court has merely refused to summon the witness as a Court witness. If one were to ask the question, "has the said impugned order adjudicated upon or determined any of the rights and/or obligations of any of the parties to the proceedings?", the answer has to be in negative. It can hardly be said to be an order determining the rights and/or obligations of any of the rival parties. Such order, in my opinion, is not open to challenge in an appeal filed u/s 82 of the Act. The appeal, therefore, is liable to be dismissed on this short count as not maintainable since impugned order does not have a status which can be equated with that of a decree passed in a suit by a Civil Court nor it has a force of a decree as understood in law. (see *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*,). It has neither adjudicated any of the rights of the parties nor it is enforceable as if it is a decree passed in a suit by a Civil Court. The order in question is not a final and conclusive, in the sense that the Court can always summon any witness at any time in the interest of justice. Appeal u/s 82 of the Act is thus tenable only against the order which has trappings or flavour of a decree as discussed hereinabove.

24. Alternatively, assuming that the appeal is maintainable against the impugned order of the E.I. Court refusing to summon a particular witness as a Court

witness, then the question which needs consideration is: whether the appeal at hand involves any substantial question of law. While considering this issue one has to refer to Section 82 of the Act which is *pari materia* with Section 100 of the C.P.C. The scope of appeal provided u/s 82 is very limited, which can be seen from the text of the Section reproduced hereinbelow.

"52. Appeal- (1) Save as expressly provided in this section, no appeal shall lie from an order of an Employees' Insurance Court.

(2) An appeal shall lie to the High Court from an order of an Employees Insurance Court if it involves a substantial question of law.

(3)

(4)"

25. The appellate Court, in an appeal filed u/s 82 of the Act, is expected to confine itself to a substantial question of law. The appellate Court is not expected to intrude into the questions of fact. The existence of a "substantial question of law", is the *sine qua non* for the exercise of appellate jurisdiction by the High Court. The High Court can exercise its jurisdiction u/s 82 only on the basis of substantial questions of law. In order to show existence of substantial question of law, it is necessary for the Court hearing the appeal to formulate that question at the time of admission of the appeal and the appeal has to be heard and decided only on the basis of such duly framed substantial questions of law. Section 82 of the Act providing for an appeal has a similar scheme as is engrafted in Section 100 of C.P.C., the parameters of which are laid down by the Apex Court in *Dnyanoba Bhaurao Shemade Vs. Maroti Bhaurao Marnor*, . Same parameters will have to be followed while considering the appeal filed u/s 82 of the Act.

26. Applying the above parameters, let me turn to the impugned order and text thereof. If one reads the impugned order, then, it is clear that the impugned order has only refused to summon Shri Patankar as a Court witness. The order refusing to summon an additional witness is an order based on exercise of discretion in respect of procedural matter. The impugned order is, a speaking order, passed after hearing both parties, that too after taking into account all the facts and circumstances of the case. The view taken is a reasonable and possible view sustainable on the material available. Exercise of discretion by the Court below cannot be said to be perverse. The appellant could neither highlight any substantial question of law nor could frame any substantial question of law in the memo of appeal. Apart from this, one fails to understand why the judicial or quasi-judicial authority is required to be examined as a witness who was essentially the witness of the opposite party. The record being the foundation of the order, the action based on such record can very well be challenged or sustained on the basis of the record. The appellant can produce their record and prove their own case. The appellant has to stand on its own legs. If respondent wants to disprove the case made out by the appellant, it is for them to produce and prove their case based on record. The examination of cross-examination of

the officer, who has passed the order, is not necessary to prove the illegality of the order. In this view of the matter, I do not see any substantial question of law involved in this appeal.

27. In the result, appeal is dismissed in limine with no order as to costs.