

(2008) 06 MAD CK 0022
In the Madras High Court
Case No : C.M.A. No. 846 of 2001

Allied Industries

APPELLANT

Vs

Employees' State Insurance Corporation and Another

RESPONDENT

Date of Decision : 20-06-2008

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 7A
Employees State Insurance Act, 1948 — Section 45A

Citation : (2008) 119 FLR 570 : (2009) 1 LLJ 805

Hon'ble Judges : P.R. Shivakumar, J

Bench : Single Bench

Advocate : R. Yasod Vardhan, for S. Venkataraman, for the Appellant; S. Jayakumar and P. Shanthi Rakkappan, G.A., for the Respondent

Final Decision : Allowed

Judgement

P.R. Shivakumar, J.—This Civil Miscellaneous Appeal is directed against the order dated August 29, 2000 passed by the E.S.I. Court

(First Additional Judge, City Civil Court, Madras) in E.S.I.O.P. No. 41/1990. The competent authority under the Employees State Insurance Act

passed the impugned order dated February 23, 1989 fixing the contribution to be paid by the appellant at Rs. 1,11,311.22P for the period from

April 1985 to March 1987. The said determination of the contribution was challenged before the E.S.I. Court by the appellant herein on the

ground that there were immediate employers, namely contractors and the amount paid to the contractors were taken by the authority under the

Employees State Insurance Act to be the wages paid to the employees. It was also the contention of the appellant herein before the E.S.I. Court

that the workmen employed by the immediate employers (contractors) were earning more than Rs. 1,600/- per month and hence they were not

covered by the scheme of insurance under the Employees State Insurance Act and that this aspect was not properly taken into account and

considered by the authority concerned. However, the E.S.I. Court dismissed the above original petition holding that the records furnished by the

appellant herein were not* genuine and were prepared for the purpose of the case. The said order of the E.S.I. Court dismissing the E.S.I.O.P.

No. 41/1990 is challenged in this Civil Miscellaneous Appeal.

2. This Court heard the submissions made by the learned senior counsel appearing for the appellant and the learned Counsel appearing on behalf

of the respondents. The materials available on record were also perused.

3. It is the contention of the learned senior counsel for the appellant that the order of the competent authority under the Employees State Insurance

Act as well as the order of the E.S.I. Court are vitiated because of the non-impleadment of the contractors who are alleged to be the immediate

employers of the workers. It is the further contention of the learned senior counsel appearing for the appellant that at least the contractors should

have been summoned to verify the fact whether they are the immediate employers or not and to fix the liability of the immediate employers to

reimburse any contribution to be paid by the principal employer. The learned senior counsel for the appellant also contended that the orders of the

authority under the Employees State Insurance Act as well as the E.S.I. Court are against the observations made by the Hon"ble Supreme Court in

Food Corporation of India Vs. Provident Fund Commissioner and Others, and in Bharat Heavy Electricals Ltd. Vs. ESI Corporation, . According

to the contention raised by the appellant, when it is pleaded that there is an immediate employer, the determination of the contribution to be made

by the principal employer should have been made either after impleading immediate employer or after summoning the alleged immediate employer.

In view of the said contention, the short question that arises for consideration in this appeal is:

whether the order of the first respondent dated February 23, 1989 is liable to be set aside on the ground that the alleged contractors have not been

imp ledged or summoned before determining the contribution to be paid by the appellant herein?.

4. In Food Corporation of India v. Provident Fund Commissioner and Ors. (supra)

wherein a similar question arose, of-course while dealing with the liability of the principal employer to pay contribution under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, the Hon'ble Apex Court made the following observations at p. 1137 of 1994 III LLJ (Supp) 1136:

6. We have carefully perused the Commissioner's order and also the order of the High Court. The total amount ordered to be payable comes to about Rs. 22,48,000/- in respect of the employees of depots namely: Udaipur, Jaipur, Ajmer, Badmer and Sawai Madhopur. The Commissioner has also directed the Divisional Officer, Jaipur to deposit the provident fund contribution i.e. Rs. 18,72,194/- to the Fund being maintained by the trustees of the establishment. It is indeed a large amount for the determination of which the Commissioner has only depended upon the lists furnished by the Workers' Union. It is no doubt true that the employer and contractors are both liable to maintain registers in respect of the workers employed. But the Corporation seems to have some problems in collating the lists of all workers engaged in depots scattered at different places. It has requested the Commissioner to summon the contractors to produce the respective list of workers engaged by them. The Commissioner did not summon the contractors nor the lists maintained by them. He has stated that the Corporation has failed to produce the evidence.

7. The question, in our opinion, is not whether one has failed to produce evidence. The question is whether the Commissioner who is the statutory authority has exercised powers vested in him to collect the relevant evidence before determining the amount payable under the said Act.

5. After quoting the relevant Section, namely Section 7-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, the Hon'ble Supreme Court has also made the following observation:

9. It will be seen from the above provisions that the Commissioner is authorised to enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen.

The Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. That is the legal duty of the Commissioner. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person.

6. Again in *Bharat Heavy Electricals Ltd. v. Employees' State Insurance Corporation* (supra) cited above, the Hon''ble Supreme Court has held

that the principle applicable to the determination of contribution to the provident fund under the Employees' Provident Funds and Miscellaneous

Provisions Act, 1952 applies to the determination of contribution under the Employees' State Insurance Act also and that if it is pleaded that there

is an immediate employer (contractor) under whom the workmen are employed directly, the authority should either implead the said contractor or

at least summon him to be examined regarding the said aspects. The relevant portion in the judgment is extracted here under for better

appreciation. It reads:

20. We, with respect to the learned Judges, fail to notice any significant difference in the purport and object of both the provisions. The purport

and object of both the statutes, for all intent and purport, in our opinion, is the same. In the proceedings initiated u/s 45-A of the Act, an immediate

employer or principal employer may also show that they are not liable to deposit any contribution on behalf of the employees as the establishment

in question did not come within the purview thereof. The purpose of the proceedings, both under the Act as also the Employees' Provident Funds

Act, is to determine the amount due from any employer in respect of the employees under the statutory schemes. Both the Acts envisage

compliance with principles of natural justice. The proviso appended to Section 45-A of the Act provides for a statutory mandate of giving a

reasonable opportunity of being heard.

21. The quantum of amount due has to be determined in respect of all contract workers engaged by the contractors. The principal employer would

be entitled to recover the contributions from the contractor, they being the immediate employers. Whereas under the Provident Funds Act, the

principal employer is statutorily liable in terms of the provisions of the Act to comply with the provisions therein; in terms of the Act, the principal

employer is entitled to recover the amount of contribution payable by the immediate employer for them.

22. Section 45-A of the Act enables the appropriate authority to recover such dues both from the principal as also the immediate employer. It

provides for an opportunity of hearing to both of them.

7. The Hon"ble Supreme Court proceeded further and passed the following order:

It appears that the determining authority did not give an opportunity of hearing to the petitioner in regard to the names and other particulars of the

contractors. The impugned judgment, therefore, cannot be sustained. It is set aside accordingly. The appeal is allowed and the matter is remitted to

ESI Corporation/determination authority for considering the matter afresh. The authority shall either implead the contractors as parties and/or

summon them for producing necessary records for the said purpose.

8. Following the said judgments of the Apex Court and applying the principle enunciated therein, this Court comes to the conclusion that the order

of the authority has got to be interfered with and set aside and the matter has to be remitted back to the said authority to re-determine the

contribution payable by the appellant, if any, after either impleading the alleged contractors or summoning them and examining them.

9. For all the reasons stated above, this appeal is allowed and the order of the learned First Additional Judge, City Civil Court, Madras dated

August 29, 2000 passed in E.S.I.O.P. No. 41/1990 is set aside. E.S.I.O.P. No. 41/1990 shall stand partly allowed setting aside the impugned

order of the Assistant Regional Director, Employees" State Insurance Corporation, Chennai dated February 23,1989. The matter is remitted back

to the Regional Director, Employees" State Insurance Corporation, Chennai, with a direction to conduct a de novo enquiry and decide the liability

of the appellant to pay contribution after impleading the alleged contractors or summoning and examining them. There shall be no order as to cost.