(1998) 11 MAD CK 0135

In the Madras High Court

Case No : Writ Petition No. 14481 of 1990

Ashok Leyland Limited APPELLANT

Vs

Employees' State Insurance Corporation RESPONDENT

Date of Decision : 02-11-1998

Acts Referred:
Employees State Insurance Act, 1948 — Section 2(13), 2(17), 39(1), 40(1), 41(1)

Citation : (2000) 2 LLJ 593

Hon'ble Judges : P. Sathasivam, J

Bench : Single Bench

Advocate : Sanjay Mohan, for Ramasubramaniam Associates, for the Appellant; Radha Srinivasan, for the Respondent

Final Decision : Allowed

Judgement

P. Sathasivam, J.—Aggrieved by the notice of the respondent dated August 16, 1990, the petitioner has filed the above writ petition.

The case of the petitioner is briefly stated hereunder: The petitioner is a company registered under the Companies Act, 1956, and having a factory at Ennore, wherein it is engaged in the manufacture of medium duty commercial vehicles. It is covered by the Employees'' State Insurance Act, 1948, (hereinafter referred to as "the Act"). The company has engaged various third parties and contractors for the purpose of carrying out various activities including repairs to buildings, plant and machinery and for the purpose of doing various repairs. Various activities including supply of materials, is entrusted to third parties who at times carry out work inside the factory premises of the company. The management has no method of knowing whether these contractors or third parties at all employ persons and if so, the number of persons who are in employment with such contractors or third parties. The bills of these third parties are paid in lumpsum upon presentation and they are not expected to give details of the labour element in the bills. The respondent issued a letter dated January 23, 1990, to the management in pursuance of the powers given to the respondent under the Act for summoning of records, etc. In this letter, in paragraph 3, the respondent sought for inspection of various documents in regard to "employees employed by the contractors". On the same day, the respondent also sent another letter wherein they wanted to have details in regard to entries in the general ledger, for the period 1980 to 1987 and they requested that the management should give details of segregated figures relating to costs of materials on the one hand, and labour charges of third parties, on the other.

2. It is further stated that since the said proceedings were apparently tinder Section 45-A of the Act, it was pointed out that in so far as contract labour was concerned, all necessary records such as attendance registers, wages registers, cash books, general ledgers, Income Tax statement, etc., could be available only with the said third parties and contractors. The petitioner-management by its letter dated February 20, 1990, enclosed the list of contracts and requested the respondents to summon those details from the said third parties, because the petitioner has no such powers nor was the management entitled at all to even look at these ledgers. Since most of the contractors were big companies, they had already been covered under the Act and this was also brought to the notice of the authorities. The authorities thereafter, took no steps either by writing to the management or issue notice to the contractors concerned. All of a sudden the petitioner has received the impugned order dated August 16, 1990, received on August 26, 1990, pointing out, inter alia, that the question of issuance of notice or summons by the respondent to the contractors, does not arise. The said direction is contrary to the decisions of this Court as well as the Apex Court. Accordingly, the respondent has failed to carry out the powers vested in them under the Act. In such circumstances, having no other effective remedy, the petitioner has approached this Court by way of the present writ petition.

3. The respondent filed a counter-affidavit disputing various averments made by the petitioner. It is stated that a communication dated January 23, 1990, was sent to the petitioner calling upon them to furnish certain particulars and the petitioner is obliged to furnish the information sought for by the respondent. As an employer, the petitioner is bound under the provisions of the Act to pay the contributions in respect of every employee, whether employed by him or through an immediate employer. All employees either working directly or through contractors are entitled to the benefits conferred under the Employees'' State Insurance Act. u/s 40 of the Act, the employer is obliged to pay both the employee''s share and the employer''s share of the contribution. However, the employer is entitled to recover the employees'' share of the Employees'' State insurance contribution from the employee. It is also stated that the petitioner, as employer, is obliged to maintain certain registers in relation to their employees and furnish returns to the Employees'' State Insurance Corporation. The impugned notice is not an order and much less an order u/s 45-A. The provisions of Section 45-A should be invoked only when the petitioner fails and neglects to produce the relevant records. The writ petition itself is not maintainable and the

petitioner has not made out any cause of action.

In the light of the above pleadings, I have heard learned counsel for the petitioner as well as respondent.

4. After taking me through the relevant provisions of the Employees'' State Insurance Act as well as the Tamil Nadu Contract Labour Act and the Rules made thereunder, Mr. Sanjay Mohan, learned counsel for the petitioner, contended that inasmuch as the petitioner company has engaged various third parties and contractors for the purpose of carrying out various activities, the respondent ought to have issued notice to those third parties and contractors to ascertain particulars, as claimed. He also submitted that in the light of various statutory provisions in the Act, a duty is cast on the respondent to issue notice to the contractors and third parties for production of the particulars called for. On the other hand, Ms. Radha Srinivasan, learned counsel appearing for the respondent contended that as per the statutory provisions under the Act, the petitioner being a principal employer, they are primarily responsible for compliance of the said provisions. She also submitted that in so far as the contribution is concerned, it is for the petitioner to furnish the details, particulars regarding the employees, engaged by them as well as the third parties and contractors.

5. I have carefully considered the rival submissions. There is no dispute that the petitioner-company is covered by the provisions of the Employees'' State Insurance Act, 1948. It is the case of the petitioner that they engaged various third parties and contractors for the purpose of carrying out various activities including repairs to buildings, plant and machinery as well as various repairs. Various activities also include supply of materials, which is entrusted to third parties, who at times carry out the work inside the factory premises of the company. It is also their case that in many cases, the work of the company was entrusted to third parties who carry out the work outside the premises of the company and without any supervision by the petitioner''s employees. Initially, the respondent issued a letter dated January 23, 1990, to the petitioner-management by virtue of the powers conferred under the Act for summoning of records, etc. In the light of the said position, it is also stated that the petitioner-company is willing to furnish the documents, registers, ledgers, etc., relating to the employees working under them and it is not possible to get the particulars from the other contractors and third parties doing work for them. In such circumstances only, the respondent issued the impugned notice.

6. Now, I shall consider the various statutory provisions dealing with the above aspects. Section 2(13) of the Act defines "immediate employer" as follows:

"2. (13) ''immediate employer'' in relation to employee, employed by or through him, means a person who has undertaken the execution, on the premises of a factory or an establishment to which this Act applies or under the supervision of the principal employer or his agent, of the whole or any part of any work, which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer and includes a contractor."

7. The expression "principal employer" is defined in Section 2(17) as follows:

"2. (17) ''principal employer'' means -

(i) in a factory, the owner or occupier of the factory and including the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under the Factories Act, 1948 (63 of 1948), the person so named;

(ii) in any establishment under the control of any department of any Government in India, the authority appointed by such . Government in this behalf or where no authority is so appointed, the head of the department;

(iii) in any other establishment, any person responsible for the supervision and control of the establishment; ....."

8. Chapter IV deals with contributions. As per Section 39(1) in that chapter, the contribution payable under this Act in respect of an employee shall comprise, contribution payable by the employer and contribution payable by the employee and shall be paid to the Corporation. Section 40(1) stipulates that principal employer shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer''s contribution and the employee''s contribution. Section 41 deals with recovery of contributions from immediate employer. Section 41(1-A) enables the immediate employer to maintain a register of employees employed by or through him and submit the same to the principal employer before the settlement of any amount payable under Sub-section (1). As per Section 44, every principal and immediate employer, have to furnish returns and maintain registers. Section 45 speaks about appointment of inspectors, their functions and duties for the enforcement of the provisions of the Act. Section 45-A deals with determination of contributions in certain cases.

9. Apart from the above provisions, learned counsel for the petitioner has also brought to my notice some of the relevant rules in the Tamil Nadu Contract Labour Rules, 1975. By pointing out Rules 74, 75 and 78, it is contended that the contractors have to maintain separate registers.

10. It is seen from the records that in pursuance of the notice issued by the respondent on January 23, 1990, for production of records in respect of the employees employed by the contractors from 1980 to 1987 for verification, the petitioner by their letter dated February 20, 1990, has informed that muster rolls, wage registeres, cash book, vouchers and general ledger for the period up to September, 1985, have been perused by the concerned inspectors. They also

undertook to produce these records before the said authority at the relevant time. Regarding the records relating to casual workers, it is stated by the petitioner, that since all those works were being attended by contractors, they furnished a list of all contractors of their factory from 1980 onwards and requested the authority to issue notice/summons to them for production of such records as are available in their custody, such as, attendance register, wage registers, cash-books, general ledgers, Income Tax statement, etc. They also informed that insofar as the statutory forms that are available with them in terms of contractors covered by the Contract Labour (Regulation and Abolition) Act, 1970, will be produced for inspection at the appointed time, on receipt of notice from the authority. The list of contractors and the sub-contractors furnished to the respondent have been included in the typed set of papers, from pages 8 to 55. By placing the above particulars and in the light of the statutory provisions referred to above, Mr. Sanjay Mohan has contended that except the statutory forms, documents that are available with them in terms of the contractors covered by the Contract Labour Act and some of the provisions of the Employees'' State Insurance Act, it is not possible for the petitioner to place the documents claimed by the respondent, such as attendance registers, wage registers, cash-books, general ledgers, Income Tax statement, etc., for the perusal of the respondent. Even though the principal employer alone is primarily responsible for all contributions, in view of some of the provisions of the Act, namely, Sections 41(1), 41(1-A) and 44 of the Act, where certain obligations have been entrusted not only with the principal employer, but also with the immediate employer. As per Section 2(13), immediate employer includes a contractor. A conjoint reading of all the above mentioned provisions would clearly show that it is the principal employer who is primarily responsible for all contributions payable to the respondent. However, immediate employer and the contractors are also equally duty bound to furnish the particulars regarding their employees'' wages and also place all the relevant records, ledgers relating to them, for perusal of the respondent. In such circumstances, after reiterating that they are willing to place all the relevant records available with them before the respondent authority at the appropriate time, the petitioner rightly furnished the particulars of contractors and sub-contractors employed by them. In such circumstances, in order to implement the provisions of the Act effectively and in the light of statutory obligations of the "immediate employer" and "contractors", it is but proper, notice has to be issued to those persons either for production of records or for clarification. In this regard, Mr. Sanjay Mohan has relied on a decision of Madras Gymkhana Club v. E.S.I. Corporation, 1992 I LLJ 580 (Mad). The learned judge, in a similar circumstance, after referring to the decision of the Apex Court in Food Corporation of India Vs. Provident Fund Commissioner and Others, , has observed thus:

"In view of the decision of the Supreme Court, the respondent ought to have impleaded the contractors as parties as requested by the petitioner in order to adjudicate the matter in controversy. Learned counsel for the respondent, further contended that the impugned order is sustainable, but, in view of the decision of the Supreme Court, this Court finds that there is justification on the part of the petitioner seeking to implead the contractors as necessary parties for adjudication of the matter in controversy. Consequently, the impugned order is set aside and the respondent-Corporation is directed to implead the contractors as necessary parties for adjudication of the matter in controversy and to proceed further. The writ petition is allowed. No costs."

11. In Food Corporation of India v. Provident Fund Commissioner, (supra), after referring to Section 7-A of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952, which is similar to Section 45-A of the Employees'' State Insurance Act, their Lordships have concluded thus:

"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 power to collect all evidence and collate all materials 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.

We, therefore, allow the appeal and reverse the order of the Commissioner and that of the High Court. The matter stands remitted to the Commissioner to dispose it of fresh and in accordance with law and in the light of the observation made."

12. No doubt, in spite of all the statutory provisions as well as the law laid down by the Apex Court and the decision of the learned single judge of this Court, I am of the view that it is not open to the petitioner, principal employer to simply avoid the mandatory obligations provided under the Act by furnishing the particulars of contractors and sub-contractors. I make it clear that all the statutory forms, documents, ledgers to be placed before the respondent-authority have to be furnished by the petitioner and also to get necessary particulars as per the terms of contract entered into with the contractors and sub- contractors, and pass on the same to the authority.

13. In the light of what is stated above, more particularly, in the light of the provisions as well as the decisions referred to above, I hereby set aside the order of the respondent dated August 16, 1990. The matter stands remitted to the Regional Director, Employees'' State Insurance Corporation, Regional Office, Tamil Nadu - respondent herein, to dispose it off afresh and in accordance with law and in the light of the observation made. The respondent is also directed to implead the contractors/sub-contractors if it (respondent) feels that they are necessary and proper parties on the basis of the information furnished by the

petitioner, for adjudication of the matter in controversy and to proceed further. The writ petition is allowed in the above terms, however, there shall be no order as to costs.

