

(2010) 03 DEL CK 0265

In the Delhi High Court

Case No : C.M. (Main) No. 702 of 2007 and C.M. Application No. 6983 of 2007

C.D. Securities Services Network Ltd.

APPELLANT

Vs

Employees Stated Insurance Corporation

RESPONDENT

Date of Decision : 25-03-2010

Acts Referred:

Constitution of India, 1950 — Article 227

Employees State Insurance Act, 1948 — Section 44, 45A, 45C, 45D, 45E

Citation : (2010) 3 LLJ 818

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : Anil Sehgal, for the Appellant; M.P. Raju and Maria Rajamani, for the Respondent

Judgement

Shiv Narayan Dhingra, J.—By this petition, the petitioner has assailed an order passed by learned ESI Judge whereby he directed the petitioner to deposit 50 per cent of the demanded amount with the Corporation in terms of Section 75(2)B of ESI Act.

2. The brief facts relevant for the purpose of deciding this petition are that an order u/s 45-A of ESI Act was passed by Deputy Director of ESI Corporation against the petitioner raising a demand of Rs. 2,44,24,609/- holding that the petitioner failed to produce the records and, therefore, ESI has power to make assessment u/s 45A of the Act. The reasons given by Deputy Director for arriving at this conclusion are as under:

- a) Inspection of the unit was conducted from 11/92 to 12/93 on 08/02/94. No ledgers were produced on the plea that the same are lying with the Chartered Accountant.
- b) Inspection of the unit was conducted from 01/94 to 07/95 on 26/09/95. No ledgers were produced on the plea that the same are lying with the Chartered Accountant.

- c) Letter dated 14/11/1995 and 08/12/1995 was issued to the employer for production of ledgers.
- d) Inspectors visited on 22/02/2001 but no records were produced and Notice was issued for 07/03/2001.
- e) On 07/03/2001 no records were produced and again Notice was issued for 28/03/2001.
- f) On 28/03/2001 inspection was conducted for 08/95 to 2/01. However, Account Books were not produced on the plea that the Account Books are lying with the Chartered Accountant and some records are with the Income Tax Department.
- g) The Inspector again visited on 29/09/2003 but no records were produced and Notice was issued for 15/10/2003. However, the employer in his remarks requested for date in November, 2003.
- h) The Inspector again visited on 11/11/2003 but no records were produced on the plea that the same are with the Auditors and the employer requested for fixing for 25/11/2003 as date for inspection.
- i) No records were produced on 25/11/2003 on the plea that some of the records are with the Income Tax Department and the Account Books for the year 2002-2003 are under finalization.
- j) The Inspectors again visited on 26/06/2006 but no records were produced.
- k) On 07/08/2006 the Inspectors again visited and conducted inspection for 04/01 to 06/06. However, the Account Books were again not produced on the plea that the same have been lost.

3. Learned Counsel for the petitioner submitted that the order passed by ESI was in gross violation of the spirit of the Act. The petitioner had been following the provisions of ESI Act regularly and have been submitting the reports under the Act right from the beginning and has been allowing inspection of all records in relation to the employees, their salaries, deductions made, etc. The law does not require the petitioner that he should make available to the inspectors all the time his account books, day books, ledgers where the accounts regarding functioning of the company are maintained. There were no allegations made at any point of time by ESI that he had not shown the records and books concerning employees, their ESI contribution or salary, etc. The order passed by ESI does not mention this. He also drew my attention to the show cause notice served by ESI on petitioner and the relevant part of the notice dated 27th November, 2006 reads as under:

1. Information has been laid before the RD/JD/DD/ASSTT. DIRECTOR of ESI Corporation and on consideration whereof he has reason to believe:
2. (i) That you have so far not paid the contributions as per provisions of Law and have also not submitted return of contribution:

(i) From To (ii) From To

(ii) That you have failed to furnish any particulars of the contributions actually due in respect of your employees for the above said periods as worked out on the basis of your records.

(iii) That you have failed to produce the relevant records of contribution payable before the Insurance Inspector who visited your factory/establishment on.

(iv) You have also not paid arrears of contribution for the period from to 03/05 in respect of as pointed out by this office dated not you have submitted Returns of contribution for the period from to.

3. Please note that u/s 45A of the Act, where in respect of a factory/ establishment no return, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of Section 44, the Corporation may on the basis or information available to it by an order determine the amount of contributions payable in respect of employees of such factory/ establishment and the same can be caused to be recovered u/s 45-C to 45-I the said Act.

And whereas it is proposed to determine and recover the amount of contribution payable in respect of the employees of your factory/establishment u/s 45-A of the Act as under:

Calculation

Period

-----						S.
Nature of Amount of Basis for No. Dues Contribution Calculation Payable No. of						
Employees	X	Notional	Wages	X	No. of Months	X Rate of Contribution
-----						1)
ADHOC	CONT.	24.11.92	30.11.92	19,311.60/-	912X1650X7/30X5.5%	
-----						2)
ADHOC	CONT.	01.12.92	31.12.96	40,55,436/-	912X1650X49X5.5%	
-----						3)
ADHOC	CONT.	01.01.97	31.03.04	1,84,37,562/-	912X3575X87X6.5%	
-----						4)
ADHOC	CONT.	01.04.04	30.06.06	66,02,310/-	912X4125X27X6.5%	
-----						5)
Total					2,91,14,619.60	
-----						6)
Less	Already			Paid		46,90,011/-
-----						7)
Net			Payable		2,44,24,608.60	

And whereas it is proposed to afford M/s. C.D. Security Services Network Ltd., an

opportunity to show against the said determination and recovery.

Please Show-Cause within 15 days here of as to why assessment should not be made as proposed above. In case you have any objection, you are hereby given an opportunity to explain the same and/or file a statement giving full particulars of the contributions actually due as per your records for the above said period within the time specified above. In case you desire to represent your case personally you may appear before the undersigned in person or through an authorized representative on 21/12/06 at 11:00 A.M./P.M. with necessary documents to explain your case.

4. It is submitted by counsel for the petitioner that the show cause notice did not state that any books relevant to the employees were not produced before the respondent and the respondent arbitrarily arrived at a conclusion that there were 912 employees of the petitioner and calculated ESI contribution amount on the basis of these 912 employees whereas the petitioner had been filing return of the wages and the number of employees. The petitioner's employees had been varying from 209 to 763 according to the quantum of work/contracts with the petitioner. Since the petitioner was in the business of providing security services, number of its employees varied according to demand. The petitioner did not have any regular manufacturing business or any regular establishment where a fixed number of employees were required by him. The petitioner placed on record the data of employees from November, 1992 onwards till March, 2006 and this data shows the period for which returns were filed with ESI; showing number of employees, their wages, etc. The petitioner also placed on record documents showing that inspection of records of the petitioner's employees was carried from August, 1995 to February, 2001. In March, 2001 all books relating to employees were produced, however, account books of the company were not produced before the inspector for which an observation slip was issued by ESI Inspector on 28th March, 2001.

5. During arguments, this Court asked counsel for the respondent as to what was the basis for concluding that the petitioner had 912 employees all along from 1992 till 2006. How this magic figure was arrived at and this Court also wanted to know if the petitioner had not produced relevant records for the years 1992-1993 onwards, as noted in the order dated 28th February, 2007, what action was taken by ESI Director against Inspector for taking no action against petitioner at the relevant time and what was the reason for taking no action at the relevant time. A query was also put as to why the ledgers of the company were needed by the ESI Inspectors as they were not concerned with the account books of the company. They were concerned with the record relating to employment of the employees, their salaries, ESI deductions being made by the petitioner, whether the deductions were being deposited or not. Counsel for the respondent submitted that it may be that the number of employees as filed in the return was to be counter checked from the ledger, however, it is not understood how the number of employees could be counter checked from the

ledger which is a general accounting book of the company wherein incoming revenue and outgoing expenditure is shown. The respondent was also not able to explain why notice was silent in respect of what was to be answered by the petitioner.

6. An issue has been raised by the respondent that this Court has no jurisdiction to entertain a petition under Article 227 of Constitution of India in respect of an order passed by ESI Court since ESI Court was within its jurisdiction in dismissing the application of the petitioner for waiving the deposit of 50 per cent. He submitted that an ESI court had an obligation to ask the petitioner to deposit 50 per cent of the amount u/s 75(2)B. It was a mandatory requirement. It is only where the ESI court is satisfied that there was sufficient reason that this mandatory requirement need not be complied with that the ESI court can waive of this requirement. He submitted that this discretion was with ESI court and under Article 227, the High Court cannot substitute its own discretion with the discretion of the ESI court. He also submitted that this Court is not a court of appeal and under Article 227, the court cannot scrutinize the order of ESI court on merits and act as a court of appeal.

7. On the issue of jurisdiction, it is submitted by counsel for the petitioner that the law does not let a man go without remedy. The ESI Act does not permit an appeal against such an order and appeal lies against the final orders of ESI Court before High Court only on a substantial question of law (Section 82). Since no appeal lies and there were no provisions for revision in the ESI Act, the only remedy available against an order where the ESI Court fails to exercise its jurisdiction was by way of a petition under Article 227. He submitted that it was a case where the ESI court failed to exercise its jurisdiction of considering the material before it before arriving at a conclusion that whether it was a fit case for waiver of deposit or not.

8. While deciding an application u/s 75(2B) made by the petitioner against an order of ESI Court for deposit of amount, ESI court must take into consideration the entirety of facts and circumstances. It must pose questions which arise naturally from the record. It is not even the case of ESI that reports were not being filed and number of employees was not being reflected by the petitioner or the subscription in respect of those employees based on their wages was not being deposited. Thus, the natural question which the court would ask was how come that suddenly after 14 years, ESI Court had come to a conclusion that there were 912 employees employed with the petitioner and how come the ledger of the company was necessary to be shown to ESI Inspectors. It is not the case of respondent that at any point of time when petitioner took plea that the ledger were with Chartered Accountant, the petitioner was asked to appear in ESI office along with ledgers on a particular day and petitioner failed to appear in ESI office with ledgers, etc. If ESI Inspectors wanted to inspect the ledger and had considered that cross checking was necessary with the ledger, they would have directed petitioner to produce ledger on some appointed day in the office.

The notice served on the petitioner dated 27th November, 2006 talks of the ledger having not been produced before ESI Inspector despite a demand raised. The ESI court even did not devolve upon the issue whether ledger was at all relevant and was there any requirement on the part of petitioner to keep ledgers and other account books always ready in his office, open for inspection of the ESI Inspectors. It is not an unknown fact that ledger and other account books are maintained by accountants and these account books are regularly required at the time of filing annual Income Tax returns and other returns and it was not something strange that the books were not available in the office premises and they were with the Chartered Accountant.

9. The ESI court below does not seem to have addressed itself any of the questions raised by the petitioner regarding necessity of documents by the respondent and regarding demand made by the respondent suddenly after 14 years and about the imaginative figure of 912 employees. It is well settled that every discretion vested in a court has to be exercised judiciously after considering the facts of that case. Where a judge fails to exercise his discretion judiciously, and does not consider the facts which were obvious on the record, he fails to exercise his jurisdiction. Under Article 227, the court can interfere if the order passed by the sub-ordinate court or tribunal would result into gross injustice.

10. I, therefore, hereby set aside the order of the ESI Court. The matter is remanded back to ESI Court to consider the application of the petitioner afresh in the light of the facts revealed from the record and then pass an order about quantum of deposit.