

(2010) 10 MAD CK 0108
In the Madras High Court
Case No : C.M.A. No. 1384 of 2007

Dandy Garments Erode

APPELLANT

Vs

The Employees State Insurance Corpn.

RESPONDENT

Date of Decision : 22-10-2010

Acts Referred:

Employees State Insurance Act, 1948 — Section 40, 84, 85

Citation : (2010) 10 MAD CK 0108

Hon'ble Judges : C.S. Karnan, J

Bench : Single Bench

Advocate : No appearance, for the Appellant; A. Paramasivan, for the Respondent

Final Decision : Dismissed

Judgement

C.S. Karnan, J.—The above Civil Miscellaneous Appeal has been filed by the appellant/petitioner against the Order and Decreetal Order

dated 12.09.2005, made in E.S.I.O.P. No. 2 of 2002, on the file of the Principal District Court, Erode.

2. Aggrieved by the said Award and Decree, the appellant/petitioner has filed the above appeal praying to set aside the order and decreetal order

passed by the learned Principal District Judge, Erode.

3. The short facts of the case are as follows:

The petitioner concern, which was a proprietorship concern, was manufacturing garments. Since it sustained loss, it had to be wound up. The

petitioner firm was covered under ESI Act in Code No. 5644277 and it was maintaining true and correct account with regard to its employees.

The Inspector of the first respondent inspected the firm on 22.12.1999 and 23.12.1999 in a hurried manner and ignoring the explanation offered

by the petitioner, the Inspector submitted a report to the second respondent on the basis of which the second respondent sent a communication

dated 05.05.2000 claiming payment from the petitioner in an arbitrary manner. The petitioner was not given any opportunity to represent his case.

In the impugned order dated 05.05.2000 the second respondent claimed contribution under the head of omitted wages. The charges paid to the

other manufacturers have been termed as wages by the second respondent has also include the cost of materials, transporting charges, electricity

charges and taxes paid as omitted charges and calculated the amount. Since subsequently the petitioner's firm sustained loss which has already

wound up explained all these things to the second respondent. In spite of that all of a sudden the petitioner received a summon from the Judicial

Magistrate No. II, Coimbatore, in C.C. No. 561 of 2001 for non-payment of amount, which is abnormal and arbitrary. The second respondent

issues show cause notice dated 05.05.2000 to this petitioner as well as claim notice also. As such, the second respondent's notice dated

05.05.2000 it is to be set aside.

4. The second respondent/Employees State Insurance Corporation, in their Counter, which was adopted by the first respondent also, had resisted

the claim petition that the petitioner is false and not maintainable. Hence this petition is filed only to delay the payment of contribution to the

respondent/Corporation. It is false to say that the employer is prompt and perfect in deducting and remitting ESI contribution. Since the petitioner

was not complying with the payment, the inspector had to inspect the premises and on the spot the Inspector submitted a report. No explanation

whatsoever was furnished by the petitioner/employer in writing Form C.18 dated 05.05.2000 claiming contribution and contribution on omitted

wages was issued to the employer on the basis of the inspection conducted by the inspector on 23.12.1999 after verification of records viz.,

attendance register, wage register etc., No objection either to the inspection report or to the spot letter was raised by the petitioner/employer.

Further, the figures relied on and calculated are the figures taken from the records/accounts books the employer and not fictitious or assumed

figures. The figures in respect of omitted wages for the period from April 1996 to March 1999 were taken from the various heads seen in the

account book of the employer viz., wages, salary, incentive, ironing cooly, checking cooly, tailoring wages etc., which are the individual account

heads. Since, these items of head are to be included in the wages and attracts contribution as per the provisions of the act. The same was taken

into consideration for payment of E.S.I. Contribution by the employer. All these facts have been recorded in the spot letter and was also attested

by the employer/petitioner. Had there been any objection, the petitioner ought to have communicated either to the inspector or to the respondents

thereafter. Hence, he came forward with this letter only after receiving the order. The subsequent incurring of loss in business cannot be an excuse

for statutory liability. Initiating prosecution for non-payment is a natural course of action against the defaulting employer, when no reply is received

or compliance is made within the stipulated time as mentioned in the show cause notice. If the prosecution case initiated as against the employer

was penalised by the Court by imposing fine, the employer had to pay a total amount of Rs. 48,641. As such, the respondent prayed for dismissal

of the petition.

5. The learned Principal District Judge, Erode had framed the following issue for consideration namely:

(i) Whether the order dated 05.05.2000 under Ex.A1 is to be declared as arbitrary unjustified and to set aside?

6. On the petitioner's side, the petitioner was examined as PW1 and nine documents were marked as Exs.A1 to A9 namely Ex.A1-Show cause

notice sent by the first respondent to the petitioner, Ex.A2-Notice sent by R1 to the petitioner after inspection of records by the respondents

Inspector in petitioner's premises, Ex.A3-Notice issued by the R1 to the petitioner, Ex.A4-Demand notice sent by R1 to the petitioner, Ex.A5-

Certified copy of the deposition of PW1 in C.C. No. 561/2001 of J.M. No. II, Coimbatore, Ex.A6-Certified xerox copy of Judgment in C.C.

No. 561 of 2001 of J.M. No. II, Coimbatore, Ex.A7-Order issued by the Inspector of factories Erode to the petitioner, Ex.A8-Attested copy of

accounts of the petitioner firm from the period of 1995 to 1999, Ex.A9-Form No. 4 issued by the Deputy Chief Inspector of Factories, Erode to

the petitioner. On the respondents' side one Koodalingam was examined as RW1 and no documents were marked.

7. The case of the petitioner is that the Inspector of the respondent Corporation inspected the business premises of the petitioner on 22.12.1999 and 23.12.1999 and without getting any explanation from the petitioner and without properly look into the documents available in the premises of the petitioner, the inspector of the respondent Corporation arbitrarily prepared the report and on the basis of that report without getting any explanation and without giving any opportunity to the petitioner, the respondent issued notice under Ex.A1 calling upon him to pay the contribution of Rs. 48,641/- for the period from October 1997 to November 1999, that Ex.A1 is not based upon any documentary evidence or not based on facts. As such it has to be declared as arbitrary and to be set aside. To prove this contention, the petitioner got into the box and would depose that he was running a business in the name and style as Dandy Garments at No. 36, Ranganathan Street, Karungalpalayam, Erode and the firm of the petitioner was subjected to assessment by the respondent Corporation with assessment No. 5644277. The Inspector of respondent's Corporation inspected the premises on 22.12.1999 and 23.12.1999 without asking any question from the petitioner and without getting any explanation from the petitioner, the Inspector arbitrarily prepared a report and at the time of inspection he would state that he would get the explanation subsequently. Without issuing any show cause notice, all of a sudden the respondent's Corporation issued Ex.A1 notice calling upon the petitioner to pay the amount. The petitioner completed the work on job work basis and the payment made the Job work has also been included as waged and the cost of the goods, the cost of transportation and the electricity charges has also been included in the head wages and the respondent Corporation has issued Ex.A2 notice on the basis of Ex.A1 calling upon the petitioner to pay a total sum of Rs. 79,907/- towards E.S.I. Contribution. Subsequently the respondent Corporation has issued Ex.A3, dated 20.06.2001 the recovery order and they have also launched a prosecution in C.C. No. 561 of 2001 for non-payment of the amount. On the basis of Ex.A4 recovery order, due to loss in the firm, the petitioner has wound up the unit and he is doing business on commission basis, Ex.A5 is the copy of the deposition given before the criminal court and Ex.A6 is the order passed by the criminal court. He also produced Ex.A7 the registration certificate of Dandy Garments and Ex.A8 the accounts of the

firm for 2001-2002. He also produced Ex.A9 dated 14.05.1997 issued by the Inspector of Factories for cancellation of the licence on the basis of the closure of the unit.

8. To counter act this evidence adduced on the side of the petitioner, the respondent Corporation has examined its E.S.I. Inspector, Koodalingam, who inspected the petitioner premises on 22.12.1999 and 23.12.1999 on those days as per the registers maintained in the office and as per the personal inspection since it was found 53 persons were employed in the petitioner premises and on the basis of the inspection on the registers he submitted a report and on that basis from C.18 under Ex.A1 was issued to the petitioner. On that day a spot letter also was given to the petitioner and the petitioner was also issued with a recovery note. Till the filing of this case, before this Court the petitioner had neither sent any petition nor his explanation before the respondent Corporation. As such, he has issued the final order to pay the amount. Since the petitioner has not paid the amount, he has also been prosecuted in C.C. No. 561 of 2001 for non-payment of the contribution. In that case, the petitioner was found guilty and he was duly convicted. But the petitioner has not preferred any appeal as against the conviction passed by the Criminal Court. As such, the petitioner has no right to agitate before this Court. It is seen that Ex.A1 show-cause notice was issued to the petitioner by the respondent/Corporation on 05.05.2000. Subsequently Ex.A3 recovery order has also been issued to the petitioner on 20.06.2001 in which the petitioner was directed to pay a total compensation of Rs. 1,28,548/- for the period from October 1999 to November 1999 viz. A and from April 1996 to March 1999 viz. B totally to Rs. 1,28,548/- and Rs. 27,466/- towards interest aggregating to Rs. 1,56,014/- with subsequent interest at the rate of 15% per annum. Subsequently, on 21.06.2001 another notice under Ex.A4 was issued by the first respondent to the petitioner non-payment of this amount. The respondent Corporation has prosecuted the petitioner for the offence under the provisions of Employees State Insurance Act. In that case pending in C.C. No. 561 of 2001 on the file of the Judicial Magistrate Court No. II, Coimbatore the petitioner was found guilty and he was convicted to pay a fine of Rs. 5,000/- and in default of which to undergo imprisonment for two months. The copy of the

Judgment passed by the criminal Court is marked as Ex.A6. But, the petitioner has not preferred any appeal as against this Judgment. The contention of the petitioner is that now he has also produced Ex.A7 order passed by the Inspector of Factories, wherein removed from the purview of Factories Act. By referring this Ex.A8 the petitioner's counsel would contend that since the petitioner's firm viz. Dandy Garments was removed from the purview of the Factories' Act and it should not be subjected to State Employees Insurance Act. Having received the notice under Exs.A1 and A2 the petitioner kept quite without sending any protest or explanation to the respondent Corporation till Ex.A3 notice was issued on 20.06.2001 that itself would go to show that the petitioner was having nothing to offer as explanation before the respondent Corporation since he has failed to issue reply or explanation now he is not entitled to agitate that Ex.A1 notice is arbitrary and he is not entitled to ask to be set aside. Simply for the mere reason that subsequent to the inspection he has closed the garments would not absolve his liability to pay the contribution to the E.S.I. Corporation, which act was introduced by the parliament to safe-guard the interest of the labourer under the private companies. The respondent Corporation has not claimed any amount subsequent to the closure period. It has claimed the amount only during the period which the Dandy Garments was run. RW1 has explained as to how he has arrived at the amount. As such his Court comes to the conclusion that the petitioner has not established and not disproved the contention of the respondent/Corporation that the petitioner firm was not entitled to pay ESI contribution. Even though the petitioner had produced the various order and criminal Court records, the petitioner has not chosen to produce the account ledger and the attendance register of the firm to show that there was no such employees as noted down in the report of the E.S.I. Inspector. Having failed to adduce such an evidence and having failed to sent any protest or any explanation to Ex.A1 notice, this Court consider that the petitioner has come forward with this application only in order to delay the payment and in order to protract the proceedings. As such, this Court considers that the petitioner is not having any ground to declare Ex.A1 notice as arbitrary and unjustifiable and as such the petitioner has to fail. Accordingly, the learned Principal District Judge, Erode dismissed the petition with costs.

9. Aggrieved by the said dismissal order, the appellant/employer has filed the above appeal to set aside the order and decretal order passed by

the learned Principal District Judge, Erode.

10. The learned Counsel appearing for the appellant has raised the grounds in the appeal that the Company was not functioning therefore payment

of contribution does not arise. There is no document to establish that the demand had been made from the principal employer and Section 40 of

the Act and in the absence of any demand it is presumed that the Company is not functioning. The respondent herein had not furnished any

statement to establish the factum of functioning of the Company nor is there any competent person on their behalf that could be examined before

the Court. The learned Counsel also raised the grounds that the factory had wound up, so the payment of contribution does not arise. The

employees of the appellant had not raised any obligation in regards to contribution. The penal proceedings cannot be evoked as a matter of normal

course and penalty u/s 84 of the Act, and prosecution u/s 85 can be undertaken only in the event of the Company or Industry avoiding any

payment knowingly or deliberately furnish a false statement or representation.

11. The learned Counsel appearing for the respondents argued that the respondents' subordinate had inspected the appellant firm on 22.12.1999

and 23.12.1999 in the presence of the employer. At the time of inspection, the Inspector of Insurance verified the attendance register, wages

register, books of accounts, cash book ledger. After duly inspecting the firm in the presence of the employer, a demand notice was issued on

05.05.2000 and claims for the payment to the respondent Corporation. The demand was made after about five months. So sufficient opportunities

were given to the employer. The learned Counsel further argued that the employer did not disclose the correct date of winding up of the company.

Even though the contribution amount for the period October 1997 to November 1999 was not indicated before winding up of the firm. The

employer was penalised before the Judicial Magistrate No. II, Coimbatore in C.C. No. 561 of 2001. This penalty was due to non-payment of

regular contribution from the employer for the period from October 1997 to November 1999, amounting to Rs. 48,641/-. The learned further

argued that the cause of action from 22.12.1999 to till date, the appellant is

evading the payment of contribution. Further, the learned Counsel argued that the order passed by the learned Principal District Judge, Erode is a well considered one. There is no discrepancy in the Order. Hence, the learned Counsel prays to dismiss the appeal filed by the appellant.

12. In view of the facts and circumstances of the case, grounds of the appeal and arguments advanced by the learned Counsel for the respondents

and findings of the learned Principal District Judge, Erode, in E.S.I.O.P. No. 2 of 2002, this Court is of the view that

(i) the respondents issued a show cause notice for initiating prosecution against the employer/appellant to pay a sum of Rs. 48,641/-. This was not

complied by the employer. Hence, the respondents initiated criminal proceedings in C.C. No. 561 of 2001, before the Judicial Magistrate Court

No. II, Coimbatore. This case was contested and the appellant was penalised. One of the main issue before this Court was that non-payment of

contribution for the period from October 1997 to November 1999.

(ii) the claim notice issued on 05.05.2002 after receipt of the same the appellant filed receiving communication from the respondents on

20.06.2001 and 21.06.2001. So, this case was filed in order to evade the payment of contribution.

(iii) the appellant did not indicate the date of winding up of the company even before the District Court or the Judicial Magistrate Court No. II,

Coimbatore.

These defence by the appellant was not established at either of the two Courts. Therefore, this Court is unwilling to interfere with the order and

decreetal order passed in E.S.I.O.P. No. 2 of 2002, on the file of the Principal District Judge, Erode. Hence, this Court concurs with the findings

of the Trial Court.

13. In the result, this Civil Miscellaneous Appeal is dismissed and the Order and Decreetal Order dated 12.09.2005, made in E.S.I.O.P. No. 2 of

2002, passed by the learned Principal District Judge, Erode is confirmed. No costs.