

(2007) 11 GAU CK 0011
In the Gauhati High Court

Employees" State Insurance Corporation and Another	APPELLANT
Vs	
Moonlight Pyrbot	RESPONDENT

Date of Decision : 30-11-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 96
Employees State Insurance Act, 1948 — Section 40, 45, 75, 82
Limitation Act, 1963 — Section 12, 5

Citation : (2008) 2 GLT 192

Hon'ble Judges : Tinlianthang Vaiphei, J

Bench : Single Bench

Final Decision : Allowed

Judgement

T. Vaiphei, J.—The sole question which falls for consideration is whether appeal lies against the ex parte decree dated 04.04.2003 passed by the learned Presiding Officer, Employees State Insurance Court, Shillong in Misc. (ESI) Case No. 4 of 2002. The question arises out of the following facts and circumstances:

The appellant issued the Notice dated 31.03.2003 u/s 82 of the Employees State Insurance Act, 1948 ("the Act" for short) upon the respondent to pay his contribution amounting to Rs. 69,712/- for the period from April, 2001 to March, 2002 in accordance with the provisions of Section 40 of the Act read with Regulations 29 and 31 of the Employees" State Insurance (General) Regulations. The respondent thereupon filed an application before the Employees State Insurance Court, Shillong u/s 75(g) of the Act for declaration that his firm was not covered by the provisions of the Act as it employed only six persons and was not, therefore, liable to pay the contribution as demanded in the impugned notice.

2. The Insurance Court by the order dated 23.10.2002 admitted the application and stayed the operation of the impugned notice. On receipt of notice of appearance, the appellant apparently entered its appearance before the Insurance Court on 19.12.2002 and prayed for time, which was allowed by fixing

10.02.2003 for show cause against the application. On the next date fixed for show cause, the appellant did not file the show cause statement, whereupon the Court again fixed 25.03.2003 for filing the show cause, but the appellant again did not put in its appearance or filed the show cause even on this date. It would appear that on the failure of the appellant to make its appearance on 25.03.2003, the Court directed that the case be proceeded with against it ex parte and accordingly fixed 27.03.2003 for ex-parte hearing and evidence. On the date so fixed for hearing, the respondent evidently filed his examination-in-chief on affidavit and produced some documentary evidence to substantiate his case. The Insurance Court thereafter passed the impugned ex-parte decree.

3. At the outset, Mr. A.S. Siddique, the learned Counsel for the respondent raises preliminary objection on the maintainability of the appeal contending that there is no provision under the Act for filing an appeal against an ex-parte order passed by an Insurance Court. Drawing my attention to Rule 26(6) of the Meghalaya Employees' State Insurance Courts Rules, 1980 ("the Rules" for short), he submits that when the ex-parte order in this case has admittedly been passed under Rule 26(4) of the Rules, the only remedy available to the appellant was to apply, within thirty days from the date of such order, in Form 6 to the Court which passed the order to set it aside, and having not availed of this provision, this appeal is incompetent and is liable to be dismissed at the very threshold.

4. He further points out that the only appeal contemplated by Section 82 of the Act is an appeal involving a substantial question of law, and no substantial question of law can possibly be involved in a case of this nature, which is basically for setting aside an ex-parte order. He, therefore, submits that this appeal is not maintainable and is liable to be dismissed at the threshold. Per contra, Mr. K.S. Kynjing, the learned senior counsel for the appellant, contents that the question whether the ex-parte order was passed in accordance with law certainly involves a substantial question of law. He highlights a number of procedural irregularities committed by the Insurance Court such as the recording of evidence otherwise than the procedure prescribed by Rule 31, the very admission of suit without complying with the provisions of law, etc. and of the inherent lack of evidence to substantiate the case of the respondent and lack of corroboration of the sole testimony of the respondent. He finally submits that the question as to whether the respondent firm is an employer liable to make contribution under the Act is a substantial question of law, and as such, the appeal is maintainable. He, therefore, urges this Court to dismiss the preliminary objection of the respondent and proceed with the appeal in accordance with law.

It may be recalled that this Court, while, admitting the appeal, formulated the following substantial questions of law for consideration:

1. Whether the recording of evidence otherwise than in accordance with Rule 31 of the Meghalaya Employees' Insurance Courts Rules, 1980 vitiates the entire proceeding of the Trial Court?

2. Whether there is sufficient evidence to support the findings of the trial in decreeing the suit?

There is no dispute at the bar that the application of the respondent was allowed by an ex-parte order passed in accordance with Rule 26(4) of the Rules, which says that where the applicant appears and the opposite party, after receiving the summons fails to appear when the application is called on for hearing, the Court may proceed ex-parte. What is then the remedy available to the opposite party like the appellant herein against whom such an ex-parte order has been passed? Sub-rule (6) of Rule 26 provides such a remedy, and the same reads thus:

(6) In any application in which an ex parte order has been passed against the opposite party, he may within thirty days from the date of such order apply in Form 6 to the Court which passed the order, to set it aside and if the Court is satisfied that he was prevented from appearing when the proceeding was called on for hearing due to any sufficient cause, it shall after serving notice thereof to the applicant in Form 7 make an order setting aside the order upon such terms as to costs or otherwise as it thinks fit and may proceed with the hearing of the case or appoint a day for proceeding with the same.

5. The provision extracted above, evidently enables the opposite party like the appellant, without much difficulty, to avail of this remedy provided, of course, he files an application in that behalf within 30 days from the date of such order by satisfying the Court that he was prevented by sufficient cause from appearing when the proceeding was called on for hearing. Having failed or omitted to take recourse to this statutory remedy, the appellant is preferring this appeal u/s 82 of the Act. For better appreciation of the controversy, it will be useful to refer to and reproduce herein below the provisions of Section 82, which are in the following terms:

82. 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) The period of limitation for an appeal under this Section shall be sixty days.

(4) The provisions of Sections 5 and 12 of the Limitation Act, 1963 (36 of 1963) shall apply to appeals under this Section.

6. Sub-section (1) of Section 82 appears to be pre-emptory in nature in that it categorically lays down that unless expressly provided so, there can be no appeal against the order of an Employees' Insurance Court. Even the appeal entertainable by this Court, as evident from Section (2) of Section 82, is hedged in by the condition that such appeal should involve substantial question of law. A cursory look at the various provisions of the Act and the rules made thereunder will show that there is no provision for an appeal against an ex-parte order engrafted therein, which is corresponding to Section 96(2) of the Code of Civil

Procedure. Nevertheless, in my opinion, the absence of a provision for appeal against an ex-parte order in Section 82 of the Act will not preclude the aggrieved person from filing an appeal provided that he has a substantial question of law to raise.

7. The expression "substantial question of law" appearing in Section 82(2) of the Act, which is held to be similar to the one used in Section 30 of the Workmen's Compensation Act, 1923, should be given wider meaning than that given u/s 100 of the Code of Civil Procedure. Be that as it may even going by the concept of substantial question of law as understood in Section 100 of the CPC i.e., in a narrower sense also, a finding of fact based on no evidence can be attacked by an aggrieved person even though the order was made ex-parte. Even a concurrent finding of fact can be assailed in a second appeal u/s 100 of the Code if such findings are based on no evidence or are perverse or where the evidence taken as a whole is not reasonably capable of supporting the finding. In other words, a finding based on no evidence certainly raises substantial question of law even in a limited appellate jurisdiction u/s 100 of the Code. If that is so, on a party of reasoning, if an ex-parte order passed by the Insurance Court is not based on evidence, I do not see why an aggrieved person cannot attack such a decree based on a finding without evidence in an appeal u/s 82 of the Act. After all, the hallmark of a judicial decision is that it must be always be based on evidence.

8. A finding which is based on no evidence is no decision at all. It is a well-settled proposition of law that it is not incumbent or obligatory upon the Trial Court to pass an ex-parte decree. The Court will refuse to do so if no satisfactory evidence, or, at least, prima facie evidence is not made out by the plaintiff. In an appeal u/s 82 of the Act, the opposite party like the appellant herein can challenge the legality of the ex-parte order on the grounds; of merits highlighting the total lack of evidence or the inherent lack of jurisdiction, if they can be demonstrated from the materials available before the appellate Court. I cannot for a moment accept the contention of the learned senior counsel for the respondent that this appeal is incompetent inasmuch as there is no provision for in Section 82 of the Act for preferring an appeal to challenge an ex-parte order.

9. The next question which then falls for consideration is whether there is evidence to support the findings of the Trial Court. The case of the appellant-respondent in the suit is that he, as the proprietor was running a small motor garage with six employees at Shillong Jowai Road, Nongthymmai, Shillong, and undertook minor repairing work of light vehicles, mostly belonging to friends and relatives. The appellant issued the notice dated 31.03.2000 to him informing him that his workshop, on the basis of the inspection alleged to have been conducted on 18.02.2000, was covered under the provisions of the employees' State Insurance Act, 1948. The respondent promptly replied the notice by pointing out that his workshop was closed on 18.02.2000 due to some bereavement when no inspection could have been done. The matter was apparently kept in cold storage

till 26.09.2001 when the appellant issued another notice holding him liable for payment of Rs. 34,856/- as his contribution to the Corporation's Fund for the period of October, 2000 to March, 2001. The respondent by his reply letter dated 16.10.2001 informed the appellant that there were only six employees in his workshop, and was not accordingly covered by the Act. The appellant thereafter issued another letter dated 29.11.2001 maintaining that the workshop of the respondent had 25 workers as per their preliminary inspection report, but without mentioning the date of the inspection. On the same day i.e. 29.11.2001, the appellant issued another notice of recovery u/s 45C to 45(1) of the Act holding the respondent liable to pay Rs. 34,856/- for the period commencing from October, 2000 to March, 2001 along with interest @ 15% per day w.e.f. 27.09.2001. Several correspondences were thereafter exchanged between the respondent and the appellant until the last of the notices was issued on 04.10.2001 directing the respondent to pay a sum of Rs. 69,712/- to the Corporation together with the accrued interest for the aforesaid period. This prompted the respondent to file an application before the Trial Court u/s 75(g) of the Act for declaration that his firm is not liable to pay make contribution under the Employees State Insurance Act.

10. To determine whether there is evidence to support the findings of the Trial Court, so much of the findings as are necessary for this decision are reproduced hereunder:

Perused the case record and I have examined and verified the Annexures/ documents annexed, produced and exhibited by the petitioner/PW.

Upon examination of the evidence of the petitioner/PW and on perusal and examinations of the relevant official papers and documents on record annexed, produced and exhibited by the petitioner/PW this Court is satisfied that there is a prima facie case in this case of the petitioner.

The Court also is satisfied that" the petitioner/PW has established the prima facie case by the said documents and the same was conclusively proved by the petitioner against the Ops.

After examination of the evidence of the petitioner ex-parte and an examination of the documents/Annexures this case is decreed ex-parte against the Ops.

Hence it is declared that:

(1) The petitioner's firm/Motor Garage is not covered by the Employees' State Insurance Act, as the garage employed only 6(six) persons.

(2) Since the petitioners Firm/Motor repairing garage is not covered by the said Act, the petitioner's Firm/garage is not liable for payment of Rs. 34,856/- (Rupees Thirty four thousand eight hundred fifty six) and Rs. 69,712/- (Rupees Sixty nine thousand seven hundred twelve).

(3) The Ops are therefore directed not to interfere with the petitioner's firm.

This case is decreed ex-parte against the Ops and in favour of the petitioner. With the relief/reliefs in favour of the petitioner, this case is finally disposed off.

Prepare the decree accordingly.

11. I have carefully read and re-read the paragraphs extracted in the foregoing. I have also carefully perused the statement of the respondent, which is in the form of affidavit duly sworn by him. No other witnesses were examined by him. I have also examined the lower Court record. The Trial Court has recorded that he had perused the relevant official papers and documents on record, which were exhibited by the respondent and also the evidence tendered by him.

12. Apparently, it was on the basis of those deposition and documents that the Trial Court held that the respondent had made out prima facie case or had conclusively proved the case against the appellant. In my opinion, the Trial Court has completely gone astray in reaching the aforesaid findings. In the first place, the oral evidence of the respondent was not corroborated by any other witness. Secondly, there is absolutely no documentary evidence to substantiate his case that he employed only six persons. Moreover, the observation made by the Trial Court that it based its findings on official documents/papers is completely misleading inasmuch as there is nothing on record including the annexures annexed to the application of the respondent to indicate, even remotely, that the respondent employed only six persons in his workshop. On the contrary, the documents annexed to the application of the respondent are found to be copies of the numerous correspondences exchanged between him and the appellant, which has nothing to do with the numbers of persons employed by him. In this view of the matter, I find force in the contention of Mr. K.S. Kynjing, the learned senior counsel for the appellant that the findings of the Trial Court are based on no evidence, or that, at any rate, the evidence adduced by the respondent, taken as a whole, is not reasonably capable of supporting the findings of the Trial Court. Confronted with this situation, Mr. A.S. Siddique, the learned Counsel for the respondent fairly submits that in that case, the case be remanded to the Trial Court for fresh trial. Since the impugned judgment and decree is liable to be set aside on the ground stated above, the need for considering the first point is obviated.

13. The result of the foregoing discussion is that this appeal succeeds. The impugned ex-parte judgment and decree be and is hereby set aside. The case is remanded to the Trial Court for fresh trial in accordance with law. Since the case is long pending, the Trial Court is directed to hear and dispose of the case as expeditiously as possible, preferably within six months from today. Transmit the LC record forthwith.