
(2015) 02 GAU CK 0050
In the Gauhati High Court
Case No : Case No. M.F.A. 34 of 2004

Employees" State Insurance Corporation and Others	APPELLANT
Vs	
Super White Industries	RESPONDENT

Date of Decision : 12-02-2015

Acts Referred:

Employees State Insurance Act, 1948 — Section 2 (12), 2(12), 75, 82
Evidence Act, 1872 — Section 35, 74, 75, 77

Citation : (2015) 145 FLR 513 : (2015) 2 GLT 737 : (2015) 2 LLJ 674 : (2015) 3 LLN 388 : (2015) LLR 714

Hon'ble Judges : Nishitendu Chaudhury, J

Bench : Single Bench

Advocate : K.K. Nandi and J. Paul, for the Appellant

Final Decision : Dismissed

Judgement

Nishitendu Chaudhury, J.

1. The judgment and order dated 20.11.2003 passed by the learned E.S.I. Court in E.S.I. Case No. 7/2000 has been called in question in this appeal under section 82 of the Employees" State Insurance Act, 1948 (hereinafter referred to as "the ESI Act"). One Ashis Agarwal claiming to be proprietor of M/s. Super White Industries, Katahbari, Guwahati-25, filed an application under section 75 of the ESI Act before the E.S.I. Court stating that two notices were served on him on 5.1.1998 and 7.4.1998 asking for a sum of Rs. 6,435/- as contribution for the period from April, 1997 to September, 1997 and also demanding recovery of the same, were not maintainable and illegal inasmuch as, the ESI Act itself is not applicable to his firm. He stated that he maintained muster rolls, wage register, cash book etc. and on 5.3.1998, an inspector of the E.S.I. Corporation visited his concern. He wrongly described the concern to be a partnership one with one Sajjan Agarwal who has no relation in connection whatsoever, with the business at all. The aforesaid notices dated 5.1.1998 and 7.4.1998 were wrongly issued considering that the firm of the petitioner is a factory within the meaning of

section 2(12) of the ESI Act. He stated that in no point of time he had ten or more than ten employees in his establishment and so there was no question of applying the provisions of the ESI Act in this case. The petitioner also took other objections as to jurisdiction of the inspector and applicability of the Act for lack of notification etc.

2. On being summoned, the E.S.I. Corporation submitted written statement denying the statements made by the petitioner and specifically claimed that on 26.2.1997 when the Inspector conducted preliminary inspection, one Ratan Roy claiming to be the manager of the firm had informed him that it was a partnership concern of Sri Ashis Agarwal and Sri Sajjan Agarwal. But subsequently on 4.9.1998 and 5.9.1998 when he paid visit again, he was confronted by another manager named as P.K. Jha and he informed that the firm is a proprietorial one belonging to Ashis Agarwal. In the reply, Inspector claimed that in his visit on 26.2.1997 he found that the factory was being run by using power and that there were ten or more persons working in it since January, 1996. Accordingly, by letter dated 28.2.1997 the ESI Act was provisionally applied to the firm w.e.f. 1.6.1996. The opposite party also claimed that despite giving all opportunities, the petitioner did not furnish necessary documents to the authority.

3. The petitioner as well as opposite party Corporation examined one witness each. Both the parties adduced documentary evidence. Petitioner Ashis Agarwal examined himself as PW 1 and proved three (3) Attendance Registers as Ext. 1, Ext. 2 and Ext. 3. The opposite party, on the other hand, examined 4 documents as Ext. A, B, C and D which are reports of the Inspector on different dates.

4. After hearing the learned Counsel for the parties, the E.S.I. Court did not find any reason in favour of the argument made by E.S.I.C. but placing reliance on the Attendance Registers, namely, Exts. 1, 2 and 3, the learned Trial Court came to a finding that in no point of time there were ten or more than ten employees in the establishment. The learned Trial Court found that Ext. 2 is the Attendance Register for the period from April, 1996 to March, 1997 and it shows that 9 employees were working in the establishment during the relevant period. Similarly, Ext 3 which is the Attendance Register for the period from April, 1997 to March, 1998 shows that there were less than 10 persons employed in the concern. Ext. 4 is the Attendance Register for the period from April, 1998 to March, 1999 and it shows that there were not more than 8 employees in any month during this whole period. The PW 1 who exhibited these 3 (three) registers were put to cross-examination.

5. Having gone through the depositions, the learned trial Court did not find any effective cross examination to dislodge or discredit the credibility of the prosecution witness. These documents appear to have been maintained in course of daily transaction of the business. Having so found, the learned trial Court was of the considered view that the establishment of Ashis Agarwal never engaged 10 or more persons and so it cannot be held to be a factory within the meaning of section 2(12) of the ESI Act. Consequently, the petition under section 75 filed by

Ashis Agarwal, respondent herein, was allowed and the impugned notices were quashed. It is this judgment which has been brought under challenge in this appeal.

6. I have heard Mr. KK Nandi, learned Counsel for the appellant. None appears for the respondent.

7. This Court while admitting this appeal on 30.3.2004 framed as many as 5 (five) substantial questions of law 4 (four) of which are in regard to actions taken under the provisions of the ESI Act. The substantial questions of law are quoted below:--

(i) Whether the report of the ESI Inspector, which was exhibited without any objection and which report was prepared by the Inspector in discharge of his official duty, is admissible in evidence as per section 35 and section 74 of the Indian Evidence Act?

(ii) Whether the application of the respondent under section 75 of the ESI Act, 1948 is barred under section 77 of the said Act?

(iii) Whether the report of the ESI Inspector, being Ext. C, which was exhibited without any objection, could have been accepted and/or relied upon for the purpose of coverage under the ESI Act, 1948?

(iv) Whether the recovery notice issued by the appellant is as per powers conferred under the ESI Act, 1948?

(v) Any other substantial question (s) of law that may be urged at the time of hearing of this appeal.

8. Here in this case, learned trial Court arrived at the considered opinion that petitioner firm never engaged 10 or more employees at any point of time and so it was not a factory within the meaning of section 2(12) of the ESI Act and consequently application was allowed. The ESI Act itself having been held to be inapplicable in the present case, the validity of the report submitted by the ESI Inspector and/or validity of actions under any of the provisions of the ESI Act, 1948 cannot arise at this stage. Substantial questions of law referred to above, therefore, are hereby modified and the same is recast as follows:

"Whether on the basis of the findings of the learned Court below, the provisions of the ESI Act are applicable to the case in hand?"

9. The finding of the learned trial Court that ESI Act does not apply to this case is only on the basis that petitioner Ashis Agarwal never engaged 10 or more persons in his establishment at any point of time. The learned Trial Court arrived at this finding only because of the fact that the employer adduced documentary evidence vide Ext. 2, 3 and 4 which are attendance registers for the relevant period. It was seen that there were entries in the register and it was maintained regularly in course of business by taking signatures of the employees. If this finding of fact arrived at by the learned trial Court is based on some evidence

then, perhaps, there would be no scope to impeach the same merely because Inspector submitted report as Ext. C and D. The report of the Inspector contains his opinion. According to him, on a given date he consulted the attendance register and found that there were 13 persons engaged in the business. Had he come across any such attendance register, he would have seized the same and there would not have been any difficulty for the Court to accept his report. Now, merely because Inspector submitted a report but did not base his report on any documentary or oral evidence the report itself cannot be basis for arriving at a decision by a Court of law. On the contrary, petitioner Ashis Agarwal exhibited attendance registers and gave oral evidence as well. Cross-examination does not show that evidence of Ashis Agarwal could be shaken in any way by the opposite party. Having so found, it has to be held that aforesaid findings of the Trial Court as to employment of less than 10 employees in the establishment during the relevant period is based on materials on record. This is a finding of fact and it cannot be disturbed unless it is shown that the finding of fact is perverse. Learned Counsel for the appellant, Mr. KK Nandi, could not convince this Court that the finding of the Trial Court is otherwise perverse. Having found so, the sole substantial question of law has to be answered in the negative and against the appellant holding that in no point of time PW 1, Ashis Agarwal, engaged 10 or more than 10 persons in his factory. Consequently, it is to be held that it is not a factory within the meaning of section 2 (12) of the ESI Act.

10. In view of what has been stated above, this appeal is devoid of any merit. It is accordingly, dismissed.

11. No order as to costs.

12. Send down the records immediately. Interim order, if any, shall automatically stands vacated.