(2011) 09 DEL CK 0214

In the Delhi High Court

Case No : FAO No. 213 of 1999

Employees'' State Insurance Corporation — APPELLANT

Vs

Intercraft Limited and Another — RESPONDENT

Date of Decision : 13-09-2011

Acts Referred:
Employees State Insurance Act, 1948 — Section 2(9), 45A, 82
Evidence Act, 1872 — Section 102, 106

Citation : (2011) 09 DEL CK 0214

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : K.P. Mavi, for the Appellant;

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—The challenge by means of this First Appeal u/s 82 of the Employees State Insurance Act, 1948 (hereinafter ESI Act) is to the impugned order of the ESI Court dated 2.1.1999 quashing the demand against the Petitioners therein, and the Respondent No. 1 herein (hereinafter referred to as Respondent), issued by the Appellant/ESIC for the period from 1979 to 1983.

2. The Appellant passed an order dated 27.7.1988 u/s 45-A of the ESI Act calling upon the Petitioner to pay contribution amounting to Rs. 1,34,216.45 along with interest. The Respondent herein challenged this demand before the ESI Court and stated that the payments which are shown in the balance sheet are not towards wages/salaries but are, in fact, towards the outsourcing charges which include not only wages but also tailoring charges, packing charges and pressing and washing charges inasmuch as the Respondent-company used to outsource the manufacturing work to third parties and a lump-sum amount was paid to the companies from where the work of manufacturing of garments was got done. It was claimed that the Respondent-company could not carry out any manufacture because there were no machines in the factory after around 1979 when even the sewing machines were disposed of. It was further contended by the Respondent-

company that a fire had broken out in its office resulting in destruction of books of account pertaining to the period from January, 1979 to January, 1982 and with respect to this, fire department was intimated and an FIR was also lodged. Pursuant to the notice issued by the Appellant, the Respondent besides filing the report given to the fire department and also the FIR, filed the balance sheet of the relevant years in its possession. The Appellant had contended as the Respondent before ESI Court that it was upon the Respondent to show that the payments which are shown to have been made and reflected in the balance sheet are not towards wages.

3. The issue therefore before the ESI Court was that whether the payments which were as reflected in the balance sheet was towards job work got done from a third party, i.e. whether the manufacturing work was outsourced and the payments as shown in the Balance Sheets were not made towards the wages/ salaries. In this regard, the ESI Court in the impugned order has held as under:

9. According to the Petitioner, he was getting the work for tailoring, washing and packing from other establishments and was not doing any work in is factory. The question is whether the employees employed by the contractor were working under the supervision of the Petitioner or were working independently of the Petitioner. Obviously, the contract work was being done by the remaining establishments of their own as per the orders given to them by the Petitioner-company and the payment made to them included costs of raw material to be used b y them, wages to be paid to the employees and over-head expenses and profits to be earned by the contractor-employer. Hence these payments cannot e considered as wages under the definition of Section 2(9) of the ESI Act, since these workers were not working under the establishment at the factory premises of the Petitioner, or under his supervision, either employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment. These employers who were working on contract cannot be considered as agents of the Petitioner on work which is ordinarily part of the work of the factory. Hence in my opinion the amount considered as wages on the balance sheet on the remaining ledgers having been taken as per the report of the Fire Officer Ex. PW-1/1 and DD entry Ex. PW-2/1 proved on the record thus goes to show that the order imposing and considering the amounts shown in the balance sheet as wages including packing charges, tailoring charges, pressing and washing charges and repairs for machines cannot be considered as wages within the meaning of Section 2(9) of the ESI Act. No witness had been examined by the Respondent who has worked as Insurance Inspector for the period between 1979 to 1983, who carried out any inspection or proved his report. The report proved is of subsequent period, of 1986 to 1987 and the Inspectors who have been examined remained as Inspector of the area for 198 for two months and another Inspector for the area from August, 1986 to December, 198. No witness has been

examined for the period 1979 to 1983. Hence I the absence of any inspection report proved on the record on the basis of which the charges were shown as wages has been proved on the record by the Respondent-corporation, and are not covered within the definition of Section 2(9) of a the ESI Act. Hence the impugned demand raised by the Respondent-corporation is illegal and without any jurisdiction. This issue is accordingly decided in favour of the Petitioner and against the Respondent.

(underlining added).

4. I do not find any fault whatsoever in the impugned order because once it is found as a matter of fact that the Respondent-company had no machinery, obviously it could not do any manufacturing work and therefore the total payments which have been made for the manufacturing of garments got done from third parties would include not only amounts towards wages, but it would include other charges such as packing charges, pressing and washing charges, profit margins of the company from whom the manufacturing was got done and so on. The ESI Court has therefore rightly held that the payments made by the Respondent cannot be said to be exclusively towards wages/salaries.

5. Learned Counsel for the Appellant argued that as per the provisions of Sections 102 to 106 of the Evidence Act, 1872 onus of proof was on the Respondent, and once onus of proof was on the Respondent, it should have been held that this onus of proof was not discharged and the payments as reflected in the balance sheet should be taken as wages. In my opinion, the issue of onus of proof pales into insignificance as per settled law once both the parties lead evidence. In this case both the parties have led evidence. Once evidence is led by both the parties and the Court considers the evidence along with the respective stands of the parties, and believes one case or the other, the issue no longer remains of onus of proof, and on the other hand, it means that the onus of proof has been discharged as per the evidence and the stand of the Respondent which has been believed by the ESI Court. It is not disputed by counsel for the Respondent that as per the balance sheet filed of the relevant year there is no entry with respect to machinery. If that be so no manufacturing activities were being carried out by the Respondent and therefore the payment as per the evidence led by the Respondent has rightly been treated as payment done for job work which was outsourced. No substantial question of law as required u/s 82 thus arises.

6. In view of the above, I do not find any merit in the appeal which is therefore dismissed leaving the parties to bear their own costs.