

(2017) 01 BOM CK 0182
In the Bombay High Court
Case No : 750 of 2004

Employees State Insurance Corporation	APPELLANT
Vs	
M/s. Anand Bhandar	RESPONDENT

Date of Decision : 23-01-2017

Acts Referred:

Employees State Insurance Act, 1948, Section 75, Section 82, Section 75(1), Section 45-A - Matters to be decided by Employees Insurance Court - Appeal -

Citation : (2017) 01 BOM CK 0182

Hon'ble Judges : A.S. Chandurkar

Bench : SINGLE BENCH

Advocate : B. P. Maldhure, S.S. Ghatge

Judgement

1. This appeal filed under Section 82 of the Employees' State Insurance Act, 1948 [for short "the said Act"] takes exception to the judgment dated 28th September, 2004 passed by the learned Commissioner, Employees' State Insurance Court, Nagpur, in proceedings under Section 75 of the said Act.

2. Pursuant to inspection dated 30th May, 1985 undertaken by the Inspector of the Corporation, it was noticed that contribution was not being paid for employees of "Anand Bhandar Anexe", which had started functioning from 1st April, 1984. As per said report, the Firm "Anand Bhandar" was already functioning from said premises and as there was common preparation of food articles, common collection centre of money and as common employees were working in both the establishments, it was advised that relevant records of Anand Bhandar Annexe be produced. Thereafter on 22nd July, 1985, a notice was issued to the respondent herein to pay contribution with regard to three employees and further intimate the date of paying wages to thirteen employees since inception of Anand Bhandar Annexe. This notice was replied on 2nd August, 1985 in which it was stated that both the Firms were separate entities and they were not concerned with each other. The appellant was requested to seek

necessary records from Anand Bhandar Annexe directly. Thereafter, there was another inspection on 1st November, 1985 by the Inspector of the Corporation, in which it was noted that the concerned employer had agreed to make necessary contribution with regard to employees of both units. Thereafter, on 6th January, 1989, contribution was demanded by the appellant from the respondent with regard to employees of Anand Bhandar Annexe. In reply, the liability to make such contribution was denied. On 14th February, 1989, another communication was issued denying the signature of the partner of the Firm on the Observation Sheet dated 1st November, 1985 with further request to supply necessary documents. Ultimately, on 27th February, 1989, an order under Section 45-A of the said Act came to be passed clubbing both the Firms on the ground that there was unity of ownership with regard to said Firms. A contribution of Rs.37,170-00 with interest was demanded.

3. The respondent, being aggrieved by the aforesaid order passed under Section 45-A, filed a Dispute Application under Section 75 (1) of the said Act before the learned Commissioner taking a stand that clubbing of both the Firms was without any factual or legal basis and that same had been done in arbitrary manner. These proceedings were contested by the appellant by filing its written statement and by relying upon the observations made in the visit of the Inspector. Both parties thereafter examined one witness each and by the impugned order dated 28th September, 2004, the learned Commissioner allowed the application preferred by the respondent and quashed the order passed by the Corporation under Section 45-A of the said Act.

4. The appellant, being aggrieved by the aforesaid adjudication, has approached this Court by filing the present appeal under Section 82 of the said Act. The Substantial Question of Law on which this appeal was heard reads thus:- "Whether the Employees Insurance Court on the basis of the material on record was legally justified in coming to the conclusion that the two units Anand Bhandar and Anand Bhandar Annexe were different and separate establishments and thereby not liable to pay contribution for the employees of Anand Bhandar Annexe?"

5. Smt. Maldhure, learned counsel for the appellant, submitted that the learned Commissioner was not justified in setting aside the order passed under Section 45-A of the said Act. Referring to the inspection notes pursuant to the visits by the Inspector, it was submitted that both the Firms were maintaining a common kitchen and the employees engaged were interchangeable. Despite various notices being issued to the respondent to furnish further details, the same were not done. Considering the Partnership-Deed, which indicated unity of ownership of both the Firms, the clubbing as made was justified. Merely by denying reports placed on record, the respondent could not be permitted to escape its liability. Though it was the case of the respondent that one of the brothers had wrongly shown his name as a partner, he had not taken any steps to have the same rectified. It was, therefore, submitted that on a proper consideration of material

on record, the order passed under Section 45-A of the said Act deserves to be restored. In support of aforesaid submissions, the learned counsel placed reliance upon the decisions of the Honourable Supreme Court in [a] Employees" State Insurance Corporation Vs. Hotel Kalpaka International [(1993) 2 SCC 9], [b] Regional Director, E.S.I., Corporation Vs. Kerala State Drugs & Pharmaceuticals Ltd., & others [1995 Supp (3) SCC 148], and [c] Sumangali Vs. Regional Director, Employees" State Insurance Corporation [(2008) 9 SCC 106].

6. Shri Ghate, the learned counsel for the respondent, on the other hand, supported the impugned judgment. According to him, the only premise on which the order passed under Section 45-A of the Act is based is the aspect of unity of ownership. It was submitted that there was nothing on record to indicate such unity of ownership. Even otherwise, merely on the basis of unity of ownership and in absence of other factors, such as functional integrality, common employees, it could not be said that both the units were liable to be clubbed together. It was submitted that since 2nd August, 1985, the respondent had taken a stand that both the units were separate and that the Corporation should obtain necessary records from Anand Bhandar Annexe by writing to it directly. This was not done and only after said unit was closed down, were further proceedings initiated. There was no notice given to Anand Bhandar Annexe before passing the impugned order and on that count also, the order passed under Section 45-A of the said Act was vitiated. The aspect of identification of the concerned employees could also not be ignored. The learned counsel placed reliance on the decisions in [a] Regional Provident Fund Commissioner & another Vs. Dharamsi Morarji Chemical Co. Ltd. [1998 II CLR 151], [b] Nandinee Travels Pvt. Ltd. Vs. The Regional Provident Fund Commissioner, Goa [2003 II CLR 58], [c] Niton Industries, Bombay Vs. Union of India & others [2000 (3) Mh. L.J. 104], [d] Joint Regional Director, ESI Corporation and L.D. Bhawe & Sons [1994 (69) F.L.R. 1118], and [e] Bharat Heavy Electricals Ltd. Vs. Employees" State Insurance Corporation [(2008) 3 SCC 247].

7. The learned counsel for the parties have been heard at length. The records of the case have also been perused. Under Section 82 of the said Act, an appeal requires involvement of a Substantial Question of Law for the same to be entertained. With said requirement being kept in mind, the material on record would have to be examined.

8. As noted above, the initial inspection carried out was on 30th May, 1985, after which the Inspector submitted his report at Exh.44. Thereafter, in response to the notice at Exh.15, the respondent issued a communication on 2nd August, 1985 taking a specific stand that both the units in question were independent entities and that in case the records of Anand Bhandar Annexe were to be produced, same should be demanded directly from said Firm. After this reply, there was another inspection on 1st November, 1985 and the report is at Exh.45 of the record. Though it has been noted in said record that the employer had agreed that the persons employed in both the Firms were common and that

Anand Bhandar Annexe would comply with the demand in question, said report is not signed by any representative of the respondent. This report has been denied by the witness examined on behalf of the respondent at Exh.14 and the Inspector examined on behalf of the appellant at Exh.43 admitted that the documents mentioned as annexures to the report at Exh.45 were not filed on record. He also admitted that the report at Exh.45 did not bear the signature of the employer. In the light of these admissions, it is clear that the contents of report dated 1st November, 1985 at Exh.45 unless proved would not come to the aid of the appellant.

9. As per the observations of the Inspector, Anand Bhandar Annexe was functioning from 1st April, 1984 till 14th April, 1988. Surprisingly, despite being called upon to directly communicate with the Firm, nothing in that regard was done at the behest of the appellant. It is only on 6th January, 1989, which is after the closure of said Firm, that notice at Exh.17 came to be issued demanding contribution for employees from said Firm. If since 2nd August, 1985 it was the stand of the respondent that the records of Anand Bhandar Annexe should be demanded from said Firm and for said purpose, communication should be entered into directly with the said Firm, then there is no reason evident from the record for not doing so. From 1st November, 1985 to 6th January, 1989, no steps were taken by the appellant in this regard. This inaction for considerable period without any explanation is a factor against the appellant.

10. Perusal of the order passed under Section 45-A of the said Act indicates that except for the ground of unity of ownership, there is no other basis for clubbing both the units together. In Regional Provident Fund Commissioner & another [supra], the Honourable Supreme Court has observed that in absence of any evidence to indicate any interconnection between two units in the matter of supervisory, financial or managerial control, only on the basis of unity of ownership the clubbing of two units would not be justifiable. Similar is the view in Nandini Travels Pvt. Ltd. [supra] and L.D. Bhawe & Sons [supra]. Considering this legal position, it is found that the basis for passing the order under Section 45-A of the said Act, namely unity of ownership by itself is not sufficient to sustain the order in these facts.

11. Though it was urged on behalf of the appellant that both the units were proximately situated, they had common workforce and a common point for collection of revenue, there is no evidence on record in that regard. Merely on the basis of observations in the inspection report, said contention cannot be accepted. Moreover, the report dated 1st November, 1985 is not signed by any representative of the respondent and same cannot be used to the prejudice of the respondent. On these counts, the decisions relied upon by the learned counsel for the appellant are clearly distinguishable. Similarly, though it was urged by the learned counsel for the appellant that the aspect of identification of beneficiaries was relevant under the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, it is not necessary to go into said

aspect as even otherwise the material on record is not sufficient to set aside the impugned order.

12. The learned Commissioner, after considering the entire material on record, came to the conclusion that there was no factual or legal basis to order clubbing of both the units. On that count, the order passed under Section 45-A of the said Act came to be set aside. Only on the basis of the premise of common ownership, clubbing of both the units is not warranted. As I find that the learned Commissioner has passed the order after considering the entire material on record and after keeping in mind the relevant legal position, there is no case made out to interfere with the same. The Substantial Question of Law is answered in the affirmative and against the appellant.

13. In the result, the appeal stands dismissed with no order as to costs.