

(2010) 08 KAR CK 0039

In the Karnataka High Court

Case No : Miscellaneous First Appeal No"s. 4623 and 6677 of 2003

Employees State Insurance Corporation

APPELLANT

Vs

New Forge Company
 New Forge Company Vs
Employment State Insurance Corporation

RESPONDENT

Date of Decision : 13-08-2010

Acts Referred:

Employees State Insurance Act, 1948 — Section 39, 40 (1), 45, 75

Citation : (2011) 128 FLR 356 : (2010) 4 KCCR 3052 : (2011) 1 LLJ 681

Hon'ble Judges : Aravind Kumar, J

Bench : Single Bench

Advocate : Geethadevi M.P. in M.F.A. No. 4623 of 2003 and J. Aravind Babu, for A.Y.N. Gupta, in M.F.A. No. 6677 of 2003, for the Appellant; J. Aravind Babu, for A.Y.N. Gupta in M.F.A. No. 4623 of 2003 and M.P. Geethadevi, for R-1 in M.F.A. No. 6677 of 2003, for the Respondent

Final Decision : Allowed

Judgement

Aravind Kumar, J.—These two appeals have been filed challenging the order dated 28-5-2003 passed by the Additional Industrial Tribunal, Bangalore in ESI application No. 22/2002 whereunder the application filed u/s 75 of the E.S.I. Act by the employer challenging the order dated 25-3-1999 passed by Competent Authority u/s 45A of the ESI Act has been allowed in part.

2.M.F.A. 4623/2003 is by the Employees State Insurance Corporation (hereinafter referred to as the "Corporation" for the sake of brevity) questioning the correctness and legality of the above referred order dated 28-5-2003 whereunder order passed by the competent authority under the E.S.I. Act in exercise of Powers u/s 45A dated 25-3-1999 has been partially modified by substituting the quantum of Wages to be taken into account for purposes of computation of Employees Contribution.

3. M.F.A. No. 6677/2003 is by M/s. New Forge Company (hereinafter referred to as "employer" for the sake of brevity) questioning the correctness and legality of

the above said order dated 28-5-2003 whereunder the employer's claim to set aside the order dated 25-3-1999 passed u/s 45A of the E.S.I Act by the Competent Authority has been rejected and said order has been upheld.

4. Facts in brief are that employer is a partnership concern engaged in the manufacture and sale of gears and gear units. Provisions of E.S.I. Act was extended to the employer with effect from 1-7-1997 and since then contributions are being paid in accordance with law. For the period July 1997 to September 1998 employer is said to have failed to pay the contributions in accordance with Section 39 and 40(1) of the Employees' State Insurance Corporation Act, 1948 at the rates prescribed under Rule 51 of E.S.I. (Central) Rules, 1950 and in the manner prescribed under Regulations 29 of the E.S.I. (G) Regulations, 1950 within the time limit prescribed under Regulation 31 and as such a show-cause notice was issued on 11-2-1999 and a personal hearing was also offered to the employer by fixing the date of personal hearing as 26-2-1999 at 2 p.m. The said notice was duly served on the employer and no reply was filed. As such competent authority passed an order u/s 45A of the Act on 25-3-1999 holding that contribution amounting to Rs. 38,443/- is payable by Employer as the principal employer(s) and directed them to pay the same within a period of 15 days from the date of order along with interest at 15% per annum. It was also notified failure to remit the amount would result in recovery of the same through the Recovery Officer. Since the amount was not remitted recovery certificate came to be issued on 28-5-1999.

4.1. The employer filed an application u/s 75 of the E.S.I. Act in E.S.I. application No. 22/2002 before the Employees' State Insurance Court and Additional Industrial Tribunal at Bangalore praying for setting aside the order dated 25-3-1999 passed u/s 45A of the E.S.I. Act by the competent authority. The said application came to be resisted by filing statement of objection by the Corporation. The Insurance Court on considering the rival contentions framed the following issues:

(i) Whether the applicant proves that impugned order passed by respondent determining the contribution on the assumed wages is bad in law?

(ii) If so, what relief the applicant is entitled?

(iii) What order?

4.2. The employer in support of its claim examined one of the partners of the firm as P.W.1 and got marked Ex.A-1 to A-14. On behalf of the Corporation Inspector was examined as R.W.1 and got marked Exs.R-1 to R-6. The E.S.I. Court on considering the contentions and evidence on record by its order dated 28-5-2003 allowed the application in part and it is this order which is assailed by both the Corporation as well as the Employer in these two appeals.

5. Heard Smt. Geetha Devi Papanna, learned Counsel appearing for the appellant-Corporation and Sri. J. Aravind Babu learned Counsel appearing for the employer

respondent/appellant.

6. It is contended by Smt. Geethadevi that Tribunal erred in applying wages fixed under the Minimum Wages Act for determination of Contribution payable under E.S.I Act and would contend that when the employer had failed to produce the records and establish the actual amount of wages paid to its employees the Corporation was fully justified in assuming certain amount as the monthly wages of the employees and to claim contribution on the assumed wages. She would also contend an employer who is dissatisfied with the order of the Corporation passed u/s 45A of the Act has to specifically plead what exactly the amount of wages had been paid to its employees by producing records and substantiating the same to demonstrate the claim of the Corporation is not correct and in the absence thereof the order of the competent authority ought not to have been interfered by the E.S.I Court. She would elaborate her submission that tribunal could not have adopted its own reasoning to determine the rate of wages and the quantum of contribution particularly when the employer had pleaded about the actual amount of wages paid to its employees and the contribution paid thereon and she contends that the adoption of principle of Minimum Wages Act would defeat the very purpose of the Act since the employer who finds that adoption of Minimum Wages Act is beneficial to him would withhold the records from the authorities or Court and allow the authority/Court to adopt the principle of Minimum Wages thereby defeating the very purpose of the Act. On these grounds she seeks for allowing of the appeal M.F.A. 4632/2003. She would also submit that appeal namely M.F.A. No. 6677/2003 filed by the employer deserves to be rejected and she would support the order passed by the E.S.I. Court whereunder it has rejected the claim of the employer to rely upon the exhibits produced by them and accordingly she prays for dismissal of the appeal M.F.A. No. 6677/2003 also. In support of her submission she relies upon the following judgments:

(I) Modella Woollens Limited v. Employees State Insurance Corporation

(II) An order dated 14-1-2003 passed in M.F.A. No. 2777/2001 C/w. M.F.A. No. 2776/2001 by this Court in The Regional Director ESI Corporation v. M/s. Balki data Forms Pvt. Ltd.

(III) Order dated 14-2-2003 passed in M.F.A. No. 3422/2001 in the case of E.S.I. Corporation v. Hotel Ksheera Sagar.

7. Per contra Sri. J. Aravind Babu, learned Counsel appearing for the employer would submit that E.S.I. Court erred in not relying upon the wage Register produced by the appellant of the years 1997-98 and 1998-99 which is at Ex.A-9 and A-10 and Attendance Register produced by the appellant for the period April 1998 and March 1999 at A-11 on the ground that endorsement dated 24-11-1999 in Ex.A-10 and A-12 by the E.S.I. Inspector was subsequent to the order of determination u/s 45A i.e., dated 25-3-1999 since it has no relevance. He would also submit that wage registers and attendance registers are in

prescribed format and was being produced whenever sought for by the Officers at the time of their inspection and many a time it came to be endorsed by the inspecting officers. He would submit that E.S.I Court erred in taking the figure of Rs. 2,000/ - p.m. as wages for the purposes of calculations of ESI contribution which relates only to highly skilled labourer and it would not be applicable to the employees of the appellant in M.F.A. No. 6677/2003 as they are not highly skilled labourers. He would also submit that employer had tendered evidence to demonstrate as to how many number of persons have been employed by producing the relevant registers and actual wages paid as to the exempted employees and wages paid to the workers who would come within the purview of the Act had also been produced and the rejection of the same is improper. He would submit that when all the registers are read together no doubt arises about its origin and genuineness and as such the rejection of the said registers by the E.S.I Court is erroneous and seeks for allowing of the appeal M.F.A. No. 6677/2003.

8. It is noticed from the records that both the appeals have been admitted by this Court. However substantial questions of law as enumerated in the appeal memorandum had not been formulated while admitting the appeal and the learned advocates appearing for both the parties would fairly admit and concede that question of law formulated in M.F.A. No. 4623 at paragraph V(a) and (b) along with substantial question of law formulated in appeal memorandum 6677/2003 at paragraph 10 would arise for consideration in these appeals. Accordingly the same are formulated as follows:

(1) Whether the Industrial Tribunal was justified in adopting the minimum wages fixed under the Minimum Wages Act in determining the contribution, payable by the respondent under the E.S.I. Act, when the respondent, who is bound to produce the records and establish his case as to the exact amount of wages which it had paid to its employees and had failed to do so?

(2) Whether the application of the Minimum Wages Act for determination of the contribution, payable under the Employees State Insurance, Act, will not defeat the very purpose of the Act?

(3) The learned Judge has made the provisions of ESI Act applicable to the exempted employees, whose wages alone will come to Rs. 2,43,490/ -. The Application of provisions of ESI Act to the exempted employees constitutes substantial question of law within the meaning of Section 82 of the ESI Act.

9. Re: Question 1 and 2: These two questions formulated herein above being inter-linked are taken up together for consideration by this Court. The coverage of the establishment with effect from 1-7-1997 is not in dispute. The narrow compass within which these two questions are required to be answered covers the period from July 1997 to September 1998. A show-cause notice had been issued on 11-2-1999 to the employer by the Corporation calling upon them to pay contributions for the said period within 15 days and explain as to why further

proceedings should not be initiated to recover the amount. In the said show-cause notice an opportunity had been given to the employer to appear before the competent authority at 2 p.m. on 26-2-1999. Though a contention had been raised in M.F.A. 6677/2003 by the appellant employer that no such notice was issued the same has been considered by the E.S.I. Court and it has been held that show-cause notice had been duly served as per Ex.R.4. In view of the same this Court is not inclined to accept the said contention though raised with a feeble voice by the appellant.

10. In so far as the contentions of the learned advocates appearing for the Corporation and the employer regarding the method adopted by ESI Court to determine the wages of Employees is to be examined by this Court on the basis of the material evidence tendered before the E.S.I. Court. It is to be noticed that after issuance of show-cause notice employer had to appear before the authorities and demonstrate as to what was the actual wages paid and what was the contribution required to be made by it under the Act. In the absence thereof the competent authority has used "best judgment" method and arrived at the wages for purposes of working out the contribution payable under the E.S.I. Act. One another undisputed fact which requires to be noticed is that for the relevant period i.e., July 1997 to September 1998 a sum of Rs. 6,931/- has been remitted by the employer under Ex.A-3 A-4 and A-5 and half yearly returns have been filed as per A-6, A-7 and A-8 on 18-8-1999 wherein the details of the wages paid to the employees for the number of days worked and also the contribution payable has been reflected. All these documents are subsequent to issuance of show-cause notice i.e., 11-2-1999 and the order u/s 45A of the Act on 25-3-1999 which is at Ex.A-1 and A-2. Hence, much credence cannot be attached to these documents.

11. The records which have been produced by the employer before the E.S.I. Court for its consideration are the Wage Register (Ex.A-10), Attendance Register (A-11) and Pay Register (Ex.A.9). If all these records were available with the employer as on the date of issuance of show-cause notice and the order of determination i.e., 11-2-1999 and 25-3-1999 respectively, nothing prevented the employer to produce these records before the authorities and demonstrate and as to what was the actual wages paid and as to why it was not liable to pay the amount claimed in the show-cause notice. It did not do so. On the other hand having received the show-cause notice Ex.A1 on 17-2-1999 as per acknowledgment Ex.R-4 it did not choose to reply. It is only after having received the order of determination dated 25-3-1999 on 1-4-1999 (EX.R-6-postal acknowledgement) these registers have cropped up before the E.S.I. Court and it sought to justify its claim. This cannot be countenanced by this Court also inasmuch as on the date of issuance of the show-cause notice these records were available with the employer and the alleged payments said to have been made under Ex.A-3, A-4 and A-5 reflects that payments have been made on 13-8-1999 subsequent to the issuance of show-cause notice. Even when the order dated 25-3-1999 was passed these records were said to be available with the employer

but were not produced. There are no reasons forthcoming in the grounds urged before E.S.I. Court by the employer as to why these records were not produced before the authorities.

12. However, it is to be noticed that when the matter has been moved before the E.S.I. Court for grant of stay of the order dated 25-3-1999 a submission has been made that the applicant (employer) appeared before the concerned authority and their presence has not been noted, goes to show that either the said submission is incorrect or in the alternative that if the said submission is to be accepted no reasons are forthcoming as to what prevented the employer to seek for extension of time to file objections to the show-cause notice and also seek permission of the authorities to produce these registers namely Ex.A.9, 10, 11. This exercise was not undertaken. It is only at the stage of evidence before E.S.I. Court these Registers have seen the light of the day. Thus, authenticity or the correctness of contents of these documents and its acceptability or otherwise is to be looked into with circumspection. The said exercise has been done by the E.S.I. Court and for cogent reasons assigned in paragraph No. 9 it has been held that same cannot be accepted and said finding of E.S.I. Court deserves to be accepted. On appreciation of evidence tendered before E.S.I. Court and on reconsideration of these exhibits it is to be held that time, the manner and mode in which these registers have been produced before E.S.I. Court does not inspire confidence on the credibility of these Registers. Even if it were to be so the endorsement that has been made is in Ex.A-10 by the Insurance Inspector on 24-11-1999 which relates to the period April 1998 to March 1999 with which issue in question is not concerned about also made this Court to reject the same. Further in the other two registers namely A-9, and A-11 there is no such endorsement and as such the E.S.I. Court was justified in rejecting the contention of the learned Counsel for the employer and not accepting these registers. Non-production of these registers at appropriate time before the authorities, an adverse inference will have to be drawn.

13. In so far as the applicability of Minimum Wages Act which has been used as the yardstick for arriving at the wages for the purposes of determination under the E.S.I. Act is concerned it is to be noticed that E.S.I. Act contemplates under Chapter v. as to how the contributions are to be paid and recovered. u/s 44 of the Act a duty is cast on the employer to furnish the returns and maintain register as required under the Act and regulations made thereunder. In the instant case it is noticed that employer was brought within the purview of the E.S.I. Act with effect from 1-7-1997 and was aware about the contributions required to be paid. In fact on 13-8-1999 i.e., after issuance of show-cause notice and determination order, contributions have been remitted under Ex.A-3 A-4 and A-5. This itself clearly goes to show that employer was aware about the mandatory duty caste on it for payment of E.S.I. Contributions to be remitted to the Corporation. In this background it is to be examined as to whether E.S.I Court was justified in adopting the principle of Minimum Wages Act in the absence of any co-gent evidence available before it. In this regard, it would be of

benefit to extract the judgment of the Hon"ble Supreme Court in the case of Modella Woollens Limited v. Employees State Insurance Corporation whereunder it has been held to the following effect:

Dispute regarding payable amount of contribution_Exact amount payable whether must be decided by the Insurance Court Where the employer impugned the Corporation"s ad hoc assessment, without himself stating the correct amount which according to him was payable and the question of law involved was answered against the employer, held, the Insurance Court committed no wrong in accepting the Corporation"s assessment as correct without any further scrutiny.

14. Though in the instant case the employer has stated what was the amount payable by him, E.S.I. Court having examined the records produced by the employer did not accept the said records and it ought to have left the order dated 25-3-1999 untouched. However, a step forward has been taken by the E.S.I. Court by applying Minimum Wages Act and the notifications issued thereunder. I am of the considered view that only option that was open to the E.S.I. Court was to either adjudicate on the contention urged by the employer with reference to the documents produced by it to arrive at the wages on the said basis either by accepting it or rejecting it which would in effect mean that it cannot substitute with a different view contrary to provisions of ESI Act. This I say so because E.S.I. Act is a beneficial legislation enacted for the benefit of the employees and provisions thereunder have to be read in favour of whom such enactment has been brought about and it would not sub-serve the purpose when interpretation and construction of said statute is sought to defeat the purpose and such plea when sought to be put-forward cannot be accepted, inasmuch as under the guise of the applicability of Minimum Wages Act, an employer would take shelter under it and in effect defeat the very purpose of the E.S.I. Act itself and as such the contention of the learned Counsel for the appellant in M.F.A. 6677/2003 cannot be accepted and accordingly it is rejected. Thus Substantial questions of Law formulated herein above are answered as follows.

ANSWERS:

(a) Question 1 and 2 are answered in Negative by holding ESI Court was not right in adopting Minimum Wages Act in determining the minimum wages for purposes of ascertaining contribution payable as it would be contrary to provisions of ESI Act.

(b) In the absence of establishing before the Corporation by employer the authority was justified in applying "best judgment" method for arriving at wages paid to employees and hence question No. 3 is to be held in favour of the Corporation and against the employer.

15. In view of the above discussion, the following order is passed:

ORDER

(i) Appeal M.F.A. No. 4623/2006 is hereby allowed and order dated 28-5-2003

whereunder the Minimum Wages Act has been applied and contribution payable has been re-determined by the E.S.I Court is hereby set aside.

(ii) The appeal M.F.A. No. 6677/2003 is hereby dismissed.

(iii) The order passed by the Competent Authority E.S.I. Court dated 25-3-1999 is restored. No order as to costs.