

(2009) 08 DEL CK 0181

In the Delhi High Court

Case No : F.A.O. No's. 401, 402, 405 and 406 to 405 of 2002 and C.M. No's. 1050, 1079, 1080 and 1081 of 2002

Employees" State Insurance Corporation

APPELLANT

Vs

Om Prakash and Others

RESPONDENT

Date of Decision : 13-08-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Employees State Insurance Act, 1948 — Section 75

Citation : (2010) 2 LLJ 524

Hon'ble Judges : Vidya Bhushan Gupta, J

Bench : Single Bench

Advocate : K.P. Mavi, for the Appellant; Pradeep Kumar Arya, Narinder Chaudhary, Deepankar Dutt Sharma and Yajuvendra, for the Respondent

Judgement

V.B. Gupta, J.—As common question of law is involved in these appeals and facts are similar, hence, these appeals are being disposed of by common judgment.

2. Respondents herein, filed petitions u/s 75 of Employee State Insurance Act, 1948 (for short as "Act") on the ground that provisions of this Act are not applicable to their firms and the action of the appellant in issuing ESI Code to them is mala fide, illegal and is liable to be quashed.

3. In reply, the case of appellant was that respondent's firm had employed between 27 to 56 employees respectively, at the time when inspection was conducted. Under these circumstances, Act in question is applicable to the firm of respondents.

4. Trial Court vide impugned judgments, held that appellant had failed to prove that respondents employed more than the requisite number and as such coverage and consequent allotment of the Code number and the impugned demand, if any, is illegal.

5. Aggrieved by the decision of the trial Court, appellant-Corporation filed these

appeals.

6. It is contended by learned counsel for appellant that trial Court erred in accepting version of respondents that they never employed more than 2 to 5 persons and totally ignored the material placed on record by appellant-Corporation, including survey report, which had been duly proved by the appellant. It specifically states the names of the persons employed by respondents firm and this list was received from the office of District Labour Commissioner, Government of NCT, Delhi.

7. It is further contended that team of officials of appellant-Corporation, visited premises of the respondents and physically inspected the same. Thereafter only, they filed the survey report, giving specific number of employees employed by them.

8. Moreover, this Act, is a welfare and social legislation and trial Court ought not to have taken technical view, that survey report should have particulars such as name of employees, father's name, designation and addresses etc. When survey report had been signed by the inspectors of appellant-Corporation, there was no reason to discard the same.

9. On the other hand, it is contended by learned counsel for respondents, that respondents never employed more than 2 to 5 persons in their establishments. The so called survey report is a photocopy, the original of which has not been placed or proved on record. Moreover, this survey was conducted by Labour Department and not by the employees of appellant-Corporation.

10. It is further contended that survey report is absolutely vague, as it does not give parentage, address, designation, date of employment and wages, drawn by each employee. Hence, no reliance can be placed on the same.

11. Initial onus is upon appellant-Corporation to prove that respondents employed requisite number of employees for the purpose of applicability of the Act.

12. Case of appellant is full of contradictions, as in (F.A.O. No. 401/2002), in written statement, it is stated that 56 persons were found in the establishment. While, appellant's witness (RW-2), in cross-examination, stated that, after verification they found 56 employees present, out of 85 mentioned in the list.

13. According to appellant's own case, there was a list of 85 persons, purported to be working in the establishment of respondent, while in written statement, appellant states that 56 persons were found working for the respondent. So, this is a glaring contradiction in the case of appellant.

14. In (F.A.O. No. 406/2002), appellant's witness (RW-1), Sh. Ghanshyam Singh, Assistant Director (Vigilance) stated that survey report Exhibit RW-1/1 bears his signatures and they met proprietor of respondent namely, Sh. Amarnath, who confirmed that five trucks were working in the company. He also

gave a letter, but the same is not, at present in file. From information gathered from the people there, at least five persons were working on each truck. There was a letter in which he had mentioned everything.

15. In cross-examination, RW-1 stated that they have not mentioned the number of trucks in their report, because the employer had given a letter in which he has confirmed the number of trucks. RW-1, further stated that he did not record statement of any employee, who could say that he was working with the respondent. He had also not taken/seen any proof of employment of the employees. RW-1,, admitted that he never verified the number of trucks.

16. In (F.A.O. No. 405/2002), Sh. M.S. Chauhan, (RW-2), appellant's witness, in cross-examination stated they did not record the statement of any of the workers mentioned in the list of Labour Inspector and they had not collected any proof of their employment with respondent. RW-2 admitted that list of workers, is not bearing any date or signatures of Labour; Inspector, Hargian Singh.

17. In (F.A.O. No. 402/2002), appellant's witness (RW-1), Manjeet Singh, Insurance Inspector, stated that he conducted survey of the firm, along with other inspectors on directions of Regional Director, to verify complaint Mark "A", received from the office of Labour Commissioner.

18. Complaint mark "A" is purported to" have been sent by the office of Labour Commissioner, bearing name of Hargian Singh. The same has been addressed to Secretary, Employee Union. Thus, the survey of respondents" firm, if any, was conducted by Labour Department and report of Labour Department was sent to the Employee Union.

19. On the basis of complaint of the union, Inspectors of appellant-Corporation conducted; inspection of premises of respondents firms. Thus, the basic document in this case is, the survey report, conducted by Labour Department. However, that survey report has not been proved, as none of the officials of Labour Department has been examined. Moreover, survey report, is an unsigned document and is merely a scrap of paper. No reliance can be put on this document and trial Court rightly rejected this survey report.

20. Relevant findings of the trial Court in this regard are:

In the instant case, on perusal of the material on record, I find that Exhibit RW-1/2 containing the names of 85 employees was received in the office of the respondent from Labour Department and thereupon a survey was conducted by the respondent's Inspectors and they found 56 employees working over there. But during inspection, I find that they neither obtained the names, addresses and signatures of these 56 employees. The petitioner has not placed any material on the record showing that he never in fact employed more than two employees but the respondents are equally at fault in not obtaining the required particulars of the workers found to be working there. There is no material on the record by which any reliance can be placed on this photo copy of the list Exhibit RW-1/2. It

is not clear as to which of the employees were working and which were not working. There is no material on the record that the workers refused to disclose their names and addresses. In the absence of any supporting material, I find it difficult to believe the version of the Inspectors RW-1 to RW-3 that they found 56 employees working at the site of the petitioner, when they failed to record their names and addresses. Accordingly, no reliance can be placed on this photo copy of the list. This issue is accordingly decided in favour of the petitioner and against the respondent.

Further held:

In the instant cases, there is a dispute about the number of employees and none of the parties have placed any documentary evidence on the record from which the number of employees or the amount of wages paid to the employees can be ascertained. In an authority reported as *Employees State Insurance Corporation v. Kamataka Asbestos Cement Products*, Vol. 79 F.J.R. 188, wherein it observed by the Karnataka High Court that at the time of inspection, the Inspector must record the name, father's name, place from which the employee hails, the designation, the length of services, emoluments etc. In these cases, the respondents have relied upon a list sent by the Labour Union. In Petition No. 9/95, RW-1, Sh. Ghanshyam Singh has conceded in the cross-examination that he has not taken any proof of the employment of the employees nor made any enquiry from the Secretary of the Union. He has not confirmed the number of trucks. This has been corroborated by RW-3, Janak Kumar also. Similar is the statement of Sh. M.S. Chauhan, RW-2 in Petition No. 2/96. In Petition No. 5/96 the evidence of RW-1, Manjeet Singh is slightly different but he has also not collected any evidence about the employees but relied solely upon the list supplied by the Labour Union. In all the three cases, the respondents have not examined anyone from the Labour Department or from the Labour Union nor have collected any evidence on their own about the number of employees. In view of these observations, there is no evidence about the number of employees being employed by the petitioners. I have no option but to believe the version of the petitioners that they were not employing the required number of employees. The issues are accordingly decided in favour of the petitioners and against the respondents.

21. I do not find any reason to disagree with the reasoning given by the trial Court. Appellant-corporation has miserably failed to prove the number of employees working with the respondents at the time of inspection. Thus, provisions of the Act, do not apply to any of respondents' firm.

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22. Appellant had filed these applications seeking permission to prove the report of Labour Officer and examine employees of the respondents.

23. Provision applicable to produce additional evidence in appellate Court, is Order 41 Rule 27 C.P.C. which reads as under:

27. Production of additional evidence in Appellate Court- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if:

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

((aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or)

(b) the Appellate Court requires any document to be produced, or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

24. According to Sub-clause (aa), a party may be permitted to produce additional evidence in appellate Court, if it establishes that such evidence, which it seeks to produce as additional evidence, was not within his knowledge or could not, after the exercise of due diligence, produced by him.

25. In the present case, additional evidence sought to be produced is, the survey report of the Labour Officer. This report was already on record, before the trial Court. It is not the case of appellant, that this evidence was not available with it. Moreover, survey report sought to be proved now, is an unsigned document which is not more than a scrap of paper.

26. Under these circumstances, no ground is made out for allowing these applications for additional evidence.

27. In view of above discussion, I do not find any ambiguity or infirmity in the impugned judgments. The present appeals as well as applications for additional evidence, are not maintainable and are dismissed with consolidated costs of Rs. 25,000/-.

28. Costs of Rs. 25,000/- be deposited within eight weeks with Registrar General of this Court, failing which trial Court shall recover the same in accordance with law.

29. These costs have been imposed keeping in view the careless and negligent attitude of appellant officials as they were gross negligent in not proving even the basic document, i.e. the survey report, on which appellant has based its case.

30. Appellant-corporation is having large number of legal officials, at its disposal. It is apparent that none of them, scrutinized the survey report received from the Labour Department, which was neither original nor the same was signed by

anyone. Thus, there is a clear cut dereliction of duties, on their part, who without looking into the primary document, went on contesting these matters, before the trial Court.

31. After getting an adverse decision, appellant/corporation, which is a statutory body, still choose to file these appeals, when admittedly it knew, that it has no legs to stand in the appellate Court and that is why, it also filed application for additional evidence in each appeal.

32. Officials of appellant-Corporation did not scrutinize or examine these files properly, before filing the appeals. It is a usual practice with Public Sector Undertaking/Statutory Bodies, to go on filing appeals, without proper application of mind. These officials work in a mechanical manner and give their opinion as "fit for appeal" in every matter. These officials have scant regard for public exchequer as well as Court's time.

33. It is hoped that legal officials of appellant/corporation will henceforth, properly scrutinize each and every case, before filing any appeal in appellate Court. Chairman of appellant-Corporation shall issue necessary guidelines to its legal officials, in this regard.

34. Registrar General will send a copy of this judgment to the Chairman of appellant-Corporation.

35. List for compliance on October 15, 2009.