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(2009) 08 DEL CK 0126

In the Delhi High Court

Case No : FAO No. 403 of 2002

Employees State Insurance Corporation — APPELLANT

Vs

Radha Maheshwari — RESPONDENT

Date of Decision : 11-08-2009

Acts Referred:
Employees State Insurance Act, 1948 — Section 1(6), 45A, 75, 82

Citation : (2009) ILR Delhi 766 Supp

Hon'ble Judges : Vidya Bhushan Gupta, J

Bench : Single Bench

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

Final Decision : Dismissed

Judgement

V.B. Gupta, J.—Appellant has filed this appeal u/s 82 of the Employee State Insurance Act, 1948 (for short as "Act") against judgment of Senior Civil Judge, Delhi, dated 29th April, 2002, vide which petition u/s 75 of the Act, filed by respondent, was allowed.

2. The brief facts of this case are that respondent is stated to be carrying on business of fabrication of garments since 1st February, 1983 in the name of M/s Radha Maheshwari. It is her case that number of persons employed by her in the business, never exceeded 17. No power is being used. Appellant''s Inspector visited the business establishment of the respondent and informed that since, she was using an over-locking machine which operates with power, her establishment was liable to be covered under the Act. Accordingly, appellant issued an order dated 23.12.1991, creating a liability of Rs. 38,270/- on account of ESI contribution for the period 1st April,1985 to 25th March, 1988 in the name of respondent.

3. On 1st April, 1985, respondent disposed off said over locking machine and intimation to this effect was given to the appellant. Despite this, appellant issued a liability of ESI contribution in the name of respondent for the period 18th

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February, 1985 to 21st August, 1985. Appellant after being satisfied that, Act ceases to have its applicability on the respondent, rectified the liability earlier created for the period 18th February, 1985 to 21st August, 1985 and confined the same up to 31st March, 1985 and asked the respondent to pay sum of Rs. 1298.10/- up to 31st March, 1985. This amount was also paid by respondent under protest. Thereafter, order dated 31st December, 1991, u/s 45A of the Act was passed. Respondent filed petition before the Trial Court challenging that order. Trial court, vide impugned judgment set aside the demand.

4. On 28th July, 2003, this matter was admitted and came up for hearing on 27th July, 2009. On that date, none appeared on behalf of respondent. It remained continuously on board since 27th July 2009. As nobody appeared on behalf of respondent since that date, on 3rd August, 2009, arguments advance by counsel for appellant were heard.

5. It has been contended by learned Counsel for appellant that respondent failed to discharge the burden cast upon her to prove that she was not using power in manufacturing process and was not employing more than 17 persons. On the contrary, vide letter dated 9th January, 1989 it was intimated that she had now stopped the use of power, indicating thereby, that earlier she was using power in manufacturing process.

6. It is further contended that officer of appellant visited the premises of respondent and physically inspected the same and filed survey report stating that there were 17 persons employed during the period 1st April, 1985 to 31st March, 1988, in the unit of the respondent and power is being used in the manufacturing process.

7. Last contention made by learned Counsel for appellant is that as per Section 1(6) of the Act, even if respondent ceases to use the power, still the provisions of the Act would apply to her establishment.

8. Respondent''s case is that the number of workers employed by her never exceeded 17 and she never used power, as the operation of over-locking machinery is manual. While the case of appellant is, that over-locking machinery was operated by power.

9. Thus, the only dispute is whether power was being used by respondent or not.

10. RW-1 Mrs. G. Nangrani, Insurance Inspector, conducted survey of respondent''s firm on 7th March, 1988. At that time there were only eight employees. Again she surveyed respondent''s firm on 21st March, 1988. As per survey report Ex. RW 1/1, number of employee varied from 9 to 17, from time to time.

11. In her cross-examination, she stated that as per survey report, although the number of employees at a time exceeded 10 but there was no evidence at the spot showing the use of power. She never recommended levy of ESI charges or penalties upon respondent. Survey conducted on 21st August, 1985, was not

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conducted by her and she had never seen respondent using any machine with power, at any time of her survey.

12. Appellant has placed much reliance on letter Ex. PW 1/36, dated, 9th January, 1989 written by respondent to the appellant. In this letter, it is stated that ;

we are not using power anymore and which fact was verified by your Inspector on the spot.

13. As per this letter, it is clear that respondent, had been using power earlier, but now is not using. There is nothing to show, as to from which date, respondent stopped using the power. But as per appellant''s own witness RW-1, it is clear that respondent was not using any machine with power, at the time of her survey.

14. Learned Counsel for appellant relied upon provision of 1(6) of the Act, which read as under:

1. Short title, extent, commencement and application- (1)This Act may be called the Employees. State Insurance Act, 1948.

(2 to 5) xxx xxx xxx

(6) A factory or an establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under this Act or the manufacturing process therein ceases to be carried on with the aid of power.

15. This provision was not there, when initially the Act was enacted in 1948. It was incorporated by way of amendment, and that too applicable only, w.e.f. 20th October, 1989. There is nothing in the Act to show that provisions of Section 1(6) of the Act, are to have retrospective effect.

16. It is well settled that, no amendment can have retrospective effect, unless it is specifically provided. Since, amendment came into force w.e.f. 20th October, 1989, it is effective from that date only. Hence, provisions of Section 1(6) of the Act, are not applicable to the facts of the present case.

17. Since, impugned demand, pertains to period 1st April, 1985 to 21st March, 1988, the establishment of the respondent was not covered under the provisions of the Act.

18. As respondent was not using power and the number of employees employed by her were less than twenty, the establishment of respondent was not covered under the Act and as such impugned demand raised by appellant was illegal and is liable to be set aside.

19. Thus, I do not find any illegality or ambiguity in the impugned judgment.

20. Present appeal is not maintainable and the same is hereby dismissed.

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21. No order as to costs.

22. Trial court record be sent back forthwith.

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