

(1998) 03 KL CK 0052
In the High Court Of Kerala
Case No : M.F.A. No. 972 of 1993 etc.

E.S.I. Corporation

APPELLANT

Vs

Hotel Amred

RESPONDENT

Date of Decision : 05-03-1998

Acts Referred:

Employees State Insurance Act, 1948 — Section 45A, 75

Citation : (1998) 79 FLR 961 : (1998) 2 ILR (Ker) 723 : (1998) 2 LLJ 1157

Hon'ble Judges : K.V. Sankaranarayanan, J;AR. Lakshmanan, J

Bench : Division Bench

Advocate : T.D. Rajalakshmi and T.V. Ajayakumar, for the Appellant; K. Sudhakaran, for the Respondent

Final Decision : Allowed

Judgement

A.C. Lakshmanan, J.—By consent of both parties, all the appeals were taken up for hearing. The Regional Director, E.S.I. Corporation, Trichur has filed these appeals u/s 82 of the Employees' State Insurance Act, 1948 (for short "the Act") against the order of the Employees' State Insurance Court, in CMP No. 24 of 1993 in I.C. No. 14 of 1991 dated July 20, 1993 and also against the order in I.C. No. 89 of 1993 and other connected cases dated December 24, 1996.

2. But the order in C.M.P. No. 24 of 1993 in I.C. No. 14 of 1991 was passed by the Insurance Court directing the E.S.I. Corporation, who has made the claim, to prove that their claim is sustainable. The Insurance Court allowed the C.M.P. and directed the Corporation to discharge its burden by letting in evidence first in order to establish their contention. In the common order dated December 24, 1996, the same directions as in I.C. No. 14 of 1991 were issued.

3. In all these cases, the E.S.I. Corporation issued notices to the respondents holding that the respondents' establishments are covered under the Act. According to the Corporation, evidence has been collected after inspection of the records of the respondent's establishments and were put to the respondents.

The notices were challenged before the Court by the respondents contending that the establishments are not covered under the Act and sought to restrain the appellant Corporation from making any demand. The Insurance Court, after looking into the pleadings took up the preliminary issue and common order, held thus:

"7. The learned counsel for the Corporation would vehemently contend that the applicant have approached this Court with a prayer and produced documents in support of the applications and therefore, the applicants must swear in support of the applications. Further argument is that u/s 114 of the Evidence Act all acts done by Government servant are presumed to be correct and that the Corporation has produced relevant documents prepared by their Inspectors in support of their claim which must be contradicted by the applicant. It is also contended that the applicants should submit before this Court that they are aggrieved by the action taken by the Corporation. Unless and until no evidence to that effect is adduced the Corporation has no burden to prove their claim according to the learned counsel. As I have held in the above para, since the Corporation has made a claim, it is for them to establish and prove it before this Court. Thereafter only the burden to adduce evidence shifts on the applicants. It is true that the Corporation has produced inspection reports prepared by their Inspectors to support their claim. But the reports are not proved before this Court and Inspectors are not examined to establish the claim. Unless and until that is not done, the presumption u/s 114 of the Evidence Act is not attracted here. The applicants in the applications have specifically stated that the establishments are not covered under the Act and no contribution is payable. Therefore, it is for the Corporation which has made the claim, to prove that their claim is sustainable. That is not done in this case. In view of the above conclusion, the arguments of the learned counsel for the Corporation are devoid of merit particularly in the light of the decision of the High Court of Kerala mentioned above.

8. In the result I hold that it is the duty or burden of the Corporation to lead evidence first in order to establish their contention."

4. The following question of law, therefore, arises for consideration in the appeals:

Whether from the facts and circumstances of the case, is not the applicant before the Employees Insurance Court to prove that it is not covered and the contribution claimed is not payable by the Applicant"?

5. Ms. T.D. Rajalakshmi and Mr. T.V. Ajayakumar, learned counsel appearing for the Corporation submitted that the Insurance Court failed to note that u/s 75 of the Act, the person who goes to the Court has to adduce evidence first. The Court below has also failed to note that the question to be decided was whether the employer is liable to pay contribution. Therefore, u/s 75(a), it is for the employer to prove exemption from the provisions of the Act.

6. We summoned the records from the Employees Insurance Court and we have perused the same. The petitions have been filed before the Insurance Court u/s 75 of the Act. Notices issued by the E. S. I. Corporation covering the establishments of the respondents herein and the allotted code numbers to the establishments concerned have been challenged in the applications. According to the applicants, the cause of the action for the applications has arisen when the E.S.I. Corporation directed the applicant's establishments to comply with the provisions of the Act and when the proposals to initiate criminal prosecution was taken. The E.S.I. Corporation issued notice to the establishments directing them to pay contribution for the period in question. The action of the Corporation was challenged by the establishments by filing applications u/s 75 of the Act praying for a declaration that the applicants' establishments were not covered under the Act. Our attention was drawn to the various provisions under Act. Section 45A deals with determination of contribution in certain cases. The said Section reads as follows"

"45-A. Determination of contributions in certain cases: (1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of Section 44 or any Inspector or other official of the Corporation referred to in Sub-section (2) of Section 45 is obstructed by the principal or immediate employer or any other person, in exercising his functions or discharging the duties u/s 45, the Corporation may, on the basis of information available to it, by order determine the amount of contributions payable in respect of the employees of the factory or establishment.

(2) An order made by the Corporation under Sub-section (1) shall be sufficient proof of the claim of the Corporation u/s 75 or for recovery of the amount determined by such order as an arrear of land revenue u/s 45-A."

The Section provides for the Corporation to determine the amount of contribution payable in respect of employees of the factory or the establishment on the basis of the information available to it. However, such an order determining the amount of contribution can be passed only after giving reasonable opportunity of being heard to the factory or establishment. Section 45-A(2) says that an order by the Corporation under Sub-section (1) shall be sufficient proof of the claim of the Corporation or for recovery of the amount determined by such order as arrear of land revenue u/s 45-A.

7. It is to be noticed that some of these cases have been filed u/s 75 of the Act before the Insurance Court even before the determination of the liability and the amount of contribution payable in respect of the employee of the factory or establishment. Some cases have been filed after the determination of the liability and the amount of contribution payable in respect of the employees of the factory or establishment. Section 45-B provides that any contribution payable under this Act may be recovered as an arrear of land revenue. Before the Insurance Court it was contended on behalf of the applicants that the burden to

adduce evidence initially is only on the Employees" State Insurance Corporation and then only it shifts on to the applicants. The Insurance Court accepted the said contention. In doing so, the Court below relied on the decisions reported in *S.T. Reddiar & Sons v. Regional Director* 1989 II LLJ 285 (Ker) and *Regional Director, ESI Corpn. Vs. Vijayamohini Mills*, . We have gone through the above decisions. Those decisions are not the authority on the question now posed before us for our decision . We are of the view that the reliance placed on the above ruling is not applicable to the facts of the case in hand. The first of those two decisions was a case where the Corporation contended that certain amounts paid to the employees will come under the definition of wage, and, therefore, it was held that it is for the Corporation to prove that the amounts paid represented wages. The dictum, therefore, is not applicable to the facts of this case wherein the applicants (the respondents herein) claimed that they will not come under the purview of the Act. Likewise, the decision in *E.S.I. Corporation v. Vijayamohini Mills* (supra) also has absolutely no application to the facts of this case.

8. The answer to the question of law now formulated by us is available in the very recent decision of the Supreme Court reported in *Employees" State Insurance Corporation Vs. M/s. F. Fibre Bangalore (P) Ltd.*, The said appeal was filed before the Supreme Court by special leave against the judgment of the Division Bench of the Karnataka High Court, which in turn followed the ratio of the judgment of the Full Bench in MFA 147/74 dated April 19, 1978. The Full Bench of the Karnataka High Court held thus:

"In the result, we answer the question referred to us as follows:

Where in cases to which provisions of Section 45-A of the Act are attracted, the Corporation by an order made in accordance with that Section determines the amount of contribution payable and that claim is disputed by the employer, it would not be necessary for the Corporation to seek a resolution of the dispute before the Insurance Court. Such a Claim is recoverable as arrears of land revenue. If the employer disputes the claim it is for him to move the Insurance Court for relief. In other cases-other than cases where determination of the amount of contributions u/s 45-A is made-the Corporation if its claim is disputed by the employer should seek an adjudication of the dispute before the Insurance Court before enforcing recovery."

The above ruling was reversed by the Supreme Court in the decision referred to above. The Supreme Court was of the view that the Full Bench of the Karnataka High Court was clearly in error to reach the above conclusion. The Supreme Court held that though Section 75 of the Act does not envisage as to who has to approach the Insurance Court, by necessary implication when the employer denies the liability or applicability of the provisions of the Act or the quantum of the contribution to be deposited by the employer, it is for him to approach the Insurance Court and seek adjudicated and it is not for the Corporation in each case, whenever there is a dispute, to go to Insurance Court and have the dispute

adjudication. Otherwise the Act would become unworkable and defeat the object and purpose of the Act. The Supreme Court also held that the Division Bench of Karnataka High Court, having followed the Full Bench judgment, fell into the same error and set aside that part of the judgment of the Full Bench and of the Division Bench which was not consistent with the declaration of law by the Supreme Court. The Insurance Court was directed to determine the contribution payable by the respondent before it. We are of the view that the stand taken by the applicants praying the Court to direct the Corporation to lead evidence first in the application filed u/s 75 of the Act for declaration that they will not come under the purview of the Act is fallacious. The person who comes to the Court with a grievance has a duty to establish his case by leading evidence, oral and documentary and substantiate his claim. The basic principle has been set out in Section 102 of the Evidence Act which reads as follows:

"102. On whom burden of proof lies-The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

The respondents have no case that they are entitled to succeed if no evidence at all is let in by either side. So necessarily the onus lies on the respondents herein to let in evidence first and establish their case.

Under the circumstances we set aside the order of the Insurance Court and direct the said Court to determine the case on merits and in accordance with law. We make it clear that the applicants/respondents herein have to adduce evidence first.

The appeals are allowed as above.