

(2010) 12 MAD CK 0041

In the Madras High Court

Case No : Writ Petition No. 10560 of 2003

Hall Mark Printers Pvt. Ltd.

APPELLANT

Vs

Employees State Insurance Corporation

RESPONDENT

Date of Decision : 23-12-2010

Acts Referred:

Employees State Insurance Act, 1948 — Section 75

Citation : (2010) 12 MAD CK 0041

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : A.R. Karunakaran, for the Appellant; K.C. Ramalingam, for the Respondent

Final Decision : Allowed

Judgement

K. Chandru, J.—The Petitioner has come forward to challenge an order of the Respondent ESI Corporation, dated 20.2.2002, wherein

and by which the Petitioner was informed that the Petitioner has not made contributions for the period from 10/1993 to 03/2001 and hence the

Petitioner was asked to explain as to why they should not be mulct with the liability to pay the amount. As against the said show cause notice, the

Petitioner sent a reply, dated 16.7.2002, stating that the finding that they are employing 12 persons were erroneous. The said 12 persons includes

9 security personnel and 3 employees of the company.

2. According to the Petitioner, the security service has been outsourced by the agency. Since the employees are on rotation and by any given time,

not more than 2 security personnel are detained for duty in the factory. For the contractor, the Petitioner company has paid the money even

towards ESI contribution. The outsourced security agency itself is having a

separate ESI Account with code No. 51-36118-101. In the absence of the factory having more than 10 persons, they are not liable to pay any amount as they are not covered by the provisions of the ESI Act. Notwithstanding the reply, the Respondent sent a further notice, dated 27.2.2003 asking the Petitioner to pay interest for the said period. The Petitioner once again sent a reply on 22.3.2003 stating that the order of making them liable to pay even for the security service hired by them was erroneous. The company do not have 9 security personnel as found by the Inspector. It is at this stage, the Petitioner moved this Court challenging the show cause notice by filing the writ petition, which was admitted on 7.4.2003. This Court also granted an interim stay since no notice u/s 45A was served on them.

3. On notice from this Court, the Respondent has filed a counter affidavit, dated 30.7.2010. In the counter affidavit, it was claimed that the Petitioner had not supplied due records. The Petitioner engaged 8 employees together with 4 security guards at the time of inspection. In paragraph 9 of the counter, it was averred as follows:

It is submitted that the Petitioner's contention that it had employed four employees and four guards as reported by the Respondent Inspector vide his Report dated 05.11.1993. The Petitioner had not informed to the Respondent Inspector and at the time of personal hearing before the Respondent Officer about independent coverage of the security guards deployed from M/s. Security Counsel. Further, the Petitioner was very keen to get the coverage of his visit. Under the Act, accordingly this fact was accepted by the Petitioner's Authorized Representative. Disputing the coverage at the later stage is only the after-thought of the Petitioner by giving false information such as deployment of nine security guards and finding mistake in the Report of the Respondent Inspector. (emphasis added)

This assertion made by the Respondent in paragraph 9 goes diametrically opposite to the reply sent by the Petitioner, dated 16.7.2002 and the receipt of the same was acknowledged in paragraph 6 of the counter affidavit.

4. Though the Respondent had raised the contention that the order passed u/s 45A has to be challenged only by raising a dispute u/s 75 of the ESI

Act, it must be noted that the Respondent also has liability to consider the explanation given by the Petitioner. It is an admitted case of both sides

that the service personnel were not directly employed by the Petitioner company and they were outsourced by one security agency called M/s.

Security Counsel and that agency itself has ESI Code.

5. But, however Mr. K.C. Ramalingam, learned Counsel for the ESI Corporation placed reliance upon a judgment of the Supreme Court in

Saraswath Films Vs. Regional Director, E.S.I. Corporation, Trichur, . This is for the purpose of contending that even if the security agency sends

guards by rotation, they will also be the employees within the meaning of Section 2(9) of the ESI Act as they are employees engaged through the agency.

The definition of Section 2(9) defining the term ""employee"" is very wide to cover the persons employed by or through an immediate employer on

the premises of the establishment. But, however in the case cited by the learned Standing Counsel for the Respondents, in paragraph 9, a finding is

recorded, which is as follows:

9. It is relevant to note here that in the case in hand there is material on record to show that the security guards engaged on the premises of cinema

hall discharge the duty of checking tickets of persons seeking entry into the hall, which work is directly and intrinsically a part of the work of the

establishment.

6. In the present case, there is no evidence to show that the security guards were discharging the functions of printing press. Apart from that in the

judgment of the Supreme Court, there is no evidence to show that the security agency itself was having a separate ESI account with code number

as in the present case. In the present case, the definite stand of the Petitioner was that the security personnel were deputed by the outside agency

and at any time not more than two were present and that the security agency itself is having a separate ESI Code number, which was also

furnished. The said reply was also acknowledged in the counter affidavit, a copy of which is also furnished in the typed set. Though the Petitioner

could have been driven to decide the said question before the ESI Court u/s 75 as contended by the Respondent ESI, in the present case, it is

unnecessary to do so. Nowhere the Respondent had denied the fact that the

security agency was not covered by them directly and at no point of time, the Petitioner had engaged four security personnel. When the reply of the Petitioner had not received due attention and relevant particulars have been omitted before passing the impugned order, it is unnecessary to drive the parties to the decision of an another forum. Further, this matter has been pending for the last 8 years before this Court. The Petitioner is also enjoying an interim order in their favour.

7. In view of the above, it must be held that the impugned order was passed with utter mechanical application of mind. Hence the impugned order stands set aside. The writ petition will stand allowed. No costs. However, a liberty is given to the Respondent to make a fresh assessment after taking into account all relevant facts and to issue appropriate notice after affording an opportunity to the Petitioner.