
(1988) 07 DEL CK 0029
In the Delhi High Court
Case No : First Appeal No. 281 of 1985

Hindustan Times Ltd.

APPELLANT

Vs

Employees State Insurance Corporation and Another

RESPONDENT

Date of Decision : 20-07-1988

Acts Referred:

Citation : (1988) 36 DLT 135 : (1988) RLR 549

Hon'ble Judges : D.P Wadhwa, J

Bench : Single Bench

Advocate : B.R. Sabharwal, Y.D. Nagar and K.N. Kataria, for the Appellant;

Judgement

D.P. Wadhwa, J.

(1) This appeal under S. 82 of the Employees State Insurance Act 1948 (for short "the Act") is directed against the order dated Feb. 21, 1986, of the Employees Insurance Court passed on a petition under S. 75 of the Act filed by the petitioner-appellant. Under sub-s.(2) of S. 28, an appeal lies only if it involves a substantial question of law.

(2) The appellant publishes monthly magazine called "Nandan", weekly magazine called "Saptahik Hindustan" and another weekly magazine called "Film Chitra Katha". All these magazines are published at regular intervals. The appellant also publishes daily newspaper and other magazines as well on weekly and monthly basis. By order dated June 25, 1983 the respondent Employees State Insurance Corporation (for short "ESIC") made under S. 45A of the Act determined a sum of Rs. 5879.00 as contribution payable by the appellant under the Act for the period from April 1981 to March 1982 plus interest amounting to Rs. 673.79 up to March 31, 1983. It was stated in the order that as a result of inspection of the records of the appellant for the period from January 1981 to June 1982, it was found as under :-

"(1) It has come to the notice that you have booked Rs. 66372.72 under the various heads but E.S.I, contribution on ad-hoc basis @ 7% of which works out

to Rs. 4646.00 . (2) You have paid Rs. 17757.15 to your employees but E.S.I. contribution has not been paid. You are requested to pay E.S.I. contribution on ad-hoc basis @ 7% which comes to Rs. 1243.00."

(3) It was contended before the Employees Insurance Court that the order under S. 45A of the Act was not in accordance with the Act and the demand of contribution on the two amounts of Rs. 66,372.72 and Rs. 17,757.15 was not justified and was illegal. The contentions raised were denied by the respondent. On pleas of the parties, the following issues were framed :-

1. Whether the petition is signed, verified and filed by a competent person. If not its effect ? 2. Whether the impugned assessment and demand on the basis thereof is illegal and without jurisdiction for the reasons mentioned in the petition ? 3. Relief

(4) First issue was not pressed. On second issue, the appellant examined three witnesses. The respondent examined one of its inspectors who had inspected the establishment of the appellant.

(5) It was the case of the appellant that whenever weekly and monthly magazines were published and these required to be bound, the work was entrusted to the contractors. For example, in the case of the magazine "Nandan" it was stated that expert persons were required for folding cover and inside pages of the magazine and it took three or four days to complete that work when the Magazine was published. The appellant engaged the services of professionals from outside for the purpose of folding cover and inside pages and it was not possible for the appellant, a company, to engage regular employees for such casual work which arose only for three or four days in a month. It was stated these persons could not be covered under the Act, firstly, on account of the reason that they were professionals; and, secondly, on account of the reason that the work was of casual nature.

(6) It could not be disputed that the three magazines mentioned above were being regularly published by the appellant for the last many years. The work was said to be of casual nature only because it could be completed in three to four days. It was contended that casual workers were not employees within the meaning of the Act. The Employees Insurance Court found that the folding of covers of magazines was a part of the work of the appellant and that work was done at the premises of the appellant. Reading sub-ss. (9) and (13) of S. 2 the Act, the court held that the persons employed for the purpose alleged by the appellant were employees within the meaning of the Act. In coming to this conclusion, the court relied upon a decision of the Bombay High Court in All India Reporter Ltd. v. Employees State Insurance Corporation 1985 Lab. I.C 1181. The appellant had led no evidence on the question of payment of contribution in respect of the amount of Rs. 17,757.15. On the question of the extent of liability, the Employees Insurance Court held as under :-

"THE petitioner is liable to pay amount of contribution only on that amount which

has been received by the persons who have worked. According to the deposition of PWs 10% earned by the contractors, towards commission/income which goes to the contractor cannot be held to be wages. Therefore, out of the amount of Rs. 66, 376.72 10% have to be deducted and contribution is to be paid on the balance amount. The Inspector Rw 1 examined has deposed that the contribution comes to about 6.5% but they charged 7%. In view of this admission of Rw 1 the payment of contribution can be made only @ 6.52%. Calculating the amount on this rate the amount of contribution payable by the petitioner to the respondent comes to Rs. 5052.75 which I find that the petitioner is liable to pay to the respondent along with interest Rs. 579.00 up to 31.3.1983".

(x The arguments which were raised before the court below have been repeated here. It has been contended that the court below ought to have held that the work of binding of magazines was of a casual nature and was done by the employees of the contractor engaged by the appellant and that the appellant was not. Therefore, liable to pay the contribution. It was then contended that casual workers were not covered under the Act and that sub-ss. (9) and (13) of S. 2 of the Act were not applicable in the circumstances of the present case. Then, it was contended that the principles of natural justice were violated inasmuch as no hearing was granted to the appellant when impugned order under S. 4A of the Act was made.

(8) The controversy if the Act applied to casual workers should rest with the decision of the Supreme Court in *Regional Director E.S.I. Corporation v. South India Flour Mills (P) Ltd.* AIR 1986 Sc 19 In the case, the question involved was whether the workers employed for the construction of additional buildings for the expansion of the factories in question were employees within the meaning of S. 2(9) of the Act. Workers in the case were no doubt directly employed by the principal employers. A connected question arose as to whether the construction workers, who were admittedly casual workers, came within the purview of the Act. The Supreme Court was of the view that it was the intention of the Legislature that casual employees should also be brought within the purview of the Act and it held. Therefore, that casual employees did come within the purview of the Act. The court further held as under :-

"IN our opinion, the work of construction of additional buildings required for the expansion of a factory must be held to be ancillary, incidental or having some relevance to or link with the object of the factory. It is not correct to say that such work must always have some direct connection with the manufacturing process that is carried on in the factory. The expression "work of the factory" should also be understood in the sense of any work necessary for the expansion of the factory or establishment or for augmenting or increasing the work of the factory or establishment. Such work is incidental or preliminary to or connected with the work of the factory or establishment."

(9) Reference may also be made to another decision of the Supreme Court in *Royal Talkies, Hyderabad and Others Vs. Employees State Insurance*

Corporation, . In this case, the Court held that employees of cycle stand and canteen run in a cinema theatre of the contractors were covered within the definition of "employee" as given in S. 2(9) of the Act, and that the cinema owner was liable as principal employer for their contribution.

(10) The present case pertains to the year 1981 and half of 1982. Under S. 39 of the Act, contribution payable in respect of an employee shall comprise contribution payable by the employer called the employer's contribution and the contribution payable by the employee called the employee's contribution. The contribution is to be paid at the rates specified in the First Schedule to the Act. The First Schedule as it existed in the years 1981 and 1982 was amended in 1985 (with effect from 27.1.1985 by Act 45 of 1984). It was only after the amendment of the First Schedule in 1985 that employer's contribution was made equal to 5% of the wages payable to an employee and the employee's contribution was a sum equal to 2 ? % of those wages. Then there are other details mentioned in the First Schedule which are not quite relevant for the case. Earlier to this, rates of contributions were not on percentage basis and were those as specified in the table given in the First Schedule. Now under sub-s. (1) of S. 44 of the Act every principal and immediate employer shall submit to the Esic such returns in such form and containing such particulars relating to persons employed by him or to any factory or establishment in respect of which he is the principal or immediate employer as may be specified in regulations made in that behalf. Under sub-s (2) of S. 44 of the Act the Esic can even call for such returns from any persons. Then, under S. 45 of the Act, the Esic can appoint Inspectors and functions to be performed by such Inspectors are prescribed therein. S. 45A reads as under :-

"45A.(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 subsection (2) of section 45 is obstructed by the principal or immediate employer or any other person, in exercising his functions or discharging his 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 that 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 are of land revenue u/s 45B."

(11) It will be thus seen that under this section the Esic may, on the basis of information available to it, determine the amount of contribution payable in respect of the employees of the factory or establishment. The information available with the Esic was the one communicated to the appellant in its order under S. 45A and it was only that the appellant had "booked Rs. 66372.72 under the various heads" and further that the appellant "paid Rs. 17757.15 to your employees" but E.S.I, contribution had not been paid. There was no other

information available with the ESIC. Since the appellant did not file the return giving the particulars as required under S. 44 of the Act in respect of the aforesaid payments, provisions of S. 45A were rightly invoked. But, then the question as to who were the employees and what were their wages was also squarely before the Employees Insurance Court but the question was left undetermined.

(12) In *Employees State Insurance Corporation Vs. Masco Private Limited*, this court, while dealing with an argument that even though conditions of S. 45A of the Act were satisfied and the Corporation was competent to pass an order under that section, yet it could not do so without first giving an opportunity to the employer of being heard on the ground that this was the requirement of the principles of natural justice, held that there was no such requirement. The court examined various provisions as contained in Chap. Iv of the Act relating to procedure turn determination of contribution and observed that the Act gave a full protection and opportunity to an employer so that even after determination under S. 45A, he could invoke the jurisdiction of the court by moving under S. 77 of the Act which dealt with commencement of proceedings before the Employees Insurance Court. S75 provides that if any question or dispute arises as to whether any person is an employee within the meaning of the Act or whether he is liable to pay the employees contribution, or as to the rate of wages or average daily wage of an employee, or as to the rate of contribution payable by a principal employer, or as to the person who is or was the principal employer, etc., is to be determined by the Employees Insurance Court in accordance with the provisions of the Act. The Court, Therefore was of the view that to read the requirement of an opportunity in the case of a person who had deliberately and of his own choosing non-cooperated and obstructed the Corporation in making the determination as required by the Act, would be putting a premium on such unsocial acts. "We cannot, Therefore, find any justification to bold that the requirement of a hearing before an order is passed under S. 45A should be read into the statute. More so when there is no such provision. We feel that the legislature has advisedly made no provision for hearing for the simple reason that it has provided a perfectly good and detailed remedy to an employer under S. 77 of the Act. There is thus no prejudice caused". So the court held. Apart from the argument that rules of natural justice were violated, it was submitted on behalf of the appellant that the provisions of the Act did not authorise the Esic to demand any contribution on ad-hoc basis. It was submitted that the Esic first demanded contribution at the rate of 7% which was reduced to 6"% by the Employees Insurance Court on a concession made by an Inspector of the Esic who appeared as a witness. It was further submitted that there was no provision in the Act empowering the Corporation to demand contribution at percentage basis on payment made to the employees from whom the work was taken. If reference is made to the Statement of the Inspector of the Esic in court, he said that an amount of Rs. 17,757.15 was paid as wages to Computerises by the appellant and that appellant also paid sums of Rs. 28,964.00 and Rs. 37,408.38

to the contractors on Nandan and Saptahik Hindustan respectively. He said that he gave the amounts according to the bills and the amounts were mentioned in the names of the contractors in the books of the appellant. He further said that regular contribution was also 652/6 75% at the relevant time and that "the regular contribution is according to the wages paid average daily. We did not calculate the ad-hoc assessment according to the salary". If reference is made to documents on record, it will be seen that a letter dated Sep. 4, 1982, was addressed by the Esic to the appellant wherein it was mentioned that on an inspection made on July 24, 1982, by the Insurance Inspector of the Esic, discrepancies were found regarding payments of Rs. 66,372 72 and Rs. 17,757.15 on which E.S.I, contribution on ad-hoc basis respectively worked out at Rs. 4646.00 and Rs. 1233.00. This was at the rate of 7% Admittedly, correspondence was exchanged between the parties wherein the appellant disputed its liability under the Act. It was only thereafter that order under S. 45A was issued. wherein interest was also claimed. It cannot, Therefore, be said even on the arguments of the appellant that rules of natural justice were violated to its prejudice.

(13) It may, however, be noted that one witness of the appellant stated that he was submitting to the appellant bills ranging from Rs. 400.00 to Rs500.00 a week and that he was earning about 15 paise to 20 paise in a rupee and that the remaining amount was paid to the labour. Another witness said out of the bills submitted by him to the appellant, he was earning 10% and 90% of the bills he was paying to his employees. None of the three witnesses produced by the appellant had brought their respective books of account though they were all contractors working for the appellant. The Employees Insurance Court held that 10%, of the bill amount was towards the profit of the contractors. The impugned order or the Esic does not show in respect of which employees the contributions were being claimed. The basis, as has been seen above, was that various amounts were found mentioned in the books of the appellant as having been paid to the contractors. No attempt appears to have been made by the Employees Insurance Court as well as to who are the employees within the meaning of the Act in respect of whom contribution had been claimed. If reference is made to photo-copies of various documents filed by the appellant on the record, it will be seen that there are names of five persons (S/Shri S.P. Gupta, S.B. Jain, S.M. Saini, V.K. Gupta and Vinod Kumar) who are stated to have worked combinedly on the Comptometer Machine for certain period and the amount of Rs. 17,757,15 would appear to have been paid to them. But, then there is no evidence led by the appellant to show that these were not wages or the persons named above were not the employees within the meaning of the Act.

(14) The Act is a piece of social legislation and as the preamble to the Act would show it was meant to provide for certain benefits to employees in case of sickness, maternity and employment injury. Detailed regulations have been framed under the Act to identify the employees who would be entitled to the benefits under the Act. They are to be registered and their contribution card and

identity card are to be prepared. An employee has, Therefore, to be identified in the records of the Esic so that he is entitled to claim various benefits. The amount of contribution is not demanded merely to fill the coffers of the ESIC. From the record I am unable to find the particulars of the employees on whom the benefits under the Act would be bestowed. There are no names and no amounts of wages payable to them. The Employees Insurance Court could not, in the present case, adopt the rough and ready method of calculating the wages after deducting "probable" profits at the rate of 10% and then fix the rate of contribution at the rate of 6.52%.

(15) In *Heavy Engineering Corporation Ltd. & Ors. v. Employees State Insurance Corporation* (1979) 54 Fjr 28 there was no return with the Esic required to be submitted under S. 44 of the Act. As such the Esic assessed the contribution as required under S. 45A of the Act. The court observed that the Corporation was required to determine the number of employees before sending the notice of contribution to the employer and that the Employees Insurance Court was also required to investigate the number of employees so covered under the Act.

(16) In *The Employees State Insurance Corporation, Bhopal Vs. The Central Press and Another*, , the employers failed to maintain registers or records and to submit returns of wages paid as required under S. 44 of the Act. Then, under S45A of the Act, the Esic itself should, in a case where there is omission on the part of the employer to maintain records in accordance with S. 44 of the Act, determine the amount of contributions on the strength of such information as it may collect. It can then make demand, to case of dispute the matter could be taken up before the Employees Insurance Court under S 75 of the Act. The court observed that the Corporation, however, had itself to collect information initially and make a provisional demand on the basis of the information under S. 45A in such a case. The Supreme Court also observed as under :

"WE find that S. 75(2) of the Act provides, inter alia, that a claim for the recovery of contributions shall be decided by the Employees Insurance Court. Not only is the mandatory duty cast upon it to decide such disputes, but it is armed with the powers of a Civil Court, including summoning and enforcing the attendance of witnesses, compelling the discovery and production of documents and material objects, under S. 78 of the Act.

(17) A Full Bench decision of the Karnataka High Court in *Regional Director. E.SI Corporation v. M/s. Fibre Bangalore (P) Ltd.* (1980 Lab. I.C. 583) was cited for the proposition that where in a case the provisions of S. 45A of the Act were attracted, the Corporation determined the amount of contribution payable by the employer and that claim was disputed by the employer, it would not be necessary for the Esic to get the dispute resolved by the Employees Insurance Act.

(18) The question then arises as to what the words "on the basis of information available to it" as appearing in S. 45A imply. These words Do doubt would appear to be of wide import but these have to be understood in the context in which

they have been used. The determination of the contribution cannot be without any basis. The words "determine the amount of contributions payable in respect of the employees" appearing after the words "on the basis of information available to it" are quite significant To determine the amount of contribution and to fix the liability, three things are essential: (1) the employee, (2) the employer whether principal or immediate, and (3) the wages payable to an employee. As not above, under S. 39 of the Act, contribution is payable by the employer at the rate specified in the First Schedule in respect of the employees covered under the Act. Rates are to be calculated with reference to the wages payable to an employee. The information on the basis of which contribution is to be determined by the Esic under S 45A of the Act must, Therefore, correlate to S. 39 of the Act.

(19) In the present case, the Employees Insurance Court has determined the amount of contribution payable by the employer but without any reference to the employees and the wages payable to them.

(20) To be an insured person entitled to various benefits under the Act that person has to be an employee in respect of whom contributions are or were payable : (see S. 2(14) of the Act) At this state, I may notice the observations of the Supreme Court in Royal Talkies" case (supra) which are as under:

"LEARNED counsel for the appellants finally submitted that, in this event of our negating his legal contention, he should be given the benefit of natural justice. We agree The assessment of the quantum of the employers, contribution has now been made on an ad hoc basis because they merely pleaded non-liability and made no returns. On the strength of Section 45-A the contribution was determined without hearing. In the circumstances of the case,-and the learned Attorney General has no objection- We think it right to direct the relevant Corporation authorities to give a fresh hearing to the principal employers concerned, if sought within 2 months from today, to prove any errors or infirmities in the physical determination of the contribution."

(21) Therefore, in the circumstances of the present case, I am of the opinion that the matter should go back again to the Employees Insurance Court. The appellant will be entitled to lead evidence to show as to who were the employees within the meaning of the Act and their rates of wages for the purpose of the Act. On that basis the Employees Insurance Court will pass necessary orders as required under the. Act. Any excess amount deposited by the appellant in terms of that order shall be refunded thereafter. To this extent the appeal is allowed, and the order of the Employees Insurance Court is modified. There will, however, be no order as to costs.