
(2007) 03 AP CK 0083
In the Andhra Pradesh High Court
Case No : CMA No. 594 of 2005

K. Mohan and Co.

APPELLANT

Vs

Assistant/Deputy Director, ESI Corporation and Another

RESPONDENT

Date of Decision : 09-03-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 195
Employees State Insurance Act, 1948 — Section 2(12), 45A, 54A(2), 55A, 68

Citation : (2007) 4 ALD 754 : (2007) 5 ALT 791 : (2007) 115 FLR 292 : (2007) 3 LLJ 1026

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : Kambham Madhava Reddy, for the Appellant; P.R.K. Amerandra Kumar, for the Respondent

Final Decision : Allowed

Judgement

P.S. Narayana, J.—Heard Sri Khambam Madhava Reddy, learned Counsel representing the appellant and Sri Amarendra Kumar, learned Counsel representing the respondents.

2. The following substantial questions of law arise for consideration:

(i) Whether the Court below being a original Court has got jurisdiction to remit the matter to the 1st respondent-Corporation without deciding the dispute between the parties as contemplated u/s 75(1) of ESI Act, 1948?

(ii) Whether the Court below properly exercised its jurisdiction in remitting the matter to the 1st respondent-Corporation, even though it has powers of Civil Court and Criminal Court u/s 78 of ESI Act, 1948 for summoning the records and examining the witnesses and in spite of proving the appellant that it engaged only 9 employees?

3. Sri Khambam Madhava Reddy, learned Counsel representing the appellant had taken this Court through the order which is impugned in the present civil

miscellaneous appeal and would comment that when the evidence of PWs. 1 and 2 and RW. 1 is available on record and when the documents Exs.PI to P9 and Exs. R1 to R5 had been marked, the Employees Insurance Court and Chairman, Industrial Tribunal-I, Hyderabad, hereinafter in short referred to as "Court" for the purpose of convenience, instead of deciding E.I. Case No. 17 of 2002 on the material available on record, had totally erred in setting aside the order impugned and remitting the matter to the E.S.I. Corporation for fresh enquiry. The learned Counsel had drawn the attention of this Court to Section 75 of Employees State Insurance Act, 1948, hereinafter in short referred to as "Act" for the purpose of convenience, and would submit that in the light of Section 78 of the Act aforesaid, since the Court is having all powers of a Civil Court for the purpose of summoning the records and enforcing the attendance of witnesses compelling the discovery and production of documents and material objects etc., normally the Court not to resort to remitting the matter. The learned Counsel also had taken this Court through the findings recorded by the Court below and would submit that in the facts and circumstances, the order as such cannot be sustained. The learned Counsel places strong reliance on several decisions to substantiate his submissions.

4. Per contra, Sri Amarendra Kumar, learned Counsel representing the respondents would submit that in the light of the findings recorded by the Court below inasmuch as there was some doubt relating to number of employees, though on the material available on record a finding had been recorded relating to nine employees, the matter was remitted to E.S.I. Corporation for fresh enquiry for necessary orders. The learned Counsel also would submit that it is a simple case where the Regional Director was directed to issue notice to the appellant-petitioner to produce all the Registers and after verifying all the documents and after hearing both sides and after giving fair opportunity to the appellant-petitioner, to make an order of assessment. Hence, in the light of the nature of the order the same not to be disturbed by this Court.

5. Heard the learned Counsel.

6. The appellant as petitioner filed E.I. Case No. 17 of 2002 on the file of the Employees Insurance Court and Chairman, Industrial Tribunal-I, Hyderabad, u/s 75(1)(g) of the Act stating that the Insurance Inspector visited their Pump on 24-7-2000 and verified the attendance registers and left the premises after preparing the visit note, wherein it is stated that there are 3 Cashiers and 9 Pump Boys working in the Petrol Pump. The stand taken by the appellant-petitioner is that there are only two Cashiers and S.K. Babu is working as Bill Clerk-cum-Pump Boy and as per the Registers, the total number of employees are only 9 and they are working in both the shifts and they are including Cashiers, Pump Boys etc., the names of Pump boys are not mentioned in the visit note. Further specific stand had been taken that the respondent No. 1 issued a coverage notice with an intention to apply the provisions of the Act and the appellant-petitioner disputed the same and approached the 2nd respondent not

to initiate any action, but a criminal case was filed and further a stand was taken that the provisions of the Act are not applicable at all to the appellant-petitioner establishment. The respondent resisted the matter by filing a written statement, wherein specific stand was taken that the Inspector found 12 workers with the petitioner and the said fact was mentioned in the visit note and further specific stand was taken that the appellant-petitioner is not maintaining proper registers or records. The Court had settled the following issues:

1. Whether the petitioner-diesel pump does not fall within the purview of Section 2(12) of ESI Act w.e.f. 27-4-2000?
2. Whether the petitioner engaged only 9 persons and hence it is not coverable under ESI Act?
3. Whether the petitioner is not liable to pay any amount as demanded in the show-cause notice dated 31-1-2002?
4. To what relief?

On behalf of the present appellant-petitioner, PWs. 1 and 2 were examined and on behalf of the respondents RW. 1 was examined and Exs. P1 to P9 and Exs. R1 to R5 were marked. The Court below recorded reasons from paragraphs 12 to 13.02 and ultimately came to the conclusion that in the light of the facts and circumstances since there is some controversy relating to the number of workers, the matter to be remitted to the E.S.I. Corporation for fresh enquiry. Hence, the present civil miscellaneous appeal.

7. Section 75 of the Act dealing with the matters to be decided by Employees' Insurance Court, reads as hereunder:

Matters to be decided by Employees' Insurance Court:-(1) If any question or dispute arises as to-

- (a) whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution, or
- (b) the rate of wages or average daily wages of an employee for the purposes of this Act, or
- (c) the rate of contribution payable by a principal employer in respect of any employee, or
- (d) the person who is or was the principal employer in respect of any employee, or
- (e) the right of any person to any benefit and as to the amount and duration thereof, or
- (ee) any direction issued by the Corporation u/s 55A on a review of any payment of dependants' benefit, or

(f) any other matter which is in dispute between a principal employer and the Corporation, or between a principal employer and an immediate employer or between a person and the Corporation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues payable or recoverable under this Act, (or any other matter required to be or which may be decided by the Employees' Insurance Court under this Act). such question or dispute (subject to the provisions of Sub-section (2A) shall be decided by the Employees' Insurance Court in accordance with the provisions of this Act.

(2) (Subject to the provisions of Sub-section (2A), the following claims) shall be decided by the Employees' Insurance Court namely:

(a) claim for the recovery of contributions from the principal employer;

(b) claim by a principal employer to recover contributions from any immediate employer;

(c) ...

(d) claim against a principal employer u/s 68;

(e) claim u/s 70 for the recovery of the value or amount of the benefits received by a person when he is not lawfully entitled thereto; and

(f) any claim for the recovery of any benefit admissible under this Act.

(2A) If in any proceedings before the Employees' Insurance Court a disablement question arises and the decision of a Medical Board or a medical appeal Tribunal has not been obtained on the same and the decision of such question is necessary for the determination of the claim or question before the Employees' Insurance Court, that Court shall direct the Corporation to have the question decided by this Act and shall thereafter proceed with the determination of the claim or question before it in accordance with the decision of the Medical Board or the medical appeal Tribunal, as the case may be, except where an appeal has been filed before the Employees' Insurance Court under Sub-section (2) of Section 54A in which case the Employees' Insurance Court may itself determine all the issues arising before it.

(2B) No matter which is in dispute between a principal employer and the Corporation in respect of any contribution or any other dues shall be raised by the principal employer in the Employees' Insurance Court unless he has deposited with the Court fifty per cent of the amount due from him as claimed by the Corporation.

Provided that the Court may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this Sub-section.

(3) No Civil Court shall have jurisdiction to decide or deal with any question or dispute as aforesaid or to adjudicate on any liability which by or under this Act is

to be decided by (a Medical Board, or by a Medical Appeal Tribunal or by the Employees' Insurance Court).

Section 78 of the Act deals with the powers of Employees' Insurance Court, which reads as hereunder:

Powers of Employees' Insurance Court:

(1) The Employees' Insurance Court shall have all the powers of a Civil Court for the purposes of summoning and enforcing the attendance of witnesses, compelling the discovery and production of documents and material objects, administering oath and recording evidence and such Court shall be deemed to be a Civil Court within the meaning of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

(2) The Employees' Insurance Court shall follow such procedure as may be prescribed by rules made by the State Government.

(3) All costs incidental to any proceeding before an Employees' Insurance Court shall, subject to such rules as may be made in this behalf by the State Government, be in the discretion of the Court.

(4) An order of the Employees' Insurance Court shall be enforceable as if it were a decree passed in a suit by a Civil Court.

8. There cannot be any dispute or controversy that in a just and proper case the Court may remit the matter. However, submissions at length were made that in the light of the facts and circumstances since ample and total material, in fact, had been placed before the Court, the Court was not justified in remitting the matter again instead of deciding the same on merits.

9. Reliance was placed on the judgment reported in Employees State Insurance Corporation v. Karnataka Asbestos Cement Products 1991 FLR 638, wherein the Division Bench of the Karnataka High Court at Paragraph 3 observed as follows:

The learned Employees' Insurance Court, on the basis of the evidence placed before it, came to the conclusion that the respondent had not employed more than six persons relying on the attendance registers A1 to A5 produced by the employer. At the same time, the trial Court totally disregarded the report filed by the Inspector and his oral evidence. The report was rejected, relying on the decision of this Court in the case of E.S.I. Corporation v. Subbaraya Adiga 1988 (57) FLR 613. In the said decision, it was held as follows (at page 71 of (1988) 2 Kar. LJ):

A list of employees prepared by the E.S.I. Inspector in the course of his visit to an establishment, in order to find out whether the provisions of the E.S.I. Act are attracted to it, must contain the name, father's name, place from which the employee hails, the designation, the length of service, emoluments and the signature or thumb impression of the employee, as the case may be, if at that time other persons other than the employees are present, the names and

addresses of at least two of them with their signatures and also the signatures of the proprietor or manager or the person-in-charge of the establishment should be obtained at the end of the list and a copy of which be furnished to the establishment.

The report furnished by the Inspector, RW. 1, did not contain the details which it was required to contain and, therefore, the learned Judge was correct in rejecting the report. Only other evidence available was to be found in exhibits A1 to A5, the attendance registers produced by the employer which has not been impeached and which disclose that the applicant had not employed more than six persons.

10. In *Hotel Flora Vs. Employees State Insurance Corporation*, , it was held that the evidence adduced in the case did not indicate that the appellant was taking aid of power and the number of workers in the premises was only 11 and in these circumstances this Court held that the case did not attract Section 2(12) of the Employees State Insurance Act, 1948 and allowed the appeal against an order of the Employees' Insurance Court. It was also held therein that the question whether the Act was applicable to the appellant-Hotel could be treated as a substantial question of law, as required u/s 82(2) of the Act for maintainability of the appeal.

11. In *E.S.I.C. and Anr. v. Hotel Samrat* 1999-II-LLJ 153, while dealing with the burden of proof, it was held that from the evidence adduced by the Corporation it was found by the ESI Court that the Corporation had miserably failed to prove that 20 employees were in the service of the hotel at any time; and the Inspector was unable to produce any inspection note with the names of those employees who may have been found working in the hotel at the time of inspection. Therefore it was not possible for the ESI Court to believe that the Inspector had carried out the inspection. At the same time the Manager of the hotel had given documentary evidence to show that there were only 19 employees at the relevant time.

12. Further strong reliance was placed on the decision reported in *ESI Corporation, Hyd. Vs. Bhaskara Motors, Hanamkonda*, , wherein the learned Judge of this Court after referring to the provisions of Section 75 of the Act, observed as hereunder:

In the *The Employees State Insurance Corporation, Bhopal Vs. The Central Press and Another*, , while considering the scope of the provisions of Section 75 of the said Act, the Supreme Court held at p.480 of LLJ:

2. Not only is the mandatory duty cast upon it to decide such disputes, but 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, u/s 78 of the Act....

3. The Court should give the Corporation a direction to perform its duty where it

considers that this should be performed by the Corporation. It cannot decline to perform its own duty because the Corporation has failed to discharge its function.

4. The Corporation has itself to collect the information initially and make a provisional demand on the basis of that information u/s 450A in such a case....

5. The Corporation itself should have gathered information u/s 45-A.

In *The ESI Corporation, Madras v. Tiruchy District Co-operative MPU Ltd.* 1995-H.-LLJ-581, the Madras High Court while considering the principles laid down in *Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation*, , by the Apex Court observed at p.396 of LLJ:

22. The assessment of the quantum of the employees' 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....

The High Court held that as there was an error of law committed in that case, an investigation is needed in accordance with the procedure provided under the Act.

There is no controversy that there is a dispute and the Court has already framed the issues arising out of respective claims and denials. Having thus taken a step, the Court should not have relegated the enquiry or decision thereon back to the primary stage. The scope of enquiry under the said provision is in its original form and nature, where the parties are allowed to substantiate their case. Therefore, by the orders under appeal, the Court below not only denied such opportunity to the parties but also shelved its statutory duty and mandate for a decision on an enquiry. This procedural safeguard allowed to the parties is part of the adjudicating process. A solemn obligation bestowed under a statute cannot be shelved or avoided. Further, the nature of enquiry is an original one and not appellate or revisional. Therefore, the question of remitting back in the form of a remand does not arise.

In *ESIC v. Super Tailors* 2000-I-LLJ451, the High Court of Karnataka relied on the principles laid down by the Apex Court in *Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd.*, , as regards the question of substantial law required for the purpose of Section 82(2) of the Act, which are to the following effect at p.454 of LLJ:

8. The proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion on alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well

settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial question of law.

From the above, it is evident in the case that the lower Court did not follow the mandate as contemplated u/s 75(1) of the Act nor there is any enquiry or decision in regard to the dispute which arose by remanding the matter back to the authority for fresh application and consideration. The noncompliance of the provision and absence of an enquiry denying opportunity to the parties substantially an important question on which this Court in exercise of powers u/s 82(2) of the ESI Act can interfere.

13. On a careful appreciation of the reasons recorded by the Court below, this Court is of the considered opinion that when the Court felt that further clarification may have to be obtained, it is not as though the Court is powerless. The Court can exercise the powers as provided by the provisions of the Act instead of remitting the matter on such a ground when ample material as can be seen from the record had been placed by the parties, is available. Hence, in the facts and circumstances the impugned order is hereby set aside and the matter is remitted to the Court below to give opportunity to both the parties to let in further evidence on the aspects concerned, if the parties chose to do so and decide the matter afresh in accordance with law.

14. The civil miscellaneous appeal is allowed to the extent indicated above. There shall be no order as to costs.