
(2010) 10 DEL CK 0010
In the Delhi High Court
Case No : F.A.O. No. 322 of 2001

Machine Tools (India) Ltd.	Vs	APPELLANT
The Employees State Insurance Corporation		RESPONDENT

Date of Decision : 26-10-2010

Acts Referred:

Employees State Insurance (General) Regulations, 1950 — Regulation 10B
Employees State Insurance Act, 1948 — Section 1(4), 1(5), 2(27), 2(9), 44

Citation : (2011) 2 LLJ 839 : (2011) LLR 121

Hon'ble Judges : Mool Chand Garg, J

Bench : Single Bench

Advocate : Kailash Vasdev and Siddharth Dias, for the Appellant; Wadhwa and Saurabh Dhawan, for the Respondent

Final Decision : Dismissed

Judgement

Mool Chand Garg, J.—This appeal has been filed u/s 82 of the Employees State Insurance Act, 1948 (hereinafter referred to as "the Act") against the judgment dated 7.4.2001 passed by the ESI court, Delhi in ESI Case No. 15/90, whereby the learned ESI court has dismissed the petition filed by the appellant u/s 75 of the Act.

2. Briefly stating, the facts of this case are that the appellant, a Limited company, filed a petition before the ESI court through its Director and authorized representative Sh. K.J. Gandhi on the allegations that the appellant is registered as an "establishment" under the Delhi Shops and Establishment Act and is providing professional services as their Engineers visit their clients' factories and establishments to advise and guide them about the machine tools, inspection equipments and other engineering equipments which the clients should acquire for the use of manufacturing the goods in their factories/establishments.

3. The respondents alleged that an Inspector of the respondent-corporation visited the appellant-company in the month of October, 1988 and collected some information about the appellant-company and then sent a letter dated

12.11.1988 informing the appellants that on the basis of the inspection conducted by the Inspector on 6.10.1988 the establishment of the appellant-company was covered under the Act by virtue of the Notification dated 30.09.1988 which gives effect to the coverage of the "shops" also. The appellants were called upon to furnish complete and correct particulars in Form-01 within 15 days from the date of issue of the impugned order.

4. It is the case of the appellants that their representative visited the office of the respondent and explained their case that the appellant was not a shop and as such, it was not covered by the said notification. Thereafter, the respondent called upon the appellants to show cause as to why the assessment of the establishment of the appellants should not be made u/s 45A of the Act for the period from 2.10.1988 to 30.9.1988. It was submitted that explanation was furnished by the appellants to the respondent stating that they were not covered under the Act and that invocation of Section 45A of the Act was unwarranted. It was also submitted that there were less than 20 employees and that the establishment of the appellant was not involved in any manufacturing activity.

5. However, the pleas taken by the appellants were not accepted by the respondent. They contested the matter.

6. The ESI court framed the following issues on the pleadings of the parties:

(i) Whether the demand raised by the respondent vide letter dated 8.3.90 is illegal and requires to be quashed as alleged by the petitioner in his petition" OPP

(ii) Relief.

7. The ESI court also framed the following additional issue on 30.4.1998:

Whether the factory in suit is coverable under the ESI Scheme and whether Section 45A of ESI Act could be invoked without the coverage of the factory"

8. Another additional issue was also framed on 03.01.2001 to the following effect:

Whether the employees getting salary beyond the limit of Rs. 1600/- per month have been counted for the purpose of coverage of the petitioner under the ESI Act"

9. Thereafter, the parties led their evidence. The appellants examined PW-1 Sh. Subhash Gupta, who is an account officer, and PW-2 Sh. R.K. Gupta, Manager (Finance). On the other hand, respondents have examined RW-1 Sh. Raj Kanwal, Deputy Director, & one Inspector who conducted the inspection. The ESI Court however had not agreed with the appellant and dismissed their petition u/s 75 of the Act.

10. On the question as to whether the establishment of the appellant was not covered under the Act, relying upon the Notification dated 30.09.1988 the Court held that the establishment of the appellants was covered within the definition of the "shop". With respect to the objections raised that the appellants was not

doing manufacturing activities and the employees who were employed by the employer were less than 20, the ESI court has observed that the appellant company did not fill up Form 01 given to them for supplying necessary particulars and in such a situation when a factory/establishment is not filing the return in the light of the Act, invocation of Section 45A of the Act was fully justified. Consequently, the learned ESI court held that once the respondent has proved that the appellants are employing requisite number of workers, which fact was also admitted by a witness of the appellants, who admitted that on a particular day the employees strength in the establishment of the appellants was 65 employees, claim of the appellants that they were exempted from the operation of the Act is not sustainable. Consequently, the claim petition filed by the appellants was dismissed as without any merit.

11. Before this Court, the learned Counsel appearing for the appellants has assailed the impugned order by making submissions that the ESI Court has failed to appreciate that:

(i) The Employee's State Insurance Act will apply to an Establishment when the Establishment as a fact employs 20 or more personnel drawing a salary of Rs. 600/- per month (as applicable at the relevant time). In the absence of such a determination, the provisions of the Act cannot be unilaterally extended to an Establishment.

In this regard, it has been submitted that the ESI court failed to appreciate that it was a specific stand taken by the appellants that there were less than 20 number of employees and therefore, the employees of the appellant come within the definition of the "employees" as stated u/s 2(9) of the Act. It has also been submitted that the question as to how many employees working under the appellant should have been considered at the relevant time i.e. when the inspection took place and notice was sent by the respondent i.e. between 1988 to 1990.

(ii) Merely because no reply was filed on behalf of the appellant to the queries made by the respondent, no presumption can be raised that more than 20 employees were working and therefore, the appellants were covered under the provisions of the Act as claimed by the respondent.

(iii) The learned Judge has failed to appreciate that that the activities of the Appellant constituted activities where the services rendered and the machinery/equipments imported were never brought to the premises of the Appellant and/or delivered there. The services rendered by the petitioner company did not constitute activities which would come under the definition of Shop.

(iv) It has been submitted that in their reply it was specifically stated by them that:

We rendered requisite assistance to our client in procuring the equipment as required by them from the manufacturers in India as well as from the overseas

country. That after the machine tools and other equipments are received by our clients in their factories and establishments from the manufacturers, our engineers, technical personnel, visit them to advise them on the installation of such machine tools and other equipments, their operation, maintenance, training of their operations etc., all such type of services are rendered at their premises i.e. in their Factories and Establishments.

(v) It has also been submitted by them that the action of the respondent corporation was against the principles of natural justice for the following reasons:

a. No report was prepared in the presence of the appellants. Further, no copy of the said report was ever served upon the petitioner company.

b. there was no compliance of notice u/s 44(2) by the respondent corporation and they straightaway proceeded with the determination of contribution u/s 45A without giving a hearing to the petitioner company.

c. There is no compliance on the part of the respondent corporation of Regulation 10B(c) & (d) before proceeding u/s 45A of the ESI Act.

(vi) It has also been submitted that the entire proceedings conducted by the respondents were based on assumptions in the absence of any evidence to show that the premises of the appellant were used for the business of the Shop.

(vii) It has also been submitted that the respondents did not cross-examine the witnesses of the petitioner with regard to the number of eligible employees for purposes of cover ability under the Act.

12. On the other hand, the learned Counsel appearing for respondent submitted that in view of the Notification dated 30.09.1988 the "shops" covered even the establishment of the appellants company and thus, they were covered within the purview of Section 1(5) of the Act w.e.f. 2.10.1988. Relying upon the judgment delivered in the case of Hindu Jea Band, Jaipur Vs. Regional Director, Employees' State Insurance Corporation, Jaipur, pleaded that branches of appellant also covered under the notification.

13. It was also submitted that the appellants were thereafter called upon to furnish a complete and correct particulars in Form 01 within 15 days of the date of issue of the impugned order. However, they failed to supply the necessary particulars and therefore, it became necessary for the respondent to assess the appellants u/s 45A of the Act for the period in question and for which they propose to assess the appellants at Rs. 49,630.25p on ad hoc basis despite affording an opportunity of personal hearing, which was fixed on 12.03.1990 at 2 pm. The appellants though sent their representative but did not file a reply to the show cause notice for which they took time and finally made a representation. It is also submitted that their establishment was not a "shop" and that they were not liable to coverage u/s 1(5) of the Act or that no assessment order could have been passed against the appellants u/s 45A of the Act on ad hoc basis, is not sustainable.

14. It was further submitted that in view of non-submission of Form 01 by the appellants their claim that they were employing less 20 number of employees was also not sustainable.

15. I have heard the submissions made on behalf of the parties and have perused the order passed by the ESI Court. A bare reading of the Notification dated 30.09.1988 read with Section 2(9) and Section 2(27) of the ESI Act goes to show that even a shop has been covered under the Act, which in fact extends the scope of the applicability of the Act to all such establishments.

16. There is no dispute that the appellants are also rendering service and activities carried out from their premises and are registered under the Shop & Establishment Act. The appellants act as commission agents and gets commission on machinery manufactured by foreign or Indian companies. Since the appellants despite service of notice failed to supply the necessary particulars, they were rightly issued a show cause notice u/s 45A of the Act where again they were given an opportunity to clarify their position.

17. I may also take note of Section 45A of the Act, which reads as under:

45A. 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 45A is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties u/s 45A, 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:

PROVIDED that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being

(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 45B or the recovery u/s 45C to Section 45I.

18. It is apparent from the record that the appellants have not filed a return as was required to have been filed u/s 45A of the Act. They have not done so despite receiving a notice from the respondent to do so.

19. Before the court, the respondents have proved on record the survey report Ex.RW1/1, which was signed by PW-2 Sh. R.K. Gupta even though he denied having signed the same. RW-1 Raj Kanwal has deposed in his cross-examination that it was Sh. R.K. Gupta who signed the same. It was not in dispute that Form 01 was supplied to PW-2 Sh. R.K. Gupta which has not been filled up and filed.

The ESI Court has rightly observed that:

There is no reason to disbelieve his testimony. Form 01 is supplied as per Regulation 10-B of the Employees State Insurance (General) Regulations, 1950 which contains necessary information about the employees employed by the employer. The petitioner-company did not fill up the form 01 nor the same was supplied to the respondent. In such a situation, when the petitioner-company was inspected by the Inspectors of the respondent, they were given the Form 01 and as per the record of the petitioner, they were shown to be employing the requisite number of employees, it was obligatory on the petitioner-company to file their return or to produce their record before the respondents but there is nothing in the evidence of PW-1 Sh. Subhash Chand Gupta and PW-2 Sh. R.K. Gupta that they had pursued the matter to a logical end with the respondents excepting visiting the office of the respondents and thereafter leaving the matter to them as the respondents had assured them to take appropriate action. In such a situation, when a factory or establishment is not filing return, in the light of above legal and factual discussion, the invocation of Section 45A of the Act is fully justified.

20. Moreover, as regard the submissions made by the appellants that their establishment was not covered even if they were to be considered as a "shop" as they were not employing requisite number of employees, the answer lied in the judgment reported in *Hindu Jea Band, Jaipur Vs. Regional Director, Employees' State Insurance Corporation, Jaipur*, referred to by the appellants, which was dealt with by the ESI Court in the impugned judgment. The relevant observations are as under:

27. In an authority reported as *Hindu Jea Band, Jaipur Vs. Regional Director, Employees' State Insurance Corporation, Jaipur*, it was observed:

It is not that a place where goods are sold is only a shop. A place where services are sold on retail basis is also a shop. The place of business of a firm carrying on the business of playing music on occasion, such as marriages and other social functions which made available on payment of the stipulated price the services of the members of the group of musicians employed by it on wages is a shop to which the Act is applicable by virtue of the notification, the fact that the services are rendered by the employees engaged by the firm intermittently or during marriages does not entitle the firm to claim any exemption from the operation of the Act. The firm cannot rely on Sub-section (4) of Section 1 of the Act which refers to factories only in support of its case. Moreover, the services of the employees of the firm are not confined only to marriages. It cannot also be said that marriages take place only during a specified part of the year. Nowadays marriages take place throughout the year.

28. It is the admitted case of the petition that they are providing services. When services are being sold, it becomes a commercial activity. Since the Act is intended for social welfare of the workers, it has to be given an extended

meaning. The petitioners are not providing anything for free as is conceded by PW-1 in his cross-examination that the advice is given free. This is not the case of the petitioner.

21. Similar proposition has been laid in the case of M/s. Cochin Shipping co. Vs. E.S.I. Corporation,

22. In this case, it is not in dispute that the appellants were supplied with Form 01, they were also given a show cause notice dated 12.11.1988 and again an opportunity of hearing but they have not supplied the necessary information. However, their own witness, namely, PW-1 Sh. Subhash Gupta has admitted that strength of their employees on a particular date was 65, which clearly takes the establishment of the appellant within the meaning of "an establishment employing more than 20 employees" on a particular day and thus, covers the appellants under the Act. There is no reason to interfere with the order of the ESI Court in this appeal. Accordingly, the appeal is dismissed with no order as to costs. Trial court record, if any, be sent back forthwith.