
(2019) 09 CAL CK 0032

In the Calcutta High Court

Case No : Civil Order/Miscellaneous Cas (CO) No. 2135 Of 2018

M/s Imperial Construction Compa

APPELLANT

Vs

Employees State Insurance Corporation

RESPONDENT

Date of Decision : 11-09-2019

Acts Referred:

Employees' State Insurance Act, 1948 — Section 2(9), 2(9)(ii), 2(9)(iii), 40, 41, 45A, 45AA, 45C, 45I, 75, 75(2B), 82
Limitation Act, 1963 — Section 5, 12
Constitution Of India, 1950 — Article 227

Citation : (2019) 09 CAL CK 0032

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Kashinath Roy, Subal Maitra

Final Decision : Allowed

Judgement

Sabyasachi Bhattacharyya, J

1. The petitioner is an enlisted electrical contractor with the Calcutta Electric Supply Corporation Limited (CESC) under its Mains Department on and from December 7, 2000. The terms and conditions of the contract between the CESC and the petitioner are reflected in a letter issued by the Manager, Mains Distribution of the CESC, to the petitioner, which comprised of the agreement between the two.

2. The grievance of the petitioner is that, by an order dated August 23, 2017, passed by the Deputy Director of the Employees' State Insurance Corporation, purportedly under Section 45A of the Employees' State Insurance Act, 1948 (hereinafter referred to as "the ESI Act"), it was determined that the petitioner was liable to pay its contributions totalling Rs.39,96,135/? for the period from March, 2013 to December, 2016 in lieu of its liabilities under the ESI Act. The said order treated the petitioner to be one of the principal employers and the petitioner was ordered to pay the said amount within sixty days from the date of

the order, failing which it was directed that the amount would be recovered under Section 45?C to 45?I of the ESI Act.

3. It was also indicated in a footnote to the said order that, in case the petitioner was not satisfied with the said order, it might prefer an appeal to the Appellate Authority as may be provided by regulation, within sixty days of the date of the order, after depositing twenty?five percent of the contribution so ordered or the contribution as per his own calculation, whichever was higher, with the Corporation.

4. The petitioner, being thus aggrieved, preferred an appeal under Section 45AA of the ESI Act before the competent Appellate Authority. However, by a communication bearing No. C/INS. VI/41000599770001019/5090 dated November 28, 2017, the Deputy Director of the ESI Corporation, who had passed the order under Section 45A of the said Act, himself communicated to the petitioner that the appeal preferred by the petitioner under Section 45AA of the ESI Act had been rejected by the competent authority as the appeal was not made along with payment of twenty?five percent of the amount as per the footnote to the order under Section 45A dated August 23, 2017.

5. Thus aggrieved, and raising questions as contemplated in Section 75 of the ESI Act, the petitioner approached the Employees' Insurance Court with Tender Case No. 21 of 2018, wherein the petitioner made an application under Section 75(2B) of the said Act for waiver of the deposit of fifty percent of the amount due, contemplated under the said sub?section, and prayed for injunction as well.

6. Vide Order No. 2 dated May 11, 2018, the Employees' Insurance Court refused the prayer for exemption from depositing fifty per cent of the claimed amount, but, by the same order, allowed the prayer for injunction made by the petitioner, restraining the opposite party/ESI Corporation, its men and agents etc. from realizing any amount on the basis of the impugned order dated August 23, 2017 under Section 45A of the ESI Act, covering the period from March, 2013 to December, 2016, and directed that such order shall remain stayed till the disposal of the ESI case, subject to deposit of fifty per cent of the claimed amount of Rs.39,96,135/?, that is, Rs.19,98,068/? , by the next date, that is, June 14, 2018. It was further observed that if the applicant failed to deposit such amount within the stipulated time, the said case shall be dismissed. Certain other ancillary observations were also made in the said order.

7. Being aggrieved by such order dated May 11, 2018 passed by the Employees' Insurance Court, the petitioner has preferred the instant application under Article 227 of the Constitution of India.

8. Learned counsel for the petitioner, by placing reliance on Section 2(9) of the ESI Act, submits that the petitioner did not come within the purview of a principal employer under the said sub?section. The contemplation of Section 2(9) as regards "employee" indicated the persons to whom the ESI Act would apply, and was not applicable to the instant case, since none of the criteria stipulated

therein was satisfied in the present case. The provisions of Section 2(9) of the ESI Act are set out hereinbelow:

"Employees' State Insurance Act, 1948:

Section 2(9): "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and -

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment whether such work is done by the employee in the factory or establishment or elsewhere; or

(ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service; and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment or any person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961, and includes such person engaged as apprentice whose training period is extended to any length of time but does not include -

(a) any member of the Indian naval, military or air forces; or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government:

Provided that an employee whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government at any time after (and not before) the bringing of the contribution period, shall continue to be an employee until the end of that period."

9. Learned counsel for the petitioner next places Section 75(2B) to impress upon the court that there was scope for waiver and/or reduction of the amount of fifty percent, payable along with a challenge under Section 75, under the proviso to the said sub?section.

10. Next placing reliance on Section 40 and Section 41 of the ESI Act, learned counsel for the petitioner submits that, even if for argument's sake it was assumed that the employees came within the purview of the ESI Act, the principal employer, being the CESC, was to disburse the payment first according to Section 40. Only then, the principal employer could recover the said amount

from the immediate employer under Section 41 of the Act who, in the present case, is the petitioner.

11. It is thus argued that the discretion exercised by the Employees' Insurance Court in refusing to waive the amount of fifty percent of dues payable along with a challenge under Section 75, was exercised on erroneous legal yardsticks, without going into the prima facie strength of the petitioner's case, inasmuch as the ESI Act was not at all applicable to the present case.

12. Learned counsel for the petitioner argues, on the strength of a memorandum of settlement entered into between the employees' unions and the petitioner on September 20, 2013 under the aegis of the Conciliation Officer and Additional Labour Commissioner, Government of West Bengal, that the employees were entitled only to the statutory obligations under the Payment of Gratuity Act, 1972 and the Employees' Compensation Act, 1923, which the petitioner was liable to abide by. The said agreement with the employees did not envisage any coverage under the ESI Act at all. In view of such conscious decision taken ad idem between the employees and the contractor, the same was binding on both and the provisions of the ESI Act could not be unilaterally invoked by the ESI Corporation in the present case.

13. By relying on the judgment reported at (1992) 1 SCC 441, equivalent to AIR 1992 SC 573 [C.E.S.C. Ltd. etc. vs. Subhash Chandra Bose and Ors.], it is argued on behalf of the petitioner that employees under the electrical contractors empanelled with the C.E.S.C. Ltd. did not come within the purview of the ESI Act at all. It was enunciated in the said judgment that there was no supervision exercised by the C.E.S.C. or its duly appointed agents over the works which were performed by the employees of the electrical contractors. As such, the petitioner did not operate as an agent of the principal employer, that is, the C.E.S.C., within the contemplation of Section 2(9) of the ESI Act.

14. Learned counsel for the opposite party submits that an appeal lay against an order passed by the ESI Court under Section 82 of the ESI Act and as such, the present application under Article 227 of the Constitution is not maintainable. Section 82 reads thus:

"82. Appeal. - (1) Save as expressly provided in this section, no appeal shall lie from an order of an Employees' Insurance Court.

(2) An appeal shall lie to the High Court from an order of an Employees' Insurance Court if it involves substantial question of law.

(3) The period of limitation for an appeal under this section shall be sixty days.

(4) The provisions of sections 5 and 12 of the Limitation Act, 1963 shall apply to appeals under this section."

15. It is further argued that notices were duly issued by the ESI Corporation to the petitioner/contractor on March 25, 2015 and May 22, 2017 asking for

payment of the contractor's contribution to the ESI funds. However, such notices fell on deaf ears.

16. Learned counsel for the opposite party also places the scope of a decision by the Employees' Insurance Court under Section 75 of the ESI Act.

17. It is submitted that after dismissal of the appeal preferred by the petitioner under Section 45AA on the ground of non-deposit of the mandatory twenty-five per cent, as statutorily required, the present application under Article 227 ought not to be entertained at all.

18. Learned counsel for the opposite party submits that the petitioner is thus a proven defaulter at every stage of the proceeding and as such, has not come with clean hands. In this context, learned counsel for the opposite party places the order passed by the ESI Corporation under Section 45A of the ESI Act and submits that there was no irregularity in the same.

19. It is submitted on behalf of the opposite party, although tentatively, that the amount of provident fund collected by the petitioner was not deposited with the ESI Corporation. Such contention, however, was opposed by the petitioner on the ground that no such collection was ever made by the petitioner from the employees at all.

20. It is further submitted on behalf of the opposite party that the amount partially recovered from the petitioner by the ESI Corporation was already deposited in the ESI funds and therefore, could not be repaid. As such, the prayer of the contractor/petitioner to get a refund of the amount already recovered could not be granted in any event. In support of such proposition, learned counsel cites a judgment reported at 1999(83) FLR 805 (Cal) [Employees' State Insurance Corporation vs. M/s Mackintosh Burn Limited and another].

21. Learned counsel for the opposite party next cites a judgment reported at AIR 1993 SC 252 [M/s Cochin Shipping Co. vs. E.S.I. Corporation], which liberally interpreted the expression 'shop' as envisaged under the ESI Act, on the ground that the said Act was a piece of welfare legislation, which ought to be interpreted in favour of the employees.

22. Learned counsel for the opposite party next cites a judgment reported at 2001 LAB. I.C. 273 (Madras) [Ennore Foundries Ltd. vs. Government of India and others], in respect of the date of liability for payment of the contributions under the ESI Act.

23. Learned counsel next cites a judgment reported at AIR 1961 Cal 381 [Indrapuri Studio Private Limited and another vs. Employees' State Insurance Corporation], wherein a division bench of this court held that the liability under Section 40 arises even if the contribution is not deducted from wages.

24. The next judgment cited by the opposite party is reported at 1987 (1) CHN

208 [Calcutta Electric Supply Corporation (India) Ltd. vs. Employees' State Insurance & Ors.], for the proposition that, even if the contractor engages labour, he does so as agent of the principal employer, since the principal employer is liable for such employment.

25. Learned counsel for the opposite party next cites a judgment reported at AIR 1977 Cal 258 [The India Jute Company Ltd. vs. The Regional Director, West Bengal, Region, Employees' State Insurance Corporation and another], as well as a judgment reported at AIR 1978 SC 356 [M/s Union Carbide (India) Ltd. vs. The Employees' State Insurance Corporation and others], both for the proposition that workers working outside the factory are also covered by Section 2(9) of the ESI Act.

26. In reply, learned counsel for the petitioner relies on a judgment reported at 2008 (119) FLR 444 [Employees' State Insurance Corporation vs. Birla Jute and Industries Ltd.], to show that an application under Article 227 of the Constitution of India lies against an order of the Employees' Insurance Court on certain questions of jurisdiction, despite the availability of an appeal.

27. Upon considering the submissions of both sides, it is seen that an appeal under Section 82 of the ESI Act is available against a substantive order of an Employees' Insurance Court, if it involves a substantial question of law. However, it is well-settled that a palpable jurisdictional error or illegal or irregular exercise of jurisdiction would attract interference under Article 227 of the Constitution of India and the provision of an appeal cannot operate as an absolute bar in that regard.

28. A mere perusal of Section 2(9) of the ESI Act shows that the present case falls outside the purview of the said Act. As per the definition of "employee" under sub-section (9) of Section 2 of the said Act, three scenarios are indicated, when an employee can come within the purview of the Act. The first clause, being clause (i), indicates that such an employee has to be directly employed by the principal employer, that is, the CESC, which is not the present case.

29. Clause (ii) indicates that an "employee" has to be employed by or through the immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to such work or incidental to the purpose of the factory or establishment. In the present case, there does not appear to be any supervision contemplated in any of the agreements in question. The contract dated December 7, 2000, entered into between the CESC and the petitioner indicates that the duty of engaging the employees was totally left to the petitioner. It was indicated in the said contract, more particularly in clause 2 thereof, that all orders from CESC Ltd. were subject to observance of all the statutory obligations under the Contract Labour (R&A) Act, 1970, Accident Insurance, Provident Fund and other relevant statutory provisions as applicable to contractors' personnel engaged in executing the work.

There was no indication of any supervision by the CESC, if it could be construed as a principal employer, on the work to be done by such employees at any stage. Section 2(9), clause (ii), consciously distinguishes between an immediate employer, which is used in the first part of the sentence, with an agent of the principal employer, used in the second part thereof, thereby making it clear that an immediate employer was different and contra distinct from an "agent" of the principal employer, since both the expressions "immediate employer" and "agent" were used in different parts of the same sentence. Hence, it could not be said that, for the purpose of engagement of labour, the immediate employer, that is, the petitioner, was an agent of the principal employer, that is, the CESC. Even taking into consideration the ratio laid down in 1987(1) CHN 208 (supra), it is seen that the circumstances therein are distinct and different from the present case. In the said case, the engagement of labour and the work done by the employees were undertaken by the contractor in the capacity of an agent of the principal employer as per the terms of agreements between the principal employer and the contractor.

30. However, the agreement between the CESC and the petitioner does not reflect any of such criteria.

31. Clause (iii) of sub?section (9) of Section 2 of the ESI Act, in any event, is not attracted, since the said clause envisages only employees whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service.

32. As such, the ESI Act is not applicable to the employees in the present case on a proper reading of Section 2(9) of the ESI Act.

33. That apart, neither the agreement between the petitioner and the CESC, nor the memorandum of settlement between the contractors (including the petitioner) and the employees' unions, although referring to various other legal provisions and statutes for the benefit of the employees, mentioned the ESI Act, to contractually bind the petitioner to the provisions of the said Act.

34. Moreover, Section 40 and Section 41 of the ESI Act, read in conjunction, make it clear that, in any event, it was the principal employer who was to be charged with the initial liability of contribution to the ESI fund. The principal employer could then recover the sum from the immediate employer (the present petitioner) under Section 41, which was an inter se action between the principal employer and the contractor and had nothing to do with the ESI Corporation.

35. As seen from the notice issued by the ESI Corporation to the petitioner, it is evident that the petitioner was deemed to be one of the principal employers by the opposite party?Corporation, which was patently contrary to law and the facts of the case.

36. As far as the argument of the opposite party regarding non?deposit of

twenty? five percent accompanying the appeal under Section 45AA of the ESI Act by the petitioner is concerned, the same could not be a yardstick to be considered while refusing to waive the fifty percent deposit contemplated in Section 75(2B) of the Act. Moreover, there is some illegality in the communication of such order, which is evident from the fact that the original forum, that is, the Director of the ESI Corporation, who passed the order under Section 45A, itself communicated the Appellate Authority's order of dismissal of the appeal under Section 45AA, preferred by the petitioner, to the petitioner, which complicity prima facie stares at the face.

37. Moreover, the judgment cited as regards liberal interpretation of 'shop' and the argument of welfare legislation cannot cut ice in the present matter in view of statute itself, that is, the ESI Act, casting no liability on the petitioner to pay its contribution as envisaged under the said Act at all. By no stretch of imagination, the CESC and the works undertaken by the petitioner?contractor could be contemplated to be a shop or establishment as envisaged under the ESI Act.

38. On the other hand, the judgment reported at (1992) 1 SCC 441 (supra), cited by the petitioner, is apt and more appropriate to the factual matrix of the present case, in so far as there is no scope of supervision of the work undertaken by the employees engaged by the petitioner, by the CESC, thereby taking the present case outside the purview of Section 2(9) of the ESI Act.

39. Under such circumstances, the Employees' Insurance Court acted patently without jurisdiction in shirking its duty by not going into the strength of the prima facie case of the petitioner's challenge under Section 75 of the ESI Act at all in refusing to waive the amount of deposit of fifty percent to be made by the petitioner.

40. Taking the facts and law applicable to the instant lis in proper perspective, the petitioner had a strong prima facie case in the application under Section 75 of the ESI Act in so far as the said Act is prima facie not attracted to the present case at all. Hence, the Employees' Insurance Court ought to have waived the entire deposit of fifty percent to be made by the petitioner.

41. That apart, although the agreement between the workers' unions and the contractor was not binding on the ESI Corporation, even then, the said memorandum of settlement dated September 20, 2013, indicates that the interest of the workers was sufficiently protected by casting the liability on the contractor to abide by the statutory obligations under the Payment of Gratuity Act, 1972 and the Employees' Compensation Act, 1923. Moreover, even the agreement between the petitioner and the CESC dated December 7, 2000 cast liability on the petitioner?contractor in respect of statutory obligations under Contract Labour (R&A) Act, 1970, accident insurance, provident fund and other relevant statutory provisions as applicable to the contractor's personnel engaged in executing the work. Such provisions sufficiently covered and protected the

interest of the employees engaged by the petitioner even without the applicability of the ESI Act. Hence, the argument as to liberal interpretation for protecting the interest of the employees does not hold water in the circumstances.

42. Accordingly, C.O. No. 2135 of 2018 is allowed, thereby setting aside the portion of the impugned order dated May 11, 2018, whereby the petitioner was directed to deposit fifty percent of the claimed amount of Rs.39,96,135/?, that is, Rs. 19,98,068/? as a condition for the stay/injunction granted by the Employees' Insurance Court. The petitioner shall not have to deposit such amount of fifty percent and the injunction granted by the impugned order dated May 11, 2018 shall continue till disposal of the Tender Case No. 21 of 2018 pending before the Employees' Insurance Court.

43. However, the Employees' Insurance Court is directed to dispose of the said tender case itself as expeditiously as possible, without insisting on payment of the statutory fifty per cent as indicated above, preferably within six months from the date of communication of this order to the said court.

44. There will be no order as to costs.

45. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.