(2019) 09 BOM CK 0059

In the Bombay High Court

Case No : First Appeal (ESI) No. 347 Of 2006

M/S New Power Supply, A Partnership Concern — APPELLANT

Vs

Deputy Regional Director & Another — RESPONDENT

Date of Decision : 18-09-2019

Acts Referred:
Employees State Insurance (ESI) Act, 1948 — Section 2A, 75(1)(g)

Citation : (2019) 09 BOM CK 0059

Hon'ble Judges : M.G. Giratkar, J

Bench : Single Bench

Advocate : A.P. Wachasunder, B.P. Maldhure, N.W. Almelkar

Final Decision : Dismissed

Judgement

1. The appeal is against the judgment of the Industrial Court, Nagpur in Application (ESI) No. 7 of 1993.

2. The material facts which give rise to the present appeal in short is as under.

(i) The appellant and the respondent no. 2 are the separate establishments. Employees State Insurance Inspector Shri Pande visited the premises on 5-9-1991, 6-9-1991, 19-11-1991 and lastly, on 21-11-1991 and submitted report to the respondent no. 1. The respondent no. 1 issued order dated 20-8-1992, 17-3-1993 and notice dated 2-6-1993 directing the appellant to pay Rs. 21,917/- for the period from 3-3-1991 to 30-9-1992. The respondent no. 1 on the basis of report submitted by the Inspector Shri Pande came to the conclusion that the appellant and respondent no. 2 are internally connected and they are one and the same undertaking.

(ii) The application under Section 75(1)(g) of the Employees State Insurance (ESI) Act, 1948 was filed by the appellant before the Industrial Court, Nagpur for setting aside the order and notice issued by the respondent no. 1. After recording the evidence of both the parties, the Industrial Court dismissed the application, hence, the present appeal.

3. Heard learned Advocate Shri Wachasunder for the appellant. He has pointed out documents and evidence on record. Learned Advocate has submitted that the appellant and the respondent no. 2 are the separate entities. There is no functional interconnectivity and, therefore, both the undertakings are separate. The employees are separately working and, therefore, the provisions of ESI Act are not applicable. He has pointed out evidence of partners, namely, Gurubhau Nardelwar and Shrihari Patil.

4. Shrihari Patil is the common partner in both the undertakings. Learned Advocate for the appellant has pointed out evidence of Pundlik Shelke, Area Manager working in MIDC, Nagpur. Learned Advocate has submitted that Plot No. S-42/1 belongs to appellant and Plot No. S-53 belong to the respondent no. 2. Learned Advocate has submitted that both the undertakings are working on separate plots. Learned Advocate has submitted that there is no interconnection between two undertakings, therefore, the impugned judgment passed by the Industrial Court is liable to be quashed and set aside.

5. Heard learned Advocate Shri Almelkar for the respondent no. 2. He has supported the arguments advanced by learned Advocate Shri Wachasunder.

6. Heard learned Advocate Mrs. Maldhure for the respondent no. 1. She has pointed out the report submitted by Inspector Shri Pande to the respondent no. 1. Learned Advocate has pointed out evidence of Shri Pande and submitted that witness visited the undertaking of the appellant on 5-9-1991, 6-9-1991, 19-11-1991 and lastly, on 21-11-1991. As per his report, the appellant and the respondent no. 2 are working in the same premises. Nature of work is same. Employees of both the undertakings are same. The work of appellant and the respondent no. 2 was carried on Plot No. S-42/1.

The machineries were fitted on Plot No. S-42/1. Electric charges were paid by the appellant and not by the respondent no. 2. As per the personal observations of Shri Pande, more than 16 employees were working in the establishments of appellant and the respondent no. 2. Those employees were common. No separate muster roll was prepared by the respondent no. 2 and the appellant. The muster roll does not show the names of employer. One of the employees, namely, Lokhande prepared the challan for both undertakings. All this evidence shows that respondent no. 2 and the appellant are one and the same undertaking having more than 16 employees, and therefore, covered under the ESI Act.

7. Appellant tried to show that both the appellant and the respondent no. 2 are the separate entities. To support their contention, they have examined area manager of MIDC Shri Pundlik Shelke. In his examination-in-chief, he has stated that as per the record, establishment of appellant is on Plot No. S-42/1 and Plot No. S-53 was allotted to the respondent no. 2. In the cross-examination, he has not given any definite answer. He has stated in his cross-examination as under :-

"I could not say whether plot No. S-53 was open prior to 7/9/1991. I could not say about building construction on plot No. S-53......"

Cross-examination of Shri Pundlik Shelke shows that he has no personal knowledge.

8. As per the personal visit of Inspector Shri Pande on 5-9-1991, 6-9-1991, 19-11-1991 and lastly, on 21-11-1991, the appellant and the respondent no. 2 though shown as separate undertakings but they are working on one place. Following comparative chart prepared and proved by Inspector Shri Pande shows the interconnection of the appellant and the respondent no. 2.

Particular examined

New Power Supply

Russian Electricals

Remark

Names of Partners

1. Shri Gurubhau S/o Visanaji Nardelwar Aged 29 yrs R/o Somalwada, Wardha Road, Nagpur

2. Shri Shrihari S/o Shamraoji Patil aged 28 yrs., Now R/o Plot No. 460/12 Anand nagar, Behind Sakkardara Police Station, Nagpur

1. Shri Shrihari S/o Shamraoji Patil Age - 37 yrs, R/o Plot No. 460/12 Anand nagar, Behind Sakkardara Police Station, Nagpur

2. Indubai W/o Gurubhau Nardelwar aged about 34 yrs R/o Plot No. 2 Sita Nagar, Wardha Road, Nagpur

Nature of business/ activity

Extract from the partnership deed - page 2 "That the business of partnership firm shall be repairs & distribution of power winding transformers as per ssi certificate : Mfg./processing activity (1) Electrical transformers (2) Power transformers (3) distribution transformers (4) Electrical Motor rewinding, electrical load - 34 HP

Extract from the partnership deed executed on 1/9/90 "The firm shall carry on the business of manufacturer and repairs of distribution and power transformers, current transformers, Voltage transformers and fuse elements and such other works

Place of business

Originally on Plot C-78 MIDC (rented premises) now on S-42/1, MIDC (own)

S-42/1, There is plot purchased & now construction work started for separate premises on S

Russian Electricals does not pay any rent to M/s New Power Supply for premises

Electric Connection

Electric Connection had

There is no separate electric connection for this factory and the electric is used for its work from the connection of New Power Supply without cost.

Plant & Machinery

On Plot No. S-42/1

Machineries of Russian Electricals are kept also kept/ installed in the factory premises of M/s New Power Supply. For example - L.V. Winding Machine

Inter Transferability /dependence of each other

(1) All employees in one muster book (2) Both units in one premises/ one entrance, electric power of one used by both (3) Heating chamber- common (4) Delivery challan by one employee for both

Mr. P. F. Lohkhande, a Clerk of New Power Supply has singed delivery challans of Russian Electricals

Heating chamber of New Power Supply is utilized by Russian Electricals

Registration Nos.

11/14/05156/PMT/ SSI dtd. 8/6/89 Date of commencement of order as per SSI cost - 1/1/89

S.S.I. Regn. Certificate No. 11/14/11267 dtd. 20/8/91 (provisional) Registration is subject to availability of Plot in MIDC area. Nature of business - C.T.P.T. units, fuse elements/E/L motors. Distribution & power transformer / welding transformers

Books of accounts

Common attendance register without any mention of name of the factory/firm. Books of accounts not made available said to be under preparations

9. The evidence of Inspector Shri Pande and above chart show that though appellant and the respondent no. 2 shown as separate entities but the work of both the establishments are same. The work of both the establishments were going on on Plot No. S-42/1. No work was found on Plot No. S-53 as contended by the appellant. The common attendance register without mentioning the name of factory/firm was maintained. Near about 16 employees were found working. Therefore, respondent no. 1 issued order for the recovery of Rs. 22,923/-.

10. Learned Advocate Shri Wachasunder has pointed out following decisions :

(1) Associated Cement Companies Limited Vs. Ir Workmen [AIR(SC) 1960 SC

56]. In the cited decision, the factory and lime stone quarry were situated on different locations. The facts in the cited decision are very much different.

(2) Fine Knitting Co. Ltd. Vs. Industrial Court, Bombay [1962 (Suppl.) (3) SCR 196]. Fine Knitting Company established Spinning Section in 1924 as subsidiary to the hosiery section. It is held that hosiery can exist without spinning.

(3) Workmen of the Straw Board Manufacturing Company Limited Vs. M/s. Straw Board Manufacturing Company Limited [1974 I LLJ 499]. It was a case of closure. It was observed that each factory was registered separately under the Factories Act. There was a dispute in respect of lay-off/retrenchment. In paragraph no. 18, it was observed by the Apex Court that :

18. On the other hand the circumstances pointed out in favour of the respondent are "that the two units are separate. Both factories are registered separately under the Factories Act and they are in separate premises. The raw materials used in the two factories are different and it is obtained from different sources. Electricity is obtained by the two factories from different sources, the sale of products manufactured in the respective units is effected from their respective offices, the staff of the two separate mills is separate and wages are paid separately. The accounts of the two mills are maintained separately although finally they are amalgamated into one account of the company. Fire insurance of the two factories is done separately, the local manager of the Employees' State Insurance Corporation has allotted different numbers of provident fund to the two factories, the assessment of sales tax for the sales of products of the two mills is done separately which is obviously due to the fact that the products are different and different rates of sales tax apply to them." There is no provision in the standing orders of the company regarding transfer of workmen from one unit to the other.

In the present case, the employees of appellant and respondent no. 2 were common. There was no separate muster roll prepared by the appellant and the respondent no. 2. It appears that the employees were working for both units. One of the employees namely, Lokhande signed the challan of appellant and the respondent no. 2. Therefore, the cited judgments are not applicable.

(4) Kadamba Sub-Urban Transport Corporation Ltd., Goa Vs. Assistant Provident Fund Commissioner, Goa [1999(3) Mh.L.J. 306]. In the cited decision, the Division Bench of this Court has held that "unless there is functional integrality of two units or dependence of one unit on the other to such an extent that if one was closed it will mean automatically closure of the other section 2A could not be said to be covered."

In the present case, the appellant and the respondent no. 2 having same business on Plot No. S-42/1. All machineries were fitted on Plot No. S-42/1. The electric meter was in the name of appellant. All electric charges were paid by the appellant. Therefore, it cannot be said that the respondent no. 2 was separate establishment.

(5) Nandinee Travels Pvt. Ltd. Vs. Regional Provident Fund Commissioner, Goa [2003-II-LLJ 810]. In the cited case, it is held that two establishments are separate. Their workers were separate. On the other hand, in the present case, the workers of appellant and the respondent no. 2 are same. Common muster roll was prepared. Common employees were working on Plot No. S-42/1. Electric meter was in the name of the appellant. The electrical charges were paid by the appellant. Shrihari Patil is the common partner. Wife of Nardelwar is the partner of the respondent no. 2. Nardelwar along with Patil are the partners of the appellant.

(6) Regional Director, Employees' State Insurance Corporation, Mumbai Vs. Home Engineering Works, Mumbai [2006-I-LLJ 235]. In the cited judgment, the work on the ships and in the factory are located at different places. Moreover, employees for repairing ships are separately engaged. Therefore, it is held that two establishments are separate.

(7) Sunder Transport & Anr. Vs. The Regional P.F. Commissioner [1992 II CLR 977]. In the cited judgment, it is observed that "not only the composition of the partners but the number of partners, their shares etc. all are different. The business of these firms is also not the same. The firms are in existence since 1964 from much before 1975 when the provisions of the Provident Funds Act were made applicable to the activities undertaken by one of the firms, namely, Sunder Transport. It is also, therefore, not possible to contend that these firms were created as separate and independent firms to avoid the liability under the Provident Funds Act. ...."

In the present case, one of the partner i.e. Shrihari Patil is common partner in both the establishments. Wife of Nardelwar is partner in the respondent no. 2. Nardelwar is partner of appellant. Work of both the establishments are same. The employees are same. Therefore, cited judgment is not applicable to the case in hand.

11. Learned Advocate Mrs. Maldhure for the respondent no. 1 has pointed out judgment in the case of Deputy Regional Director, E.S.I. Corporation, Thrissur Vs. Trade Links Enterprises, Ernakulam [2003 I CLR 242] wherein it is held that "due to close business relationship, functional unity, common management, geographical proximity and administrative unity, those establishments can be clubbed together. Coverage justified."

12. In the present case, as per the chart submitted by Inspector Shri Pande, Gurubhau Nardelwar and Shrihari Patil are the partners of the appellant. Shrihari Patil and Indubai W/o Gurubhau Nardelwar are the partners of the respondent no. 2. Therefore, it appears that the partners are common. The business of the appellant is for manufacture, repair and distribution of power transformers. Business of both the establishments are common. The work of both the establishments were found on Plot No. S-42/1. There is electric connection on Plot No. S-42/1. The machineries of both the establishments are on Plot No.

S-42/1. All this evidence adduced by the respondent no. 1 clearly show that employees of appellant and respondent no. 2 are common. Therefore, it is clear that there is functional unity and common management. One of the employees, namely, Lokhande signed the challan of the appellant and the respondent no. 2. Common attendance register was prepared. The name of appellant and the respondent no. 2 not shown separately. There was no separate muster roll. Therefore, it cannot be said the the appellant and the respondent no. 2 are separate establishments. Hence, impugned judgment passed by the Industrial Court is perfectly legal and correct. There is no perversity or illegality in the impugned judgment. In the result, the appeal is dismissed with no order as to costs.

