
(2016) 04 BOM CK 0053

In the Bombay High Court

Case No : First Appeal No. 21 of 2007.

M/s. Shilpa Re-Rollers Pvt. Ltd.

APPELLANT

Vs

Employees State Insurance Corporation

RESPONDENT

Date of Decision : 22-04-2016

Acts Referred:

Employees State Insurance Act, 1948 — Section 45-A, 77(1-A), 82

Citation : (2016) 4 AIRBomR 159 : (2017) 1 ALLMR 776 : (2016) 6 BCR 472 :
(2016) 150 FLR 430 : (2016) LabLR 789 : (2016) 2 LLJ 677 : (2016) 3 LLN 586 :
(2016) 5 MhLJ 704

Hon'ble Judges : A.S. Chandurkar, J.

Bench : Single Bench

Advocate : R.B. Puranik, Advocate with N.W. Almelkar, Advocate, for the Appellant; B.P. Maldhure, Advocate, for the Respondent

Final Decision : Allowed

Judgement

A.S. Chandurkar, J.(Oral) - This appeal filed under Section 82 of the Employees State Insurance Act, 1948 (for short, the said Act) takes exception to the order dated 4-10-2006 passed by the learned Judge, Employees State Insurance Court, Nagpur in proceedings under Section 75 of the said Act.

2. The appellant is a private limited Company to which the provisions of the said Act have been made applicable. In the matter of contribution payable by the appellant for the years 1993-94 and 1994-95 inspection was carried out by the Officers of the respondent Corporation. On 23-12-1997, a show cause notice came to be issued by the Corporation calling upon the appellant to pay an amount of Rs. 1,74,983/-. In the said show cause notice, the dues claimed were on account of contribution for the difference in the payments made to contractors as well as on the difference on the amount paid to Security Guards. The appellant appeared before the Corporation and contested the proceedings. After grant of necessary opportunity and after exchange of communications, the Deputy Director of the Corporation passed an order under Section 45-A of the

said Act dated 17-8-2004. It was held that as the difference of amount remained unexplained, the dues as proposed in the notice dated 23-12-1997 were finalized. On that basis a demand of the contribution for Rs. 1,74,983/- under Section 45-A of the said Act came to be made.

3. The appellant challenged the aforesaid order in proceedings under Section 75 of the said Act. It was the case of the appellant that the relevant records had been made available to the Inspectors of the Corporation during their visits. It was stated that an amount of Rs. 6,348/- as ESI contribution on the amount of Rs. 1,15,406/- was paid as demanded on 15-12-1997. Similarly, on 22-6-2002 an amount of Rs. 555/- as ESI contribution on the amount of Rs. 10,081/- was also paid. It was then stated that considering the period of time that had elapsed, the relevant records were not available and, therefore, the proceedings ought to be dropped.

The appellant examined its Personnel Officer below Exhibit-14 while the Corporation examined its Deputy Director below Exhibit-20. The learned Judge of the Insurance Court after considering the material on record held that no records had been produced by the appellant and, therefore, the order passed under Section 45-A of the said Act was just and proper. It was further held that the dispute for the period from 1993-94 and 1994-95 was never closed and the same continued till the passing of the order under Section 45-A of the said Act. On that basis by order dated 4-10-2006, the application under Section 75 of the said Act came to be dismissed.

4. The following substantial questions of law arise in the second appeal:

(i) Whether the Employees' State Insurance Corporation was entitled to raise the claim against the employer for alleged non-payment of the E.S.I. contribution for the years 1993-94 and 1994-95, after a lapse of five years therefrom in view of the proviso to Section 77(1-A)(b) of the Employees State Insurance Act, 1948.

After hearing the respective Counsel for the parties, substantial question of law No.2 that was framed on 24-1-2007 was re-framed as under:

(ii) Whether the power under Section 45-A of the E.S.I. Act, which deals with ad-hoc determination of E.S.I. dues in the absence of failure on the part of the employer to maintain returns and records, can be exercised when it is an admitted position that E.S.I. Inspector and his higher authorities repeatedly carried out the inspections and the employer made all the relevant documents available and the inspections were followed by production of records by the employer on several occasions, only because the Order is passed after seven years after the first inspection and the relevant records were not available immediately before the passing of the Order.

5. Shri R.B. Puranik, learned Counsel for the appellant at the outset submitted that in so far as the first substantial question of law is concerned, the same stands answered against the appellant in view of the decision of the Hon'ble

Supreme Court in *E.S.I. Corporation v. C.C. Santhakumar* (2007) 1 SCC 584. He submitted that in aforesaid decision it has been held that it was open for the Insurance Corporation to raise a claim against the employer even after the lapse of five years in terms of Section 77(1-A) of the said Act. It was further held that the same was required to be done within a reasonable time.

In so far as the second substantial question of law is concerned, it was submitted that various inspections had been carried out by the Authorities under the said Act and all relevant documents had been produced during the course of inspection. As per the note-sheet of the aforesaid proceedings maintained by the Corporation below Exhibit-35, it was clear that on 29-1-1998 and 9-2-1998 relevant records in respect of the Security Contractors had been produced. The last entry in said note-sheet is dated 9-2-1998, while according to the Corporation, further hearing was granted on 18-3-1998. However, submission of relevant records on 29-1-1998 and 9-2-1998 has not been taken into consideration and on the contrary the Corporation has sought to rely upon the personal hearing granted on 18-3-1998. He submitted that this indicated non-consideration of the relevant records before passing the order under Section 45-A of the said Act. Said aspect was also not considered by the Insurance Court in proceedings under Section 75 of the said Act. He referred to the documents filed on record and emphasised the legal position with regard to the powers under Section 45-A of the said Act as laid down in *E.S.I. Corporation* (supra). He, therefore, submitted that the entire action initiated by the Corporation is liable to be set aside.

6. Smt. B.P. Maldhure, learned Counsel for the respondent at the outset submitted that the present appeal that was filed under Section 82(2) of the said Act would have to be heard only on the substantial questions of law as framed while admitting the appeal. She submitted that it would not be permissible to re-frame a substantial question already framed while hearing the appeal. She referred to the provisions of Section 100 of the Code of Civil Procedure, 1908 and urged that the same were distinct from the provisions of Section 82(2) of the said Act. There was no power with the Court to re-frame a substantial question of law that was already framed while admitting the appeal.

As regards substantial question of law No.(i), the learned Counsel for the respondent did not dispute the legal position flowing from the judgment of the Hon"ble Supreme Court in *E.S.I. Corporation* (supra). In so far as the second substantial question of law is concerned, it was submitted that the appellant had not produced the relevant records despite grant of several opportunities and various visits by the Inspectors for verification. As the appellant had not cooperated by producing the relevant records, the Deputy Director had rightly passed the order under Section 45-A of the said Act. It was then submitted that it was the duty of the appellant to preserve the records as the show cause notice has been issued on 22-12-1997 and the stand that the records had been destroyed was an afterthought. It was, therefore, submitted that considering the

entire material on record, it could not be said that the impugned order had been passed in a manner contrary to law.

7. I have given due consideration to the respective submissions and have gone through the records of the case. In so far as the first substantial question of law is concerned, the Hon''ble Supreme Court in E.S.I. Corporation (supra) considered the question as to whether the contribution for a period prior to five years could be claimed by the Corporation in view of provisions of Section 77(1-A)(b) of the said Act. After considering the scheme of the entire Act, it was held that the right of the Corporation to claim contribution could not be restricted for a period of five years and that such claim could be made by the Corporation within a reasonable period. In view of aforesaid decision, the first substantial question of law is answered in the affirmative and against the appellant.

8. As noted above, the second substantial question of law was re-framed after hearing the respective Counsel on 4-4-2016. The submission made on behalf of the respondent that the Court would not have power to re-frame a substantial question of law that was already framed and that the appeal under Section 82(2) of the said Act was required to be heard only on the substantial questions of law that were framed while admitting the appeal cannot be accepted. Section 82(2) of the said Act stipulates that an appeal would lie to the High Court from the order of the Employees Insurance Court only if it involves a substantial question of law. To restrict an appeal that has been admitted by framing a substantial question of law only to said question despite the fact that during the course of hearing it transpires that either an additional substantial question of law arises or that the substantial question of law already framed is required to be re-framed would amount to putting fetters on the Court hearing an appeal under Section 82 of the said Act. The provisions of Section 82 do not restrict the hearing of an appeal only on a substantial question of law that has been framed while admitting the appeal. In fact, Section 82(2) of the said Act merely requires an appeal to give rise to a substantial question of law for the same to be entertained under said provision. In absence of any such bar in Section 82 of the said Act, there is no reason whatsoever to confine hearing of an appeal filed under Section 82 of the said Act to only those substantial questions of law that have been framed while admitting the appeal. On the contrary, the course as prescribed by provisions of Section 100(5) of the Code of Civil Procedure, 1908 can be followed. If during the course of hearing of an appeal under Section 82 of the said Act, it is found by the Court that the appeal gives rise to a substantial question of law that has not been framed earlier or that a substantial question of law already framed is required to be re-framed, such substantial question of law can always be framed/re-framed subject to grant of opportunity to the contesting party to meet such substantial question of law as framed/re-framed. Hence, said submission made on behalf of the respondent cannot be accepted.

9. While considering the second substantial question of law as re-framed, it would be necessary to first refer to the documents placed on record. On

23-12-1997, a show cause notice came to be issued to the appellant demanding contribution under provisions of Section 45-A of the said Act. The same was under two heads. The first head was contribution on the difference of the contractors' amount and the other was contribution on the difference amount of security charges. The total dues of contribution were taken as Rs. 1,74,983/-. Pursuant to this notice, the Time Office Clerk of the appellant appeared before the Corporation on 2-1-1998 and submitted certain documents. He was called upon to furnish particulars for the difference of amount on 29-1-1998. On 29-1-1998, the ledger and the relevant records for the year 1993-94 and 1994-1995 was produced. Time was granted to produce vouchers for purchase of Gas Cylinders and materials for Security Guards. On 9-2-1998, the said Office Clerk remained present. The office notice at Exhibit.35 of the record reads thus :-

"Shri A. B. Fadnavis, Time Office Clerk, attended today (9-2-98) in response to C-18 (Ad-hoc) dated 23-12-97. He produced the relevant records related to security contractors for the period from 9-3-94 and 94-95. The decision on C-18 (ad-hoc) will be intimated to the employer shortly.

This is the last entry in the office note at Exhibit-35.

10. The record further indicates that on 16-8-1999, a notice was issued to the appellant that the Assistant Regional Director would visit the establishment for inspection of records. Thereafter on 28-12-2001, another notice was issued with regard to the visit on 10-1-2002 which is at record page 129. The Assistant Director of the Corporation referred to the personal hearing dated 18-3-1998 and stated that the records pertaining to the contractors payment was not shown. In response thereto, the appellant on 13-5-2002 stated that the assertions that the records were not shown on 18-3-1998 were denied. It was stated that all relevant records had been shown and a request was made to furnish copies of the proceedings of the personal hearing. Thereafter, on 20-6-2002, a demand of contribution on payment made for furnace repairs for Rs. 555/- was demanded. The same was duly paid.

At this stage, it is necessary to refer to the communication dated 1-10-2003 issued by the Deputy Director of the Corporation (record page 133). Reference is made in said communication to the personal hearing granted on 2-1-1998 and 18-3-1998 and it is stated that on 18-3-1998, the appellant had submitted details of payments made and after considering the same, the contribution on the difference amount of security charges was not payable. The total contribution referred was Rs. 1,20,991/- on said head and 5.5% thereof was demanded being Rs. 6654.50/-. It was then stated that the records relating to the contractors' payment had not been shown. From this communication, it is clear that one head on the basis of which show cause notice dated 23-12-1997 was issued was dropped. A reply was sent by the appellant on 9-10-2003 at Exhibit-30. It was reiterated that all necessary records had been shown and that the details of the contractors' payment could not be produced due to passage of time. After giving one more opportunity and after considering the reply dated 27-5-2004

(Exhibit-32), the order under Section 45-A of the said Act came to be passed.

11. The order passed below Exhibit-33 under Section 45-A of the said Act indicates that in para 3, it has been observed that though it was the case of the appellant that the records were shown in the past, there was no specific recording in the proceedings available in the file as to which records were verified. On this basis, the dues as demanded in the show cause notice were finalized.

12. In the deposition of the witness examined by the appellant, the note-sheet at Exhibit-35 was referred in his cross-examination. This witness has further deposed about various communications exchanged between the parties. The witness examined by the Corporation in his cross-examination admitted that he was not keeping track of the case after submission of the case report and that he was not a party while issuing the order under Section 45-A of the said Act.

The learned Judge of the Insurance Court in the impugned order has held that the reasons for non-production of documents had no legal bearing. It was not a case of reopening the proceedings as the demand for contribution continued from 1997 till 2004. On that basis by observing that the fault was with the appellant, the application under Section 75 of the said Act came to be rejected.

13. As held by the Hon'ble Supreme Court in E.S.I. Corporation (supra), if the records are not produced by the establishment and there is no co-operation, then the Corporation has to make the assessment and determine the amount under Section 45-A of the said Act. The same is in the nature of a best-judgment assessment. The material on record indicates that during the course of personal hearing on 2-1-1998, 29-1-1998 and 9-2-1998 certain records were produced by the representative of the appellant. There is a dispute with regard to the personal hearing dated 18-3-1998. The note sheet at Exhibit-35 does not indicate that there is any reference to grant of any such personal hearing on 18-3-1998. However, in the communication dated 1-10-2003 (record page 133) after referring to the personal hearing on 18-3-1998, the claim for contribution under the head of security charges paid for the period from 1993 to 1995 to security contractors had been dropped. Even assuming that such personal hearing was granted on 18-3-1998, the communication dated 1-10-2003 clearly indicates that the Deputy Director was satisfied with the records produced pertaining to the difference of amount of security charges and, therefore, informed the appellant that the amount under said head was not payable. Thus, from the total demand of Rs. 1,74,983/- one head of demand for difference in the amount of security charges was dropped. This aspect has not been considered by the Deputy Director while passing the order under Section 45-A of the said Act. It was the duty of the Dy. Director to have examined the entire records including the communication dated 1-10-2003 issued by the Corporation. However, without doing so, the Authority has proceeded to pass the order under Section 45-A of the said Act.

Another ground that has been weighed with said Authority is the absence of any specific recording in the proceedings that were available on record. The appellant could not be blamed if the records of the proceedings were not properly maintained by the Corporation. The note-sheet at Exhibit-35 does not indicate grant of personal hearing on 18-3-1998 while on the basis of very same hearing, the Deputy Director on 1-10-2003 informed the appellant that the part of the demand made in the show cause notice dated 27-12-1997 was being dropped. As these relevant aspects have not been taken into consideration, it will have to be held that the order under Section 45-A of the said Act has been passed without proper verification of the records that were available. On this ground the order dated 17-8-2004 under Section 45-A of the said Act is liable to be set aside. The order passed under Section 75 of the said Act by the Employees Insurance Court is also liable to be set aside as the aforesaid aspects going to the root of the matter have not been examined. The second substantial question of law is answered by holding that though power under Section 45-A of the said Act in the facts of the present case could have been exercised, said exercise of powers is without proper verification of the records resulting in vitiating the entire exercise.

14. By order dated 23-2-2007, the effect and operation of the order dated 4-10-2006 passed by the Employees Insurance Court was stayed as the appellant had deposited 75% of the amount that was due and payable by it to the respondent. It was further directed that if the appellant succeeded in the appeal, the respondent would be liable to repay the amount withdrawn by the respondent with simple interest @ 7.5 % per annum. Though the learned Counsel for the respondent submitted that the direction to pay interest on aforesaid amount was not warranted and sought to rely upon the judgment of the Karnataka High Court in M.F.A. No. 5225/03 (The Regional Director, ESI Corporation v. M/s New Taj Mahal Cafe Pvt. Ltd.) decided on 30-7-2004, as the respondent has not challenged the order dated 23-2-2007 passed by this Court nor had the Corporation ever applied for its modification, said request cannot be accepted. Hence, the amount withdrawn by the respondent is liable to be paid to the appellant with interest @7.5% per annum. Needless to state that this would not come in the way of the Corporation in deciding the proceedings afresh and in accordance with law.

15. As a result of the aforesaid discussion, the order dated 17-8-2004 passed under Section 45-A of the said Act as well as the order dated 4-10-2006 passed under Section 75 of the said Act are liable to be set aside. The same are accordingly set aside. The proceedings are remanded to the Deputy Director, Employees States Insurance Corporation, Nagpur who shall consider the entire record and pass fresh orders under Section 45-A of the said Act after giving due opportunity to the appellant. The Corporation shall decide the proceedings under Section 45-A of the said Act expeditiously. The rights and contentions of the parties on merits are kept open. The record and proceedings be sent back forthwith to the Employees State Insurance Court. The first appeal is allowed in

aforesaid terms with no order as to costs.