

(2011) 10 KL CK 0011
In the High Court Of Kerala
Case No : Ins. A No. 23 of 2007

Muthoot Pappachan Consultancy and Management
Consultancy Services

APPELLANT

Vs

The Regional Director

RESPONDENT

Date of Decision : 04-10-2011

Acts Referred:

Employees State Insurance Act, 1948 — Section 1(5), 45A(1), 75, 75(1)(g), 77(1A)(b)
Income Tax Act, 1961 — Section 143(1)(a), 143(3), 145(2), 147, 148

Citation : (2012) 3 KLJ 441

Hon'ble Judges : K. Hema, J

Bench : Single Bench

Advocate : C.M. Stephen, for the Appellant; P. Sankarankutty Nair, SC, ESI
Corpn., for the Respondent

Final Decision : Partly Allowed

Judgement

K. Hema, J.—A petition was filed by appellant-establishment before the Employees Insurance Court ("Insurance Court", for short) u/s 75 and Section 77 of Employees State Insurance Act ("the Act", for short) for a declaration that i) appellant-establishment is not coverable under the Act ii) that Inspector of the respondent-Corporation need not make any inspection u/s 45 of the Act and also to set aside Ext. A6 as null and void. As per the averments in the application, appellant-establishment does not constitute a factory under the Act. The appellant does not come within the purview of any notification issued under the Act or Rules thereunder either by Central Government or by State Government. But, respondent-Corporation sent Ext. A6 notice dated 17.2.1999 to the appellant stating that provisions of the Act are made applicable to the appellant with effect from 1.7.1998. A reply was sent by appellant denying the allegations regarding coverage and it is Ext. A8.

2. As per reply notice, Ext. A8 from the Inspector fixed an inspection in the establishment on 13.8.2002 for the purpose of assessment of contribution u/s 45

of the Act. A request was made by appellant for postponement of the inspection and it was accepted but, the contentions on coverage was rejected. Hence, appellant filed a petition u/s 75 and Section 77 of the Act for a declaration that the appellant is not covered under the Act etc.

3. The respondent-Corporation filed a written objection contending that appellant is covered u/s 1(5) of the Act. It was further alleged that on an inspection conducted in the establishment, it was found that 23 employees were engaged for the business of the establishment with effect from 1.7.1998 and this fact was reported as per report dated 27.7.1998. An intimation was therefore, sent to the appellant, as per Ext. A6, which is a notice in Form C-II, stating that appellant is coverable under the Act and that provisions of the Act have to be complied with, it is further contended.

4. The respondent-Corporation also took up a plea that if at all appellant is not coverable under the Act, it should have instituted legal proceedings within three years from the date on which respondent asserted coverage. But, petition was filed only on 10.9.2002, much after the period of limitation and hence, the application is not maintainable. The Act automatically applied to the appellant and it is unnecessary to give any opportunity to appellant to make it liable under the Act.

5. The appellant examined AW 1 and marked Ext. A1 to Ext. A8 on its side. The respondent examined BW 1 and marked Ext. B1 to B3. On an analysis of the evidence and on consideration of the rival contentions, Insurance Court held that appellant establishment is a "shop" as notified u/s 1(5) of the Act and an order was passed declaring that applicant establishment constitutes a "shop", as notified u/s 1(5) of the Act and that applicant is bound to comply with the provisions of the Act from 1.7.1998 onwards. The respondent was directed to initiate and conclude proceedings for assessment with notice to applicant. The applicant was also directed to clear all dues with interest forthwith, as per law. The above order is under challenge in this appeal.

6. Heard both sides. Perused the records. The main controversy is on maintainability of the petition u/s 75(1)(g) of the Act. While learned counsel for appellant would argue that coverage is a jurisdictional question which can be challenged by applicant in the light of the decision reported in *Srinivas Rice Mills v. ESI Corporation*, (2007) 1 SCC 705, it is argued by learned counsel for respondent argued that application is filed beyond the period of limitation prescribed u/s 77(1A)(b) of the Act and hence, petition itself is not maintainable.

7. Learned counsel for respondent also argued that the application ought to have been filed within 3 years of arising of cause of action as stated in Section 77(1A) (b) of the Act, but the present application was filed only on 10.9.2002, after three years of the notice and hence, the application is barred by limitation. The cause of action in this case arose on the date of issuance of Ext. A6-notice, by which appellant was intimated that the establishment is coverable under the Act,

it is submitted.

8. On hearing both sides and on perusal of the records, I find that the following substantial questions of law are involved in this appeal:

(1) Can an application filed by the establishment u/s 75(1)(g) of the Act be entertained, if no order is passed by the Corporation u/s 45A(1) of the Act, determining the amount of compensation payable in respect of the establishment?

(2) Can the Insurance Court decide the disputed question whether establishment is covered under the Act or not, in a case in which no order is passed by the Corporation u/s 45A(1) of the Act?

(3) Will mere issuance of a notice (in Form C-II) by the Corporation to an establishment give rise to cause of action for filing an application u/s 75(1)(g) of the Act?

(4) In an application filed by an establishment for a declaration that the establishment is not coverable under the Act, can the Insurance Court grant a declaration that the establishment is covered under the Act?

(5) In such an application, can the Insurance Court issue direction to the Corporation to initiate proceedings for assessment and also a direction to establishment to clear all dues of contribution?

9. Question no. 1 to 3: In the nature of the contentions raised, it is necessary to read the relevant provisions of the Act first. Section 77 of the Act (excluding the portions which are not necessary for disposal of this appeal) reads as follows:

77. Commencement of proceedings-(1) The proceedings before an Employees' Insurance Court shall be commenced by application.

[(1A) Every such application shall be made within a period of three years from the date on which the cause of action arose.

Explanation - For the purpose of this sub-section,-

(a) xxxxxxxx

(b) the cause of action in respect of a claim by the Corporation for recovering Contributions (including interest and damages) from the principal employer shall be deemed to have arisen on the date on which such claim is made by the corporation for the first time.

Provided that no claim shall be made by the corporation after five years of the period to which the claim relates;

(c) xxxxxxxx

(2) xxxxxx

10. A reading of Section 77 of the Act shows that the proceedings before the Insurance Court shall be commenced by making an application within a period of three years from the date on which the cause of action arose. Explanation (a) to (c) of Section 77(1A) lays down that cause of action shall be deemed to have arisen in respect of certain claims under certain circumstances. The claims referred to in clauses (a) to (c) of Explanation to Section 77(1A) of the Act are different in nature. The claimants are also different.

11. While as per clause (a) of Explanation of Section 77(1A) the claimant is the insured person or his dependents, claimant under clause (b) is the Corporation. The principal employer is the claimant under sub-clause (c) of Section 77(1A) of the Act. The nature of claims referred to in each of the clauses (a) to (c) of Section 77(1A) of the Act is also different. While the claim under clause (a) is for "benefit" made by the insured person or his dependents, the claim under clause (b) is for "recovering contributions" etc., made by the Corporation from the principal employer and the claim made under clause (c) is in respect of "contribution" made by the principal employer against the immediate employer.

12. Both sides admit that the application in this case involves a claim falling u/s 77(1A)(b) of the Act. Such a claim is to be made by the Corporation and the claim is to be for recovering contributions (including interest and damages) from the principal employer. As per Section 77(1A)(b) of the Act, the cause of action in respect of the above claim shall be deemed to have arisen on the date on which the Corporation makes the claim for the first time. So, what is to be decided mainly in this case is whether the Corporation has made a claim for "recovering" contributions (including interest and damages) from the principal employer, as referred to in Explanation (b) to Section 77(1A) of the Act and if so, when was it made for the first time.

13. Admittedly, no steps are taken by Corporation in this case for recovering the contribution (including interest and damages) from the principal employer. So, on this ground itself it can be said that no claim is made by the Corporation for "recovering" contributions from the principal employer as stated in Section 77(1A) (b) of the Act and hence, no cause of action can be deemed to have arisen under the said provision.

14. However, learned counsel for respondent strongly argued that it is not necessary for Corporation to take any steps to recover contribution for the cause of action to arise u/s 77 of the Act. As soon as an establishment is covered under the Act, the contribution becomes payable under the Act and according to him, the liability to pay the contribution is automatic. If no contribution is paid, the contribution can be recovered by the Corporation from the principal employer and admittedly, appellant did not pay any contribution. Therefore, the order passed by this Court does not call for any interference, it is argued.

15. On going through the provisions of the Act, there cannot be any dispute that contribution becomes payable under the Act, the very moment establishment is

covered under the Act. But, on the facts of this case, the question is, when does contribution become payable and recoverable in cases in which no contribution is paid in respect of an establishment on the ground that the establishment is not covered under the Act. Will such liability arise automatically and can the Corporation be said to have made a claim by mere issuance of Form C-II notice?

16. Section 45-B of the Act lays down that any contribution "payable" under the Act may be "recovered", as an arrear of land revenue. Therefore, what can be recovered under Section-45B of the Act is only the contribution which is "payable" under the Act. Though contribution becomes "payable" in respect of every establishment which is covered under the Act automatically, contribution will not be paid in some cases on the ground that the establishment is not covered under the Act. In such cases, when does the contribution become payable? Section 45A lays down the circumstances under which the contribution becomes payable in such cases. Section 45A of the Act reads as follows:

45A. Determination of contribution 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 45 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 45, 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 heard.]

(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 recovery u/s 45C to 45-1]

17. Section 45A(1) of the Act lays down that in cases in which no returns, particulars, registers or records are submitted, furnished or maintained, in accordance with the provisions of section 44 of the Act by the establishment or in cases in which any Inspector or other official of the Corporation referred to in Section 45(2) is prevented by the principal or immediate employer or any other person, in exercising his functions or discharging his duties u/s 45, the Corporation may, by an order, determine the amount of contribution which is "payable". Therefore, in cases in which, the provisions of the Act are not complied with and contribution is not paid in respect of an establishment for some reason or other, the Corporation has to determine the amount of contribution which is "payable", by passing an order u/s 45A(1) of the Act.

18. Therefore, the contribution becomes "payable" under the Act only when the

amount of contribution is determined by the Corporation, by passing an order, u/s 45A(1) of the Act, in cases in which, the provisions under the Act are not complied with and no contribution is paid in respect of a factory or establishment, on the assertion that such factory or establishment is not covered under the Act. It also follows that if no order is passed by the Corporation determining the contribution which is payable, the contribution does not become payable and hence, it cannot also be recovered u/s 45B of the Act, especially in cases in which no contribution is paid stating that establishment is not covered under the Act.

19. Section 45A(2) of the Act lays down that an order made by the Corporation u/s 45A(1) of the Act 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 etc. So, if any claim is made by the Corporation u/s 75 or for recovery of contribution, there has to be an order passed by the Corporation u/s 45A(1) of the Act to support such claim as sufficient proof of the claim. Without such an order being passed, there will be no proof for the claim made by the Corporation u/s 75 of the Act or for recovery of contribution.

20. Therefore, in cases in which contribution is not paid in respect of an establishment on the ground that it is not covered under the Act and if the Corporation makes any claim that contribution is "payable" by such establishment and it is recoverable from the principal employer, there has to be an order passed by the Corporation u/s 45A(1) of the Act, to support such claim. In the absence of an order u/s 45A(1) of the Act, there will be no proof of claim made by the Corporation for recovery of any contribution from principal employer or for purpose of Section 75 of the Act. In the absence of any claim as referred to in Section 77(1A)(b) of the Act, no cause of action will arise for filing an application u/s 75 of the Act.

21. The cause of action u/s 77(1A)(b) of the Act will arise only if the Corporation determines the amount of contribution which is "payable", as per an order passed u/s 45A(1) of the Act and consequently, the Corporation makes a claim for "recovering" the contribution, in cases in which no contribution is paid on the assertion that the establishment is not covered under the Act. A reading of Section 75 of the Act also will make this position clearer. Section 75 of the Act (excluding the portion which is not relevant for disposal of this appeal) reads as follows:

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

- (a) xxx, or
- (b) xxx, or
- (c) xxx, or
- (d) xxx, or

(e) xxx, or

[(ee) xxx, or

(clause (f) omitted by Act 44 of 1966, sec. 32 (w.e.f. 28.1.1968)

(g) 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.

(emphasis supplied)

(2) xxx:-

(a) xxx;

(b) xxx;

(clause (c) omitted by Act 44 of 1966, sec. 32

(w.e.f. 28.1.1968)

(d) xxx;

(e) xxx; and

(f) xxx.

(2A) xxx.

(2B) xxxx:

(3) xxx.

22. Section 75(1)(g) of the Act reveals that one of the pre-requisites for the Insurance Court to take a decision under the said provision is, existence of a dispute in respect of any contribution payable or recoverable under the Act. I have already held that in cases in which no contribution is not paid on the ground that the establishment is not covered under the Act, the contribution becomes "payable" or "recoverable", only if an order is passed by the Corporation determining the amount of contribution "payable", u/s 45A(1) of the Act. Therefore, in such cases, if no order is passed u/s 45A(1) of the Act, there can be no dispute between the Corporation and principal employer in respect of any contribution payable or recoverable.

23. In the absence of a dispute as stated in Section 75(1)(g), in respect of

contribution payable or recoverable under the Act the application filed u/s 75(1)(g) will be premature. Therefore, if no order is passed u/s 45A(1) of the Act, an application filed u/s 75(1)(g) of the Act cannot be entertained by the Insurance Court in cases in which contribution is not paid in respect of an establishment, on the ground that it is not covered under the Act.

24. To sum up, I hold that a joint reading of Sections 77, 45A and 45B of the Act makes it abundantly clear that in cases in which contribution is not paid on the assertion that the establishment is not covered under the Act, an application u/s 75(1)(g) of the Act in respect of contribution payable or recoverable will not be maintainable, unless an order is passed by the Corporation u/s 45A(1) of the Act, determining the amount of contribution payable under the Act. It also follows that in such cases the Insurance Court will have no jurisdiction to decide the question of coverage under the Act, unless an order is passed u/s 45A(1) of the Act.

25. It is also contended that as per Ext. P6-notice, the Corporation has made a claim, as stated u/s 77(1A)(b). But, a perusal of Ext. P6 shows that the Corporation merely intimated the appellant that the establishment is coverable under the Act, as per the said document. The Corporation also alerted the principal employer to comply with its statutory duty under the Act. The Corporation even promised to render all necessary and possible assistance to appellant in discharging their duty and obligations under the Act, as per Ext. P6. In Ext. P6, the Corporation also expressed its confidence that the appellant will make prompt compliance of the Act.

26. Though, coverability is automatic, as pointed out by learned counsel for respondent, as per Ext. P6, the Corporation only conveyed the above fact to the appellant. Form CII notice (Ext. P6) cannot be treated as sufficient proof of a claim made by the Corporation u/s 77(1A)(b) of the Act in the light of Section 45A(2) of the Act. It can only be treated as a communication or intimation issued to appellant stating that the establishment is liable to comply with the provisions of the Act, but it is not a material to support any "claim", made by Corporation as required u/s 77(1A)(b) of the Act.

27. At any rate, there is nothing in Ext. P6 to show that the Corporation made any "claim" thereunder for "recovering" contributions, including interest and damages from the principal employer as required u/s 77(1A)(b) of the Act. In fact, such a claim could not have been made in the absence of an order passed u/s 45A(1) of the Act, as evident from Section 45-A(2) of the Act. "Claim" falling u/s 77(1A)(b) of the Act is a claim made by the Corporation, for "recovering contributions, including interest and damages from the principal employer".

28. A mere intimation or notice in Form C-II issued to the principal employer by the establishment stating that it is coverable under the Act is not sufficient to constitute a claim falling u/s 77(1A)(b) of the Act for filing an application u/s 75(1)(g) of the Act. No cause of action will arise as stated in Section 77(1A)(b)

of the Act on mere issuance of a notice in Form C-II. In the above circumstances, impugned order passed by the Insurance Court is illegal and without jurisdiction.

29. The Insurance Court also went wrong in passing a declaration in favour of the Corporation that the establishment is covered under the Act, even without a prayer for such a declaration. If at all the Insurance Court finds that the contention raised by the establishment is unsustainable, it ought to have dismissed the petition and no order should have been passed stating that the establishment is covered u/s 1(5) of the Act, especially in the absence of a prayer for any such declaration. The direction issued by the Insurance Court against the appellant to clear all dues etc., and also the direction issued in favour of the Corporation to make the assessment etc are also not legally sustainable. At any rate, the application filed by appellant u/s 75 of the Act is premature, in the absence of an order u/s 45A(1) of the Act and hence, Insurance Court ought not to have entertained the application, but dismissed the same.

Hence, the following order is passed:

1. The declaration issued by Insurance Court that the appellant-establishment is covered under the Act is set aside.
2. The directions issued by Insurance Court to both parties, as per the impugned order are also set aside.
3. It is however, made clear that there will be no bar for the Corporation to decide whether appellant is an establishment covered under the Act or not, in accordance with law.
4. It is also made clear that dismissal of the application will not be a bar for the Insurance Court to decide the question of coverability of the establishment under the Act, in a properly instituted application u/s 75 of the Act, in accordance with law.
5. The application filed by appellant u/s 75 of the Act is dismissed as premature and not maintainable.

This appeal is partly allowed.