

(2015) 10 GUJ CK 0055
In the Gujarat High Court

Case No : F.A. No. 1844 of 2003 and C.A. No. 6822 of 2003

Regional Director

APPELLANT

Vs

Shah Engineers

RESPONDENT

Date of Decision : 07-10-2015

Acts Referred:

Employees State Insurance Act, 1948 — Section 1(5), 45-A, 82(2)

Citation : (2016) 148 FLR 153 : (2015) 4 LLJ 409

Hon'ble Judges : V.M. Pancholi, J.

Bench : Single Bench

Advocate : Hemant S. Shah, Advocate, for the Appellant

Final Decision : Allowed

Judgement

V.M. Pancholi, J.—This appeal is filed under Section 82(2) of the Employees State Insurance Act, 1948 (hereinafter referred to as "ESI Act" for short) against judgment/order passed by Employees Insurance Court, Vadodara in ESI Application 2 of 1990 on 30.10.2002. Heard learned advocate Mr. Hemant S. Shah for the appellant. Though served, nobody has remained present for the respondent. Appeal is of the year 2003 and it is listed on board from time to time, however, respondent has chosen not to remain present. Therefore, this appeal is taken up for hearing in absence of the respondent.

2. Brief facts of the present case are as under:

2.1. Present respondent - original applicant filed ESI Application No. 2 of 1990 before the ESI Court, Vadodara, wherein the original applicant submitted that the applicant company is not covered under the provisions of ESI Act as the activity of the applicant company is not covered under the definition of term "factory". In spite of that, the applicant had applied for the code number under the provisions of the ESI Act in the year 1985. ESI code number was allotted to the applicant w.e.f. 01.02.1985. It is the case of the applicant that the provisions of the said Act were not applicable prior to 1985. In spite of that the demand notice

in form No. C-18 was issued by the ESI Corporation and contribution for the period from 1981 to 1984 was demanded. Thereafter, the Corporation passed an order under Section 45-A of the ESI Act on 28.11.1989. Thereafter, notice dated 01.05.1989 was issued in Form No. C-18. Thus, the order dated 28.11.1989 as well as notice dated 01.05.1989 issued by the Corporation are illegal and therefore the same be quashed and set aside.

2.2. The ESI Court issued the notice to the Corporation. Corporation filed its reply wherein it has been stated that the applicant factory was covered provisionally w.e.f. 01.02.1985 under Section 1(5) of ESI Act on the basis of the submission of form-01 in the month of March 1985. In the said form, the applicant stated the date of starting of the factory as February 1970 and number of employees in the month of February 1985 as 29. Thus, when the factory was covered provisionally w.e.f. 01.02.1985, it was necessary to decide the final date of coverage as per ESI Act. Hence, Insurance Inspector of the Corporation while conducting regular inspection of the records for the period from February 1985 to September 1987 checked wage registers for the period from March 1980 to January 1985 i.e. prior to provisional date of coverage and it was revealed that number of employees to whom wages were paid were more than 20 since March 1980 and therefore the provisions of ESI Act are applicable to the factory w.e.f. 01.03.1980 finally.

2.3. It has been further stated in the reply that on the basis of the report given by the concerned Inspector, the Corporation covered the applicant factory w.e.f. 01.03.1980 and intimated the same to the applicant vide communication dated 25.11.1988. It was requested to make the compliance from the said date and pay contribution on the amount as shown in the separate sheet. However, the applicant did not comply with the said request and therefore the Corporation issued C-18 notice on 01.05.1989 and demanded the contribution of Rs. 96,729/- on the total wages and omitted wages for the period from 1981 to 1984. Personal hearing was also given on 14.06.1989 to the applicant. However, applicant did not remain present for personal hearing. Therefore, applicant was informed to remain present on 09.08.1989. On that day also, the applicant did not remain present and therefore the hearing was adjourned on 27.09.1989. Applicant once again did not remain present nor he made the payment and therefore order under Section 45-A of ESI Act came to be passed on 28.11.1989. Thereafter, the Corporation issued C 19 recovery notice on 18.01.1990 through Mamlatdar.

2.4. During the course of the proceedings conducted before the ESI Court, the applicant produced documentary evidence with list Exh. 25, whereas opponent Corporation produced the documentary evidence vide Exh. 27 and list of documents vide Exh. 35. The documents which are produced vide list of documents at Exh. 35 were given Exh. No. 42. On behalf of applicant, Rajnikant Ramanlal Parmar gave his deposition at Exh. 33. Thereafter, the applicant or his representative have not remained present at the time of arguments and

therefore the right of the applicant for argument was closed by the Court below. After considering the documentary evidence as well as oral evidence produced on record, the Court below partly allowed the application and instead of making payment of Rs. 96,729/- to the Corporation, the applicant was held liable to make the payment of Rs. 43,494/- along with surcharge and interest to the Corporation. It is this order of learned Court below which is challenged by the appellant herein.

3. Learned advocate Mr. Hemant S. Shah appearing for the appellant - ESI Corporation mainly contended that the order passed by ESI Court while partly allowing the application of the original applicant is illegal and perverse and therefore the same be quashed and set aside and this Court may hold that the applicant is liable to pay entire amount as reflected in C-19 recovery notice issued by the Corporation. He further contended that ESI Court has wrongly considered the fact that though original partnership firm came into existence in the year of 1970, partners were changed in the said firm and lastly partners were changed in August 1982 and therefore from August 1982 the partnership firm is liable to pay the contribution under the ESI Act and not from January 1981. Learned advocate further contended that as per the application given by the applicant, the factory of the applicant was covered provisionally w.e.f. 01.02.1985 under Section 1(5) of the ESI Act. However, when the Insurance Inspector of the Corporation inspected the record of the applicant it was revealed that number of employees to whom wages were paid were more than 20 since March 1980 and therefore the provisions of ESI Act would be applicable to the applicant w.e.f. 01.03.1980. Thus, C-18 notice was issued. Reasonable opportunity of hearing was given. However, the original applicant did not avail the said opportunity and therefore order under Section 45-A of the ESI Act was passed. Thereafter also C-19 recovery notice was issued. Therefore, the Court below has committed an error in holding that the original applicant is liable to make the payment of Rs. 43,494/- towards contribution during the period between August 1982 to 1984 with interest and surcharge. In fact, the original applicant was liable to make the payment from 1st March 1980 as per C-19 notice and therefore the impugned order be quashed and set aside.

4. I have considered the arguments canvassed on behalf of the learned advocate for the appellant. I have also gone through the record and proceedings.

5. The sole question which is posed for consideration of this Court is as to whether the Court below has committed an error while applying the provisions of the ESI Act to the applicant w.e.f. September 1982 instead of March 1980 on the basis of mere change of partners of the applicant - partnership firm in the year 1982? From perusal of the impugned order, it appears that the Court below held the applicant liable to make the payment of contribution for the period from 1982 to 1984 by holding that the applicant partnership firm came into existence in the year 1982. The Court below committed an error in holding that the applicant firm came into existence only in the year 1982. Merely because the partners of the

applicant firm were changed, it does not mean that the partnership firm has not carried on its business since 1980. Further, during the inspection of the record by the concerned Inspector it was revealed that the wages were paid to more than 20 workers as per the wage register w.e.f. 01.03.1980 and therefore the Corporation has rightly applied the provisions of ESI Act to the applicant from 01.03.1980. It was also not the case of the applicant that prior to August 1982, wages were not paid to more than 20 workers between 1st March 1980 to August 1982. Thus, there was no reason for the Court below to direct the applicant to pay the contribution from September 1982. The Court below has committed an error in passing the said order.

6. Therefore, this appeal is allowed. The respondent herein - original applicant is directed to pay to the appellant herein - original respondent a sum of Rs. 96,729.30 ps. along with interest and surcharge instead of Rs. 43,494/- as directed by the Court below. As the appeal is finally disposed of, no separate orders are required to be passed on Civil Application No. 6822 of 2003 and the same is disposed off accordingly.