

(2008) 04 MAD CK 0174
In the Madras High Court
Case No : C.M.A. No. 1936 of 2000

Regional Director, E.S.I. and Another	APPELLANT
Vs	
Rahimaniya Sago Factory, by Subsequent Purchaser, Syed Mustafa Sago Factory	RESPONDENT

Date of Decision : 17-04-2008

Acts Referred:

Employees State Insurance (Central) Rules, 1950 — Rule 9
Employees State Insurance Act, 1948 — Section 45, 45A, 93A

Citation : (2008) 119 FLR 116 : (2009) 1 LLJ 344

Hon'ble Judges : S. Tamilvanan, J

Bench : Single Bench

Advocate : G. Desappan, for the Appellant; M.R. Raghuram, for the Respondent

Final Decision : Dismissed

Judgement

S. Tamilvanan, J.—This civil miscellaneous appeal has been preferred against the Order and Decretal Order, dated April 7, 1999 made in E.S.I.O.P. No. 3/1996 on the file of the Principal District Judge, Salem.

2. The appellants herein were the respondents before the Trial Court in the E.S.I.O.P. The respondent herein had filed the petition, seeking an order to declare that the sale notification issued by the appellants herein was contrary to law and to declare that the petitioner is not the occupier or employer prior to 1987 and hence, no amount is payable as contribution. The case of the respondent, as petitioner before the Trial Court is that he was running a Sago factory at Attur from 1987. According to the respondent, the factory was under the lease of one Krishnasamy of Sri Ramajayam Sago Factory from the year 1982 to 1987. Though the respondent had remitted contribution for the period from September 16, 1987 to 1995, and no other amount was due and payable by the petitioner, the appellants herein issued a demand notice, claiming a sum of Rs. 1,45,321/- and the properties belong to the respondent were also attached, though the respondent was nothing to do with the alleged claim.

3. The appellants, who were the respondents before the Trial Court filed their counter, stating that the respondent was liable to pay contribution, according to Section 93-A of the Employees' State Insurance Act, 1948 (herein referred to as Act). It is not in dispute that the officials passed the order, u/s 45(c) and 45(e) of the Act and as per Rule 9 of the Act, every question arising between the Recovery Officer and the defaulter employer relating to pay execution, discharge, satisfaction, confirmation of sale, setting aside of the sale, shall be determined not by suit but by order of Recovery Officer before whom such question arises and the Authorized Officer has power to pass orders on the same. With the above pleadings, the appellants resisted the E.S.I.O.P.

4. The Trial Court, considering the pleadings framed the following points for determination:

1. Whether the petitioner is not liable to pay the contribution?

2. Whether the demand notice is not legal?

5. On the side of the respondent, P.W.I was examined and Exhibits A-1 to A-5 were marked. On the side of the appellants herein, no witness was examined, however, Exhibits B-1 to B-7 were marked by consent. Considering the oral and documentary evidence and also the arguments advanced by both the learned Counsel, the Trial Court held the points for determination in favour of the respondent herein and accordingly the petition was allowed. Aggrieved by which, this Civil Miscellaneous Appeal has been preferred by the respondents therein.

6. Mr. G. Desappan, learned Counsel appearing for the appellants drew the attention of this Court to Section 93-A of the Act, with regard to the liability in case of transfer of establishment under the Act. The aforesaid Section reads as follows:

93-A. Liability in case of transfer of establishment-Where an employer, in relation to a factory or establishment, transfers that factory or establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the factory or establishment is so transferred shall jointly and severally be liable to pay the amount due in respect of any contribution or any other amount payable under this Act in respect of the periods up to the date of such transfer:

Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer.

7. Learned Counsel appearing for the appellants contended that originally the factory was in the name of Rahimaniya Sago Factory at Attur owned by P.W. 1. Subsequently, the same was taken on lease in the year 1987, by one Rajamanickam and Co., then in the year 1989 by one Sri Ramajayam Sago Factory and then Syed Mustafa Sago Factory and therefore, according to the learned Counsel, the respondent is bound to pay ESI Contribution.

8. The respondent had prayed in the original petition to declare the sale notification, in TN/Recy/ESI/13-51/9979-02 as illegal, arbitrary and contrary to law and declare that the respondent herein was not the occupier and employer prior to 1987 and hence, no amount was payable by the respondent herein, as contribution, prior to September 16, 1987.

9. Mr. M.R. Raghuram, learned Counsel appearing for the respondent would contend that there is no pleading or evidence on the side of the appellants to show that the respondent was the occupier or employer, prior to 1987 and therefore, without any pleadings and evidence, the appellants cannot introduce a new case in this appeal.

10. On the side of the appellants, copy of the orders passed u/s 45-A during the year 1987 have been marked as Exhibits B-1 to B-4 and the copy of the orders passed under the aforesaid Section in the year 1991 on various dates were marked as Exhibits B-5 to B-7. However, there is no evidence on the side of the appellants to show that the respondent was running the Sago Factory prior to September 16, 1987.

11. As contended by the learned Counsel appearing for the respondent, even there is no specific pleadings by the appellants in their counter filed before the Trial Court. As per the evidence of P. W. 1, he started running a factory at Ammanpalayam in the name Syed Mustafa Sago Factory and the factory operated in the name of Rahimaniya Sago Factory between 1976 and 1980, was not run by the respondent and that Sri Ramajayam Sago Factory was run by one T. Krishnasamy. Subsequently, on behalf of Sri Ramajayam Sago Factory, Rs. 4,991/-, had been paid on July 29, 1987 as contribution under Exhibit A-1 receipt. Subsequent to 1987, the respondent is paying the contribution under the ESI Act regularly without any default. Merely, because the respondent had stated the details of payment made by the said T. Krishnasamy on behalf of Sri Ramajayam Sago Factory, the liability cannot be fixed on the respondent.

12. It is a settled proposition of law that without proper pleadings and evidence to substantiate the pleadings, no one can establish any claim. In the instant case, it is not in dispute that the respondent is running the factory in the name of Syed Mustafa Sago Factory, since 1987. It is not the case of the appellants that there is any arrears or dues payable by the respondent, under the ESI Act, subsequent to September 16, 1987. In such circumstances, the burden is heavily upon the appellants to establish that the respondent herein was the employer, even prior to September 16, 1987 and liable to pay contribution under the Act. However, there is no evidence to show that the respondent herein was the employer of the disputed Sago Factory, Attur, prior to September 16, 1987. Learned Counsel for the appellants has not disputed the fact that there is no specific pleadings in the counter filed by the appellants herein before the Trial Court, that the respondent had been running the Sago Factory. It is not possible for the appellants to maintain their claim under ESI Act, without specific pleadings, supported by evidence.

13. On the aforesaid facts and circumstances, I am of the view that there is no error or infirmity in the impugned order, passed by the Court below in the E.S.I.O.P., which warrants, any interference of this Court. In the result, the appeal fails and accordingly, the impugned order passed by the Court below is confirmed and the same is dismissed. However, there is no order as to costs.