

(1981) 02 KL CK 0001
In the High Court Of Kerala

Regional Director, E.S.I.C.

APPELLANT

Vs

Marikkar Engineers Limited and Another

RESPONDENT

Date of Decision : 23-02-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9

Employees State Insurance Act, 1948 — Section 44, 45, 45A, 45B, 54A

Citation : (1982) 1 LLJ 59

Hon'ble Judges : K. Bhaskaran, J

Bench : Single Bench

Judgement

K. Bhaskaran, J.—The Regional Director, Employees" State Insurance Corporation, Trichur, the defendant in the suit, O.S. 677 of 1970 on the file of the Munsiff of Trichur, is the appellant in this second appeal. The prayer in the suit filed by M/s. Marikkar Engineers Ltd, Trichur, the respondent herein, was for restraining the defendant-appellant by means of a permanent injunction from taking coercive steps for the realisation of the employees" special contribution. The learned Munsiff by his judgment dated 5-1-1973 dismissed the suit with costs holding inter alia that the plaintiff was not entitled to the injunction prayed for in as much as the civil Court had no jurisdiction to grant the relief prayed for in view of the bar u/s 75(3) of the Employees" State Insurance Act, 1948 (for short the Act). The District Judge, Trichur, however, on appeal from the decision of the trial Court, by his judgment dated 7-3-1976 in A.S. No. 88 of 1973 allowed the appeal, set aside the judgment and decree appealed against, and decreed the suit as prayed for with costs in the appeal. It is aggrieved by the judgment and decree of the first appellate Court that this second appeal has been preferred by the defendant-Corporation.

2. Before embarking on a consideration of the argument advanced by the counsel for the appellant, it would be advantageous to notice the ground on which the first appellate Court in reversal of the decision of the trial Court granted the relief to the respondent-plaintiff. As already pointed out, it was the view of the trial Court that the suit is barred in as much as Sub-section (3) of Section 75 of the

Act provides:

No civil Court shall have jurisdiction to decide or deal with any question or dispute as aforesaid or to adjudicate on any liability which by or under this Act is to be decided by a medical Board, or by a Medical Appeal Tribunal or by the Employees' Insurance Court.

The matters which are to be decided under Sub-section (1) of Section 75 of the Act are enumerated in Clauses (a), (b), (c), (d), (e) (ee) and (g) of that Sub-section. Clause (g) thereof reads as follows:

(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.

In coming to the conclusion that civil Court's jurisdiction is barred, the trial Court relied on the decision of this Court in O.P. Nos. 133 and 134 of 1970, and also a decision of the Madras High Court in M.S. Dhananjayan v. Regl. Director, State Insurance Corporation 1972 II L.L.J. 338. The appellate Court, however, found fault with the learned Munsiff for having placed reliance on those decisions in view of the decisions of the Mysore and Delhi High Courts in Sri Krishna Mills v. E.S.I. Corporation (1973) Lab.I.C. 408 and Hindustan Lever Ltd. v. E.S.I. Corporation 1973 I L.L.J. 259, holding that the question must be worked out first by the Corporation by finding out which of the employees were covered, and then the matter had to be adjudicated upon by the Court appointed under the Act and, therefore, it was clear that in case of dispute the matter had to be referred to the insurance Court by the Corporation which sought to enforce the right under the Act. Reliance was also placed by that Court (the first appellate Court) on a decision of the Madras High Court in Gemini Studios Vs. Employees' State Insurance Corporation and Another, in which case at page 24S of the report the observation is as follows!

When there is a dispute of the kind noted here, it is for the department to institute a proceeding in the Insurance Court and get a decision as to whether at(sic) can retrospectively claim arrears of contribution from 1952 to 1964, whether all the persons in all the departments of the studio would be covered by the Act and also ascertain the definite sum due and payable by the petitioners to the department.

3. The realisation of the amount alleged to be due from the respondent-plaintiff under the provisions of the Revenue Recovery Act is sought on the basis of an order passed by the appellant-Corporation u/s 45A of the Act which reads as follows:

45A. Determination of contributions in certain cases-(1) Where in respect of a

factory or establishment no returns, particulars, registers or record 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 obstructed by the principal or immediate employer or any other person, in exercising his function 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.

(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 arrears of land revenue u/s 45A.

Section 45B provides that any contribution payable under the Act would be recovered as an arrear of land revenue. The respondent-plaintiff has no case that it had submitted returns or other relevant particulars sufficient for determining the liability with respect to the amount of contribution payable by it in respect of the workmen in the employment of the establishment. The only reason given by the first appellate Court, and urged by counsel for the respondent-plaintiff before this Court during the course of his argument, is that the plaintiff having objected to the appellant-Corporation's order fixing the respondent-plaintiff's liability to pay the contribution before the matter being adjudicated by the Insurance Court u/s 75 of the Act, in a reference by the appellant - Corporation, it could not have enforced that order. According to the counsel for the respondent-plaintiff, as Section 75(1) provides: "'if any question or dispute arises as to the various matters formulated in that Sub-section, 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" and as the respondent-plaintiff having repudiated its liability to contribution in toto it was upto the Corporation to refer the matter to the Court for its decision before attempting to enforce its order under dispute.

4. Having considered the scheme of the Act and legislative intent of the provisions of Sections 45A, 45B and 75 of the Act, I do not feel persuaded to accept the argument of the counsel for the respondent-plaintiff that in a case like this where an order has passed by the Corporation u/s 45A, about which assuming that the respondent-plaintiff feels aggrieved, the Corporation is precluded from taking steps to recover the amount due under the order invoking the provisions of Section 45A(1), and Section 45B of the Act without referring the matter to the Insurance Court u/s 75 merely because the respondent-plaintiff has not accepted its correctness. The provisions of Section 75 are meant to give an opportunity to the Corporation or the employer, as the case may be, to have an adjudication where the particular party feels aggrieved by a decision or order. In the case of an order under Section 45A, normally it could only be the employer that could feel aggrieved, and it is the employer who feels aggrieved that has to move the Insurance Court, because the order is to be made by the Corporation; but, in a

case where Section 54A applies with respect to decision by the medical board, it might either be the Corporation or the employer that might feel aggrieved in which case, the party that has to move the Insurance Court u/s 75 would be the party that feels aggrieved by the Order. Essentially, therefore, it is the aggrieved party that has to approach the insurance Court for its decision, not the party which wants to enforce the order or the decision. There appears to be little substance in the contention of the respondent-plaintiff, which found favour with the first appellate Court, that merely for the reason that an order requiring an establishment to pay contribution as determined u/s 45A is not acceptable to the establishment, a further duty is cast on the Corporation to make a reference to the insurance Court to obtain its seal of approval before steps for the realisation of the amount could be initiated invoking Section 45A(2) and Section 45B of the Act.

5. The Madras decision relied on by the Court below, *Gemini Studios Vs. Employees' State Insurance Corporation and Another*, has not made reference to an earlier decision of the Madras High Court itself in *K.C.S. Dhanushkode Nadar & Sons v. E.S.I. Corporation* 1964 I L.L.J. 213, wherein Jagadisan, J., had held as follows;

It is impossible to hold that the Corporation should, in every case of non-payment of contribution, resort to the State Insurance Court and obtain an order for recovery of the amount.

Following the decision in 1964 I L.L.J. 213, referred to above, Palaniswamy, J., held in *M.S. Dhananjayan v. Reg. Director, State Insurance Corporation* 1972 II L.L.J. 338 that "on the facts on the case if the petitioner feels aggrieved about the assessment of the amount, nothing prevents him from seeking appropriate relief from the Insurance Court; merely because he chooses to repudiate the correctness of the amount as claimed from him, no duty is cast upon the department to go to the Court for the purpose of obtaining an order, if the contention of the petitioner's counsel that because of the objection raised by the petitioner the department should first seek the orders of the Court that have to prevail, then the department can never claim the amount under the machinery provided in the Act, for it will always be open to the employer to raise some dispute or other if a demand was made; it would be wrong to hold that merely because objection is raised, the authority should resort to the Insurance Court and obtain an order". In the case of *Gemini Studios Vs. Employees' State Insurance Corporation and Another*, other questions like limitation, retrospective operation of the order, separate units having been clubbed together had also arisen. Such contentions are not raised, and are not available in the case hand. So far as the decision of the Mysore High Court reported in *Sri Krishna Mills v. E.S.I. Corporation* (1973) L.I.C. 408, is concerned in view of the recent decision of the full Bench of the Karnataka High Court in *Regional Director, E.S.I. Vs. Fibre Bangalore (Pvt.) Limited*, it cannot be considered to hold good any longer. It is, therefore, clear that where an order made u/s 45A of the Act is not acceptable to

the employer, it is for him to challenge its correctness before the Insurance Court u/s 75; merely for the reason that the employer has objected to the correctness of the order, it would not prevent the Corporation from recovering the amount due under the order by proceeding u/s 45B of the Act.

6. Yet there is another handicap so far as the respondent-plaintiff is concerned. The liability of the employer to pay contribution is a matter to be decided under the provisions of the Act. It has already been noticed that if any party is aggrieved by an order passed against that party, the proper remedy available for that party is to make a reference to the insurance Court under the provisions of Sub-section (1) or (2) of Section 75 as the case may be. Sub-section (3) of Section 75 is in the following terms:

(3) No civil Court shall have jurisdiction to decide or deal with any question or dispute as aforesaid or to adjudicate on any liability which by or under this Act is to be decided by a medical board, or by a medical appeal Tribunal or by the Employees' Insurance Court.

This provision, read with Section 9 of the C.P.C. should be construed to oust the jurisdiction of the civil Court to entertain a suit of this nature brought by the respondent-plaintiff. The fact that it is for no other relief, but only for an injunction from enforcing the order passed by the Corporation u/s 45A or that the challenge is not confined to the quantum of contribution sought to be recovered but goes to the very liability of the establishment to pay contribution, would not make the bar u/s 75(3) of the Act and Section 9 of the C. P. C. any the less applicable unless it be a case where the Corporation acted absolutely without jurisdiction which it purported to exercise. It has not been shown in the present case that the appellant-Corporation suffered from total lack of jurisdiction to pass the order, the enforcement of which is sought to be prevented by an order of injunction.

7. I am in respectful agreement with the views expressed by the Madras High Court in *K.C.S. Dhanuskode Nadar & Sons v. E.S.I Corporation* 1964 I L.L.J. 213 and *M.S. Dhananjayan v. Reg. Director, State Insurance Corporation* 1972 II L.L.J. 338, and of the Karnataka High Court in *Regional Director, E.S.I. Vs. Fibre Bangalore (Pvt.) Limited*, I also find support for this view in the recent decisions of this Court in *E.S.I. Corporation v. S.N. Transports* (1978) KLT 852 and *Indirakutty y. E.S.I. Corporation* K. L. T. 488.

8. For the foregoing reasons the Second Appeal is allowed; the judgment and decree of the first appellate Court is set aside and the judgment and decree of the trial Court are restored. In the first appeal and the second appeal the parties will bear their respective costs.