
(2014) 03 DEL CK 0090
In the Delhi High Court
Case No : FAO No. 281 of 2011

Regional Director, Esic

APPELLANT

Vs

M/s. Girdhari Lal and Sons

RESPONDENT

Date of Decision : 12-03-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27 151
Employees State Insurance Act, 1948 — Section 75 75(G) 82
Evidence Act, 1872 — Section 106

Citation : (2014) 6 AD 272 : (2014) 208 DLT 718 : (2014) 142 FLR 68 : (2014) 2 LLJ 584

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : K.P. Mavi, for the Appellant; Arjun S. Bawa, for the Respondent

Final Decision : Allowed

Judgement

Valmiki J Mehta, J.—This first appeal is filed by the ESI department u/s 82 of the Employees' State Insurance Act, 1948 (hereinafter referred to as "the Act") challenging the judgment of the ESI Court dated 17.1.2011 which has remanded the matter to the assessing authority to enable the respondent herein (petitioner before the trial court in the petition u/s 75 of the Act) to show its records as to whether the employees employed by the respondent herein were less than 10 in number as claimed by the respondent. I may note that the ESI Court holds issue no. 2 in favour of the appellant and yet has remanded the matter to the assessing authority. It is also relevant to note that the assessment in this case is of the year 1980-81 and the impugned judgment is dated 17.1.2011 and by the remand effectively clock has been set back by 30 years to the point of determination of assessment, although as will be discussed below, in the original proceedings filed by the petitioner before the ESI Court which has passed the impugned judgment it was the respondent which had to show by leading evidence the number of its employees.

2. At this stage, let me refer to paras 1, 2 and 10 of the impugned judgment and which read as under:-

1. Vide this judgment I shall dispose off the instant petition u/s. 75(G) of ESI Act filed by the petitioner against the respondent. As stated petitioner is having business of jewellery and deals in sale of gold ornaments, silver ornaments and diamond jewellery having strength of 12/13 members and is registered under shops and establishment Act. It was stated petitioner received a letter bearing no. 11-6321-66(SF) dated 27.1.81 from the office of respondent corporation directing petitioner to furnish O-I form duly filled in all respects. On receipt of the said letter petitioner got surprised as the petitioner is not an industry or a factory within the meaning of Section 2(1) of the Factory Act and further the petitioner is not using any electric power for manufacturing purposes. Petitioner replied to the same vide letter dated 27.1.81. It was stated that the coverage had been made arbitrarily and no opportunity had been afforded to the petitioner before calling upon the petitioner to comply with the letter. Respondent instead of replying to the letter back continued with the steps further. It was prayed that the order be passed restraining the respondent from covering the petitioner under the Act and the code number if any allotted at the back of the petitioner be withdrawn.

2. Written statement was filed on behalf of the respondent wherein it was stated that the petitioner is carrying on business of making, repairing and polishing/sale of gold and silver ornaments and also using power of the said purpose and hence the petitioner was duly covered under the Act. 10. Issue no. 2:-It is worthwhile to mention here that earlier the Ld. Predecessor had held that the power was being used in the unit and Ld. Cl. for petitioner in appeal before Hon"ble High Court sought for filing additional documents on record pertaining to electricity consumption for the relevant period but the documents filed are not for the relevant period but are for the period afterwards, hence are of no consequence. There is no iota of evidence on record to show that power was not used. Rather PW-1 Kishan Lal Kriplani earlier in his statement had stated that they were using rolling mill and wire mill but now PW-3 Bansilal Makhijani in additional evidence has stated that firm had not installed the rolling mill. The same is contrary to the previous witness PW-1 and rather again contrary to the statement made by PW-1 now in additional evidence namely Sanjay Kriplani who is son of previous PW-1 Kishan Lal Kriplani and this witness has stated that mills are not run with the use of powers meaning thereby the mills were installed. The attempt is to wriggle out of the liability and the same is thus not acceptable as contradictory statements have come on the record. No other material has been brought that power was not being used. Thus in these circumstances it is held that power was being used and this issue is decided in favour of the respondent and against the petitioner but another question raised is as to whether 10 persons were employed having the income of prescribed limit which is to be seen by ESIC as the unit was covered on the basis of power consumption and deeming it as employing 10 persons. No where the inspector report has disclosed the structure of wages nor

any such wage register has been produced on the record. No records were ever produced before the court and thus before fixing the liability on the petitioner and before raising the demand the ceiling structure as per the judgment of 76 (1998) DLT 128(SC) ESIC Vs. MM Suri & Associates is to be seen and ESIC is directed to cover the unit only if 10 such persons having the prescribed period are found working as per the record. If the unit is covered and demand is raised then interest will be paid as per law and for the abundant caution the petitioner is given liberty to apply for amnesty scheme so that damages can be waived off in case of coverage. Though the Cl. for petitioner has argued that earlier that demand could have been raised for one year before the date of inspection but no such rule could be brought before the notice of this court, however any such rule/notification exists then ESIC will consider the same. Issue stands decided accordingly

3. It is also relevant, at this stage, to note that earlier the petition filed by the respondent before the ESI Court was dismissed by the order dated 26.7.1985 and which was challenged by the respondent herein in FAO No. 96/1986. A learned Single Judge of this Court vide order dated 17.3.2005 remanded the matter to the ESI Court with liberty to the respondent herein to lead evidence. This order dated 17.3.2005 in FAO No. 96/1986 reads as under:-

1. This appeal u/s 82 of the Employees State Insurance Act, 1948 (hereinafter referred to as "the Act") is directed against the order dated 26.7.1985 passed by Employees State Insurance Court, Delhi, dismissing the petition u/s 75(g) of the Act. On the basis of an inspection of the premises of the appellant made by an Inspector of the Employee State Insurance Corporation (ESIC), ESI covered the establishment of the appellant on the ground that they were doing the business of sale/repair/polishing of ornaments, gold and silver having employed more than ten employees and power was being used for the said purpose. The petitioner challenged the said action of the Corporation through a petition u/s 75 of the Act before the ESI Court, thereby disputing that they were using power for manufacturing/repairing purpose. Learned Trial Court has, however, returned a finding that the appellant was using power in manufacturing and was covered by the Act. Aggrieved by the said order, the appellant has come up in the present appeal.

2. During the pendency of the appeal, the appellant has moved an application, CM 3793/05 under Order 41 Rule 27 read with Section 151 CPC seeking permission to lead additional evidence in the nature of some inspection reports and electricity bills issued by NDMC during the relevant period. Mr. Bajwa appearing for the ESIC has opposed the application on the ground that the application is highly belated and the appellant did not care to produce the document at the trial stage. Having considered the matter, this Court is of the opinion that it will be expedient in the interests of justice to allow the present application and to permit the appellant to file the documents in question, which are mostly public documents, however, subject to the right of the respondent to

produce evidence in rebuttal. The application is accordingly allowed. The documents produced by the appellant is new material and its evidentiary value is required to be considered after the same have been proved/disproved and the same can be done more appropriately by the learned Trial Court after affording an opportunity to both sides in accordance with law. Ordered accordingly.

3. For the above-stated reasons, the present appeal is allowed and the impugned order is set aside and the matter is remanded back to learned Employees State Insurance Court for afresh decision in the matter having regard to the new material put forth by the appellant or as may be put forth by Employees State Insurance Corporation in rebuttal. Ordered accordingly. The parties are directed to appear before Employees State Insurance Court on 14.04.2005.

4. The appeal and the application stand disposed of.

4. The provision of Section 75 of the Act makes it clear that proceedings initiated thereunder by the assessee are in the nature of original proceedings in which pleadings are completed and evidence is led because the assessee challenges the coverage and the assessment on various grounds. The ESI Court therefore takes a decision on merits and remand is ordered only if there is a positive finding by the ESI Court that no notice was served for coverage and assessment i.e. no notice was served before assessing the assessee. A reading of para 10 of the impugned judgment shows that there is no finding that the respondent herein, petitioner before the ESI Court, was never served of any notice by the appellant with respect to coverage and assessment. Respondent therefore had to, in the petition u/s 75 of the Act in the court below, lead evidence to show that its employees were less than 10 in number and consequently the coverage and assessment of respondent under the Act is illegal. On a query to the counsel for the respondent, it is admitted that no record of the respondent was filed before the ESI Court to show the number of employees of the respondent being less than 10 in number and what is only argued before this Court is that the onus of proof was upon the appellant herein, respondent in the proceedings u/s 75 of the Act in the court below, to show that the respondent had employees who were more than 10 in number. It is also argued that the inspector's report which is relied upon by the appellant herein, respondent in the court below cannot be read to hold that number of employees of the respondent is more than ten in number.

5. In my opinion, the entire arguments urged on behalf of the respondent herein, petitioner in the court below, are misconceived because Section 106 of the Evidence Act, 1872 states that onus of proof with respect to facts which are in the knowledge of a person is on the said person. In the present case, the knowledge of number of employees is in the special knowledge of the respondent, and this onus has to be discharged by filing the record of employees of the respondent of the number of the employees which the respondent has in its establishment. Admittedly, no record was filed by the respondent in the court below to substantiate its contention that number of employees were less than 10

in number. Accordingly, the respondent has failed to discharge the onus upon it that its employees were less than ten in number and therefore it could not be covered under the ESI Act.

6. I may note that the ESI Court has without referring to all these relevant aspects including that the respondent herein failed to file the necessary records to show that its employees are less than ten in number, has again remanded the matter for the respondent herein to again show before the assessing authority the number of its employees and which as stated above has resulted in setting the clock back by as many as 30 years. No assessing authority or taxing authority or a public authority can function if cases are remanded after 30 years without giving findings that remand is necessary because the respondent herein was not served in the assessment proceedings.

7. Learned counsel for the respondent sought to place reliance upon the judgment of the Supreme Court in the case of The Employees State Insurance Corporation, Bhopal Vs. The Central Press and Another, but when asked to show that which is the paragraph of the judgment which is being relied upon by referring to the judgment, no copy of the judgment was given before this Court except that one para of the judgment of that case which is referred to by a learned Single Judge of this Court in W.P. (C) No. 22886/2005 is cited. I have read this para which is relied upon and all that it shows is that there is power in the ESI Court to summon and enforce the attendance of witnesses and compel the discovery and production of documents. I do not think that these observations in any manner help the respondent herein in view of what I have stated above that the respondent being the petitioner in the original proceedings u/s 75 of the Act had to discharge the onus upon it to file the record with respect to its number of employees and which it failed to do to show that the number of its employees were less than ten in number. In view of the above, appeal is allowed. The impugned judgment of the ESI Court dated 17.1.2011 is set aside. The petition u/s 75 of the Act filed by the respondent herein would stand dismissed. Parties are left to bear their own costs.