

(2006) 12 MAD CK 0170

In the Madras High Court

Case No : C.M.A. (NPD) No. 784 of 1999

Shanmuga Metals

APPELLANT

Vs

Regional Director and Another

RESPONDENT

Date of Decision : 07-12-2006

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(12), 45A, 45B, 75, 76

Citation : (2007) 113 FLR 291 : (2007) 3 LLJ 85

Hon'ble Judges : P.R. Shivakumar, J

Bench : Single Bench

Advocate : R.S. Ramanathan, for the Appellant; P. Sermakani, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Shivakumar, J.—This is an appeal filed u/s 82 of the Employees' State Insurance Act, 1948 against the order of the learned Principal District Judge (E.S.I. Court), Tirunelveli, dated December 24, 1998 passed in E.S.I.O.P. No. 7 of 1996.

The petitioner in the said E.S.I.O.P. is the appellant herein. The appeal has arisen under the following circumstances:

(i) M/s. Shanmuga Metals, is a proprietary concern running a Metal Rolling Mill at No. 368, Mangalakudieruppu Street, Thatchanallur, Tirunelveli District. Brass sheets are manufactured in the abovesaid rolling mill. The said rolling mill was originally run by a Private Limited Company called "Nellai Metal Rolling Mill Private Limited". Subsequently, the said rolling mill was purchased by three persons, S. Velayutha Nadar, Shanmuga Nadar and Ponniah Nadar in the year 1975. Thereafter, from April 11, 1988 the said rolling mill was run in the name of Murugan Metal Rolling Mills. On October 28, 1989 the said concern was purchased by Sri Shanmugavel and started running the rolling mill as a proprietary concern in the name of M/s. Shanmuga Metals.

(ii) The abovesaid rolling mill was inspected by the E.S.I. Inspector on October 30, 1984. At the time of inspection, he noticed that the employer had engaged 10 or more employees and that the wage-registers were not maintained properly. He prepared the inspection reports (Exhibits R-2 and R-3) on the basis of the entries found in the ledgers, calculated the arrears of contribution on ad hoc basis at 7%. A sum of Rs. 6363/- was arrived at representing the arrears of contribution for the period May 14, 1978 to September 30, 1984. Thereafter, a show cause notice in Form C. 18 was issued to the employer under Exhibit R-4 demanding payment of the above said amount. Even though an opportunity was provided to the employer by Fixing December 18, 1995 to be the hearing date for personal hearing, the employer did not appear. Thereafter, another show cause notice dated October 17, 1986 was issued under Exhibit R-8. But this time too the employer after receiving the said notice failed to either send a reply or appear in person. Thereafter, the first respondent passed two orders on February 12, 1987 u/s 45-A of the E.S.I. Act for recovery of arrears of contribution for two different periods. Pursuant to the abovesaid orders passed u/s 45-A of the E.S.I. Act recovery orders were also issued for the recovery of the said arrears under Revenue Recovery Act. Therefore, three recovery notices came to be issued by the second respondent herein to the appellant/petitioner, the particulars of which are as under:

Contribution Proceedings No. and Date Relevant Period sought to be required
57/RRC/5525/234/96 dated July 2, 1996 January 1, 1986 to September 30, 1990 Rs. 41/-
57/RRC/5525/235/96 dated July 2, 1996 October 1, 1984 to August 31, 1996 Rs. 10,490/-
57/RRC/5525/236/96 dated July 2, 1996 May 14, 1978 to September 30, 1984 Rs. 10,634/-

2. All the three notices were challenged by the appellant before the E.S.I. Court in the above said E.S.I.O.P. No. 7 of 1996 in which the appellant herein/petitioner in the E.S.I.O.P. had raised the following contentions:

(1) The appellant could not be mulcted with liability for payment of arrears of contribution payable by the previous owner of the factory and that too for the periods prior to his purchase;

(2) The Metal Rolling Mill could not be termed a factory as at no point of time more than 5 persons were employed;

(3) Contributions for the persons employed in the said concern had been regularly paid without fail;

(4) As the claim relates to the period May 14, 1978 to September 30, 1990 whereas the recovery notices were issued only on July 2, 1996, the same are barred by limitation u/s 77(1-A) of the E.S.I. Act - According to the said Section, recovery proceedings initiated after a lapse of five years from the date on which the cause of action arose were barred by limitation; and

(5) The determination of contribution, amount u/s 45-A of the E.S.I. Act should

have been made within 3 years from the date on which the cause of action arose, but the first respondent determined the contribution payable beyond the period of 3 years on February 12, 1987 - As per Section 77(1-A) and Proviso to Section 77(1-A) determination of contribution amount after the expiry of 3 years from the date on which the cause of action arises was barred.

3. The respondents herein filed a counter statement and contested the said E.S.I.O.P. denying the petition averments regarding number of persons employed in the abovesaid concern and contending inter alia that the present employer was jointly and severally liable along with the former employer in case of change of ownership as provided u/s 93-A of the E.S.I. Act. Regarding the plea of limitation, it was the contention of the respondents that the same could be pressed into service only in respect of claims relating to the period subsequent to October 20, 1989, the date on which amendment to Section 77 of the E.S.I. Act introducing limitation was brought into force and that the same will not be applicable to the present case to which the pre-amendment provision of u/s 77 of the E.S.I. Act alone would be applicable. To prove their respective contentions, the appellant/petitioner marked 12 documents as Exhibits P-1 to P-12 whereas the respondents, marked 17 documents as Exhibits R-1 to R-17. No witness was examined on either side.

4. After considering the rival contentions and the documentary evidence produced on both sides, the E.S.I. Court framed four issues for determination which are as follows:

(1) Whether the petitioner Shanmuga Metals do not fall within the coverage of E.S.I. Act and whether the contention that the petitioner/Shanmuga Metals is not a factory within the meaning of Section 2(12) of the Act is acceptable?

(2) Whether the contention of the petitioner that the petitioner is not liable to pay the above contribution is acceptable?

(3) Whether the claim is barred by limitation as contended by the petitioner?

(4) Whether the petitioner/Shanmuga Metals Employees are entitled to the relief sought for?

5. At the conclusion of discussion deciding all the issues against the appellant/petitioner, the E.S.I. Court has dismissed the abovesaid O.P. by its order dated December 24, 1998. Aggrieved by and challenging the said order, the appellant herein has filed this appeal u/s 82 of the Employees State Insurance Act, 1948.

6. The arguments advanced by Mr. R.S. Ramanathan, learned Counsel for the appellant and Mr. P. Sermakani, learned Counsel for the respondents, have been heard.

7. Three recovery notices issued by the second respondent on July 2, 1996 in proceeding Nos. 57/RRC/5525/234/1996 dated July 2, 1996, 57/RRC/5525/235/1996 dated July 2, 1996 and 57/RRC/5525/236/96 dated July 2, 1996 claiming

arrears of contribution of Rs. 41/-, Rs. 10,490/- and Rs. 10,634/- for the periods from September 1, 1986 to September 30,1990, October 1,1984 to August 31,1986 and May 14, 1978 to September 30, 1984 respectively have been impugned by the appellant. During the course of enquiry before the E.S.I. Court it was admitted that the amounts sought to be recovered under the first 2 notices namely, Rs. 41 /- and. Rs. 10,490/- had been paid. Hence, the liability of the appellant was contested in the above said O.P. regarding the 3rd item alone, namely Rs. 10,634/- pertaining to the period from May 14, 1978 to September 30, 1984. The learned Judge of the E.S.I. Court relying on the document marked as Exhibit R-1, the communication made by the appellant to the E.S.I. Corporation, dated March 24, 1984 and Exhibit R-3, the Inspection Report of the E.S.I. Inspector has rightly come to a conclusion that the contention of the appellant/petitioner that M/s. Shanmuga Metals does not Fall under the definition of factory as found in Section 2(12) of the E.S.I. Act could not be sustained. In Exhibit R-1. the then employer has clearly, admitted that more than 10 employees worked during certain months in the above said rolling mill. It is also evident from the report of the E.S.I. Inspector marked as Exhibit R-3 that there were 16 persons employed at the time of his inspection. It is also not in dispute that electricity power was being used in the manufacturing process in the said rolling mill. As 10 or more employees were proved to have worked, the contention of the appellant/petitioner that Shanmuga Metals does not fall within the definition of factory as found in Section 2(12) of the E.S.I. Act has been rightly rejected by the learned Judge of the E.S.I. Court. I find no reason to interfere with the said finding supported by convincing reasons.

8. So far as the next contention of the appellant that he should not be mulcted with liability for payment of arrears of contribution pertaining to a period when the factory was run by another person and that he should not be held liable for the arrears of contribution for the former employer, the learned Judge of the E.S.I. Court has rightly dismissed the said contention by making a reference to Section 93-A of the E.S.I. Act which makes the present employer jointly and severally liable to discharge the dues under the Act, in respect of the contribution due from the previous owners of the factory, in case of transfer of establishment either in whole or in part. Therefore, there is no scope for interference regarding the above said finding of the Trial Court.

9. The next two objections raised by the appellant are concerning the alleged limitation for taking steps for the recovery or the arrears of contribution. According to the appellant, no recovery order u/s 45-A of the E.S.I. Act could be made after 5 years from the date on which the amount became due and that no claim for arrears of contribution can be made after expiry of 3 years from the date on which the cause of action arose. The learned Trial Judge has rightly pointed out that the said objections had been taken on an erroneous assumption that the bar of limitation is applicable not only for the claims made before the E.S.I. Court but also for the recovery orders passed u/s 45-A of the E.S.I. Act and hence, the said objections are not sustainable. Here it is a case in which the

E.S.I, Corporation has not approached the E.S.I. Court u/s 76 of E.S.I. Act. On the other hand, the amount of contribution was determined u/s 45-A of the E.S.I. Act and the said amount determined u/s 45-A is sought to be recovered u/s 45-B of the E.S.I. Act as arrears of land revenue.

10. The question of limitation has been dealt with by a Division Bench of this Court in its judgment in *The Regional Director, ESI Corporation Vs. Chemfab Alkalis Limited (Public) Limited*, . Relying on an earlier decision in *Regional Director, ESI Corporation v. Henry Woleey and Co.* 2000 III LLJ (Suppl) 582 (Mad) the Court has held that the Act provided no period of limitation for the recovery of amount due from a defaulting employer and that the only period of limitation prescribed u/s 77 was applicable for filing an application before the E.S.I. Court u/s 75 incorrectly stated u/s 75 instead of u/s 76 of the Act. The Division Bench has held in clear terms that a claim and demand made u/s 45-A of the E.S.I. Act was not barred by limitation. The said judgment of the Division Bench of this Court covers the point urged by the appellant on the question of limitation. In the light of the abovesaid observations enunciating the law on this point by the Division Bench the argument advanced on the side of the appellant is liable to be rejected as untenable. The learned Judge of the E.S.I. Court has not committed any mistake or error in coming to the conclusion that the declaration and injunction sought for by the appellant regarding recovery notices could not be granted. There is no merit in this appeal and the same deserves to be dismissed.

11. In the result, this appeal dismissed with costs.