
(1994) 08 BOM CK 0024

In the Bombay High Court

Case No : First Appeal No's. 772 and 852 of 1987

Standard Fabricators (India) Pvt. Ltd.

APPELLANT

Vs

The Regional Director, E.S.I. Bombay

RESPONDENT

Date of Decision : 19-08-1994

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(22), 40, 41, 45A, 45B

Citation : (1995) 1 ACC 688 : (1995) 1 BomCR 435

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : S.D. Puri, in F.A. No. 772 of 1987 and M.V. Jaykar, in F.A. No. 852 of 1987, for the Appellant; S.D. Puri in F.A. No. 852 of 1987 and M.V. Jaykar in F.A. No. 772 of 1987, for the Respondent

Final Decision : Dismissed

Judgement

D.R. Dhanuka, J.—M/s. Standard Fabricators (India) Private Ltd., have filed First Appeal No. 772 of 1987 impugning part of order dated 9th March, 1987 passed by the Employees State Insurance Court, Bombay, in Application (ESI) No. 45 of 1987 in so far as said order is against the appellant. The E.S.I. Corporation has filed First Appeal No. 852 of 1987 against the same order in so far as the said order is against the Corporation. M/s. Standard Fabricators (India) Private Ltd., the employer is covered under the Employees State Insurance Act.

2. By an order dated 1st August, 1981, passed under sub-section (1) of section 45A of the Employees State Insurance Act, 1948 (being the order impugned in Application (ESI) No. 45 of 1987), the Regional Director of the E.S.I. Corporation determined various amounts of contribution payable by M/s. Standard Fabricators (India) Private Ltd. to the Employees State Insurance Corporation. By the said order, various amounts of contribution payable by the said establishment were computed on the aggregate amounts debited in the ledger of the employer in the accounts of (i) factory building contractor (ii) factory building repairs (iii) maintenance of garden and (iv) manufacturing expenditure as set out therein. By

the said order, the Regional Director determined the total amount of contribution in the sum of Rs. 1,35,547.27 as principal amount and Rs. 1,23,172.50 towards interest. The Corporation thus demanded an aggregate sum of Rs. 2,58,719.47 from M/s. Standard Fabricators (India) Private Ltd. the employer herein. The employer disputed the claim of the Corporation and filed the aforesaid application in the trial Court invoking section 75 of the Act. The trial Court accepted the claim of the Corporation in respect of the amount of contribution pertaining to the aggregate debits in the accounts of the employer under the Heads "factory building contractor", "factory building repairs" and "maintenance of garden" but did not accept the claim of the Corporation in respect of the amount of contribution claimed on amount debited under the Head of "manufacturing expenditure". The trial Court did not uphold the claim for interest of Rs. 1,23,172.50 in view of the inordinate delay committed by the E.S.I. authorities in making the impugned demand. The trial Court thus partly allowed the application made by the employer. In this situation, both the parties have filed cross appeals against the order passed by the trial Court dated 9th March, 1987.

3. The relevant facts having bearing on the subject-matter of these two cross-appeals are briefly summarised hereinafter.

(a) On or about 11th April, 1978, the concerned Inspector of the Employees State Insurance Corporation visited the factory of the employer and noted down the aggregate amounts of expenditure incurred by the employer on extension of factory building during the years 1965-68, the amount incurred by the employer on factory building repairs during the same period and also the expenditure debited under the head of "maintenance of garden" as well as "manufacturing expenses" as particularised in order dated 1st August, 1981 passed by the Regional Director of the Corporation, copy whereof is at page 44 of the compilation filed in these proceedings. Correspondence ensued between the parties. The Regional Director granted the personal hearing to the employer. Thereafter the impugned order was passed by the Regional Director of the Corporation on 1st August, 1981 as indicated above.

(b) The employer impugned the said order by filing its application dated 1st September, 1981 before the E.S.I. Court at Bombay, being application No. 45 of 1981, invoking section 75 of the E.S.I. Act. The employer stated in the said application that the employer-Company was engaged in business of manufacture of textile machineries having its factory at Thane and the employer-Company had paid all the amounts of contribution payable by the employer to the Corporation. It was the contention of the employer in the said application as set out also in its letter dated 28th February, 1979 that the major part of the expenditure on expansion of factory building, related the purchase of cement, bricks, sand and other construction material. It was also the contention of the employer that the contractor who was engaged for purpose of expansion of factory building could not be treated under the Act as an "immediate employer" and the employer herein was not liable to pay any contribution on the wages paid

to the contractor's employees. The employer totally disputed the claim made by the Corporation and submitted that the employer was not liable to pay any amount to the Corporation as claimed or otherwise. The Corporation filed its written statement dated 21st September, 1981 and contested the said application on various grounds. The Corporation sought to justify the impugned order in all respects.

(c) At the hearing of the said application Sarvashri D.D. Pradhan and M.W. Ghaisas were examined as witnesses on behalf of the employer and Shri S.D. Deshpande was examined as a witness on behalf of the Corporation. It is not in dispute that during the years 1965-68 the employer had undertaken extension of its factory building situate at Thane and employed a contractor in connection therewith. In the case of *E.S.I. Corporation v. South India Flour Mills*, reported in (1986) II L.L.J 34 the Supreme Court held that the work of construction of additional building for extension of the factory was the work connected with the factory covered under the Act and the principal employer was liable to pay contribution in respect of the employers engaged by Contractor for construction of additional factory building or expansion thereof. Where such employees are employed by the contractor, the principal employer i.e. owner of the factory is liable to pay contribution to the Corporation in respect of the contractor's employees in the first instance as provided in section 40 of the Act. The principal employer who makes payment of such contribution in respect of employees of the contractor is entitled to recover the amount of contribution so paid from the immediate employer of such employer by virtue of provisions contained in section 41 of the Act. It is well settled that contribution is required to be computed only on the amount of "wages" paid or payable to the employees concerned and not on the total lumpsum paid to the contractor. Where the amount paid to contractor includes the price of materials and for execution of contract work etc. It is possible that the lumpsum amount paid by the employer to the contractor engaged for construction of additional factory building may include the cost of material procured by the contractor for execution of the contract work. It all depends upon the terms of the contract between the employer and the contractor. In several cases coming before this Court, it is noticed that lumpsum payments made to the contractor cannot be easily split up between costs of materials and the amount of wages paid to the employees engaged for execution of the construction work for want of relevant details. In such cases, the Corporation has issued a circular prescribing rough and ready formula for reduction of the lumpsum, paid to the contractor so as to estimate the quantum of wages paid to the workers employed for execution of the contract work on which the amount of construction can be computed. In this case, however, there was a conflicting testimony between the evidence of witness D.D. Pradhan and witness M.W. Ghaisas both being the witnesses examined on behalf of the employer. Witness D.D. Pradhan an Executive Assistant stated in his evidence that the employer had awarded contract to the third party which was not a labour contract and the bill submitted by the

contractor included cost of material used by him, labour charges and margin of profit of the contractor. Witness Moreshwar Waman Ghaisas, Administrative Manager of the employer-Company stated in his evidence that one Mr. Govind Pawar was employed by the employer as a labour contractor for carrying out work of extension of factory building. The said witness specifically stated in his evidence that the bills submitted by the said labour contractor included only charges paid by the labour contractor to the workmen. The evidence of the two witnesses was rather contradictory on this aspect. Neither the books of accounts were produced before the trial Court nor the relevant bills or vouchers concerning the construction work. A copy of the contract was not produced. No independent witness was examined. The break-up of the sum of Rs. 2,77,318-19; Rs. 3,51,84-96 and Rs. 421-42 could not be furnished by the employer, not even approximately. Witness Pradhan stated in his evidence that vouchers in respect of the amount were not available. The said witness further stated in his evidence "we can still search out account books for the relevant period. if we find them we will produce them". Witness M.W. Ghaisas however stated in his evidence that the books of accounts of the Company for the relevant period were destroyed. Having regard to the material discrepancies in the evidence of the two witnesses examined at the trial and having regard to the non-production of the account books, bills and vouchers and non-production of any independent evidence, the trial Court reached the conclusion that the employer was liable to pay amount of contribution on three counts viz. Rs. 2,77,318-19, 35,184-96 and Rs. 421.42 working out at the figure of Rs. 17,412-27, Rs. 4,264 and Rs. 29-50. The same appear to be the position in respect of contribution computed on the amount debited in factory repairs amount for the period 1965-66, 1966-67 and 1967-68. Sums of Rs. 26,146-60, 2,205-37 and 2,379.89 was debited in the said three accounts by the employer during the years 1965-66, 1966-67 and 1967-68. In view of the material discrepancies, in the evidence lead on behalf of the applicants, the trial Court held that the claim of the Corporation for contribution of these three amounts also work out to Rs. 1,834, Rs. 154-38 and Rs. 166-57. The view taken by the trial Court is based on appreciation of evidence and cannot be characterised as perverse.

4. The learned Counsel for the appellant has invited the attention of the Court to the evidence of witness M.W. Ghaisas in detail and submitted that in the ledger of the company cost of construction material in fact included under the Head "Factory building contractor". As regards non-production of books of accounts bills of the contractor and vouchers in respect of payment, the learned Counsel for the employer submitted that the employer was bound to preserve the relevant registers only for 5 years from the date of last entry therein. The learned Counsel for the employer submitted that the employer was bound to preserve the relevant registers only for 5 years from the date of last entry therein. The learned Counsel for the employer relied upon Regulation 32(2) of the Employees State Insurance (General) Regulation, 1950, in support of his

submission. The said regulation concerns only "Register of Account Books" and is not relevant. The learned Counsel for the Corporation invited attention of the Court to the recent judgment of this Court in Letters Patent Appeal No. 97 of 1988 arising from First Appeal No. 445 of 1984 delivered by Hon. A Bhattacharjee, C.J. and V.P. Tipnis, J. The learned Counsel for the Corporation submitted that the appeal did not involve any substantial question of law. On this aspect of the case the trial Court recorded a finding of fact based on appreciation of evidence of witnesses examined, in light of non-production of relevant books of accounts and relevant documents. I have no hesitation in accepting the submission made by the learned Counsel for the Corporation on the aforesaid aspect of the case. It is not possible to interfere with the findings recorded by the trial Court on this aspect.

5. The learned Counsel for the employer also submitted that the trial Court has committed substantial error of law in so far as the trial Court deleted the claim of computation of compensation on the expenditure incurred for maintenance of garden during the years 1965-67, amounting to Rs. 341.45 and Rs. 214.30. There is no merit in this contention also. Witness M.W. Ghaisas has stated in his evidence that the employer has engaged Garden Consultant B.R. Deshpande. He was paid consultancy charges on monthly basis. He used to visit garden once or twice in a month. In my opinion, the finding of the trial Court on this aspect of the case is also a finding of fact and does not involve any substantial question of law. No case is made out for interference of this Court on this aspect also.

6. The learned Counsel for the employer submitted that the claim made by the Corporation was barred by limitation or laches. The learned Counsel for the employer invited attention of the Court to the fact that the work of factory extension, factory repairs etc. was carried out during the years 1965-68 and the Corporation addressed its first letter in respect thereof on 11th October, 1978 based on the inspection report of the Inspector who visited the factory of the employer here on 11th April, 1978. The learned Counsel for the employer submitted that the Inspector of the Corporation used to visit factory from time to time and the Corporation could not make demand for contribution in respect of the amount set out in order dated 1st August, 1981, after a lapse of so many years. The learned Counsel for the employer invited attention of the Court to the Division Bench Judgment of this Court in the case of Gandhi v. K.T.R.P. Ltd., reported 1994 L.L.R 560. In this case, the learned Single Judge of this Court had quashed show cause notice issued by the prescribed authority under the provisions of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, invoking section 15-B of the said Act after a period of 17 years. Having regard to the facts and circumstances of the case, the learned Single Judge had held that there was inordinate delay in initiating action u/s 14B of the Employees Provident Fund and Miscellaneous Provisions Act, 1952. The Hon'ble Division Bench of this Court consisting of Mrs. Justice Sujata Manohar (as Her Ladyship then was) and N.D. Vyas, J., upheld the said decision and dismissed the appeal. The Learned Counsel for the employer submitted that the same principle

must be applied in the case of demand made by the Corporation after abnormal delay in the case of E . S .I . Act, 1948. The learned Counsel for the respondents in his turn, relied upon judgment of the Division Bench of this Court consisting of Dharmadhikari and Bhosale, JJ. in Appeal No. 25 of 1982, arising from Misc. Petition No. 882 of 1976 in the case of E.S.I. Corporation v. Asian Paints P. Ltd. The learned Counsel for the employer himself invited attention of the Court to the decision of the Kerala High Court in the case of E.S.I. Corporation v. Ramadas Reddiar, reported in 1981 L.L.J. 1966. In this case, the Kerala High Court held that proceedings u/s 45B of the E.S.I. Act were not subject to law of limitation. It is not necessary to pursue this controversy any further as I take the view that having regard to the facts of the case, it is not possible to hold that the Corporation initiated the action for estimation of the amount of contribution herein after an abnormal delay. The relevant facts were within the knowledge of the Corporation. The Act does not prescribe any period of limitation for passing of an order u/s 45A. The Act prescribes limitation for making application u/s 75 of the Act and not for passing of order u/s 45A of the Act. If there is too much delay, the Court can quash the impugned demand on the footing that the demand made amounted to an abuse of power. Such is not the case here. There is no intentional inaction or negligence on the part of the Corporation. The learned Counsel for the employer also submitted that the Corporation cannot pass an order u/s 45A of the Act after expiry of five years from the date of alleged accused of cause of action and period of limitation in this respect should be implied from the obligation of the employer to preserve the necessary registers for a period of five years under Regulation 32(2) framed under the Act. It is not possible to accept this submission. In the present case, the Corporation discovered the relevant facts for the first time on 11th April, 1978. I am not satisfied that the Corporation is guilty of laches. In this case, the question of limitation or question of laches is not a pure question of law but is intertwined with questions of facts. It is not possible to interfere with the findings recorded by the trial Court on this aspect of the case.

7. The learned Counsel for the Corporation submitted that the trial Court committed substantial error of law by deleting claim of the Corporation concerning the contribution amount computed as manufacturing expenses. The learned Counsel for the Corporation invited Court's attention to para 11 of the judgment of the trial Court. Witnesses D.D. Pradhan and M.W. Ghaisas have stated that items debited in the account books under the Head "Manufacturing expenses" included the amount paid by the employer as purchaser to the third parties for purchase of welding rods and other raw materials required for manufacturing activities. It further appears from para 11 of the judgment that the amount debited under "Manufacturing expenses" account also included certain amounts paid to the third parties for planting anodizing machinery work carried out by the third parties in the factory of the employer. The learned Counsel submitted that the trial Court ought to have splitted up the total amount included in the "Manufacturing expenses" account by apportioning part of the

amount for the work carried out by the third parties in the factory of the employer and other part as account of cost of material. The trial Court recorded the finding of fact to the effect that no contribution could be claimed by the Corporation on the manufacturing expenses incurred by the employer during the relevant years as the said manufacturing expenses did not constitute wages and as the manufacturing expenses concerned payment of amount made by the employer to the third parties for purchase of material etc. In my view, the question raised by the employer to the third parties for purchase of material etc. In my view, the question raised by the learned Counsel for the Corporation also does not involve substantial question of law. The facts placed before the Court are not quite clear. The trial Court did its best to take balanced view in the matter. No case is made out for interference by this Court with the findings arrived at by the trial Court, on this aspect of the case as well. The remote possibility of a marginal error in this behalf, if any cannot be totally ruled out. But it cannot be helped. Section 82(2) of the Act permits this Court to intervene only if the appeal involves a substantial question of law.

8. The learned Counsel for Corporation submitted that the trial Court was not justified in deleting amount of interest claimed by the Corporation in the sum of Rs. 1,23,172.50. The trial Court exercised its discretion in the matter having regard to the delay on the part of the Corporation in making claim as discussed in the judgment of the trial Court. This aspect of the case also does not involve any substantial question of law. No case for interference of this Court is made out.

9. In the result, both the appeals are dismissed. The order passed by the trial Court on 9th March, 1987 in Application (ESI) No. 45 of 1981 is confirmed. There shall be no order as to costs.

10. It is agreed between the parties that employer herein has paid a sum of Rs. 33,000 to the Corporation during the pendency of the appeal subject to the result of the appeal. The learned Counsel for the employer submits that in view of the findings of the Court, only a sum of Rs. 22,507/- would be due and payable by the employer to the Corporation. The Corporation shall check up the figures and refund the balance of the amount to the employer within six weeks from today without fail, time being the essence of the obligation.