
(2011) 03 MAD CK 0285
In the Madras High Court
Case No : CMA No. 1432 of 2006

Syndicate Printers

APPELLANT

Vs

The Regional Director ESI Corporation

RESPONDENT

Date of Decision : 21-03-2011

Acts Referred:

Employees State Insurance (Amendment) Act, 1989 — Section 1(6)
Employees State Insurance Act, 1948 — Section 45(2), 45A, 45B, 75, 77

Citation : (2011) 4 LLJ 149 : (2011) LLR 963 : (2012) 2 SLJ 52

Hon'ble Judges : Aruna Jagadeesan, J

Bench : Single Bench

Advocate : S. Ravindran, for T.S. Gopalan and Co, for the Appellant; S. Jayakumari, for the Respondent

Final Decision : Allowed

Judgement

Aruna Jagadeesan, J.—This Civil Miscellaneous Appeal is filed against the order dated 25.11.2005 made in EIOP. No. 408/2001 by the Employees Insurance Court/Presiding Officer, Principal Labour Court, Chennai herein after referred to as the ESI Court.

2. The Appellant/Syndicate Printers represented by its Proprietor V. Chockalingam filed an application u/s 75 of the ESI Act 1948 (hereinafter referred to as the Act), challenging the order dated 6.9.2000 and the consequent demand passed u/s 45A of the Act, demanding Rs. 13,967/- towards contribution for the period from 25.11.1984 to 31.8.1986. The Appellant contended that he was not served with the copy of the report of the Inspector, which report formed the basis for the impugned show cause notices, the determination u/s 45A of the Act and the demands that followed.

3. On the side of the Appellant, the attendance registers for the period from 1984 to 1986, the copy of the judgment in CC. No. 9385/1986 on the file of the II Metropolitan Magistrate, Edmore were filed as Exs.P1 and 2 apart from other documents Exs.P3 to P12. The Proprietor of the Appellant examined himself as

PW.1 and on the side of the Respondent, one Rajendra Singh was examined as RW. 1. Exs. R1 to 4th Respondent were marked on their side.

4. The ESI Court, on an analysis of the evidence on record produced before it, held that Ex.P1 attendance register is not an authenticated document, as it contains no endorsement by any Official to authenticate that it was maintained by the Appellant during the relevant period and further to prove the genuineness of the said document, no corresponding wage register was produced. It further held that there was non cooperation from the Appellant and he failed to produce the relevant records to the competent authority. It also held that since the earlier proceedings in EIOP. No. 96/1986 between the Appellant and the Respondent had reached finality, the coverage of the Appellant's Establishment under the Act is proved. Referring to Ex.P2 the judgment of the criminal court whereby the Appellant was acquitted on the ground that only less than ten persons were employed during the same relevant period, the ESI Court held that the said judgment has no bearing on the present case. Thus, the ESI Court dismissed the petition, as against which the present appeal is filed.

5. The substantial questions of law that arises for consideration in this Civil Miscellaneous Appeal are as follows:

1. Has not the Respondent barred from initiating proceedings against the Petitioner in terms of proviso to Section 77(1A)(b) of the ESI Act?

2. Is the Petitioner covered under the purview of the ESI Act?

6. Mr. S. Ravindran for M/s. T.S. Gopalan & Co., the learned Counsel for the Appellant assailed the impugned order passed by the ESI Court on the ground that the ESI Court failed to note that Ex.P1 attendance register was verified by the Inspector of Factories in the Month of February 1984 and November 1986 and erroneously held that the said document is not an authenticated one. The learned Counsel submitted that the ESI Court totally disregarded the judgment of acquittal passed by the criminal court and the same ought to have been taken for consideration though not binding on the said court. The learned Counsel would point out that in spite of insistence by the Appellant to the Respondent to furnish him the copy of the report of the Inspector, the same was not furnished to him and he was not made known as to the basis on which the Inspector has come to the conclusion that more than 10 persons were employed.

7. The learned Counsel for the Appellant would submit that when the Employer refuses to cooperate or fails to abide by the relevant provisions of law, Section 45A of the Act empowers the Corporation to determine the amount of contribution on the basis of information available to it. In such cases, the Corporation is obliged to pass a speaking order indicating as to how it has determined the amount of contribution and what was the information available to it for determining such amount. He would contend that though the power to determine the amount is conferred upon the Corporation, it cannot be said that Section 45A confers unguided or uncontrolled discretion upon the Corporation to

determine the amount of contribution. It is the contention of the learned Counsel for the Appellant that if an Employer disputes his liability, he can take recourse to the provisions of Section 75 of the Act and whether the determination of the amount is based on the objective consideration is also to be decided by the ESI Court. He would submit that in the absence of any such material or evidence, the attendance register produced by the Appellant ought to have been considered and the same should not have been rejected on the ground that it is not an authenticated document, especially when it has been verified by the authority concerned. He would submit that Ex.P1 was the only evidence available before the ESI Court and the ESI Court committed wrong in rejecting Ex.P1 as not an authenticated document and holding that the Act is applicable to the Appellant Establishment.

8. On the other hand, Ms. Jayakumari, the learned Counsel for the Respondent contended that it was the duty of the Appellant to produce all such evidence which could have been of assistance to the adjudicating authority to decide about the applicability of the Act and the Appellant having failed to produce the relevant registers despite opportunity given, the authority after having been satisfied with the materials placed before it held that the Act is applicable to the Appellant Establishment. Therefore, she would contend that the Corporation was well justified in invoking the provisions u/s 45A of the Act and deciding about the contribution payable by the Appellant. She would support the order of the ESI Court by contending that the ESI Court, on the basis of the evidence produced before it, has rightly arrived at the correct finding and the same cannot be interfered with.

9. As regards the first substantial question of law is concerned, the learned Counsel for the Appellant conceded that in view of the settled position of law, the right of the Corporation to recover the arrears by coercive process is not restricted by any limitation.

10. In 2007 (1) LLN 1 [ESI Corporation v. C.C. Santhakumar] it is held as here under:

29. Section 77 of the Act relates to commencement of proceedings before the ESI Court. The proviso to Sub-Section 77 of the Act cannot independently give any meaning without reference to the main provision, namely, Section 77 of the Act. Therefore, the proviso to Cl.(b) of Section 77(1A) of the Act, fixing the period of five years for the claim made by the Corporation, will apply only in respect of claim made by the Corporation before the ESI Court and to no other proceedings.

11. It is held by the Honourable Supreme Court that the prescription of limitation u/s 77(1)(A)(b) of the Act has not been made applicable to the adjudication proceedings u/s 45A by the legislature, since such a restriction would restrict the rights of the Corporation to determine the claims u/s 45A of the Act and the right of recovery u/s 45B and further, it would give a benefit to an unscrupulous

Employer. It further held that the period of five years, fixed under the Regulation 32(2) of the Regulations, is with regard to maintenance of registers of workmen and the same cannot take away the right of the Corporation to adjudicate, determine and fix the liability of the Employer u/s 45A of the Act, in respect of the claim other than those found in the register of workmen, maintained and filed in terms of the Regulations.

12. In view of the settled position of law, the question of limitation raised merits no consideration.

13. Turning to the argument advanced by the learned Counsel for the Appellant questioning the applicability of the Act to the Appellant, it is no doubt true that the applicability of the Act to an Establishment would necessarily depend upon the number of employees employed in such an Establishment. Certainly, it is always within the knowledge of the Employer as to how many employees he has engaged in his Establishment. The burden regarding the proof of number of employees would definitely be upon the Employer of the Establishment to discharge and once the Employer establishes the number of employees employed in such Establishment, it will automatically disclose whether the Act is applicable to such Establishment or not.

14. Section 45A of the Act clearly provides that the Corporation may on the basis of the information available to it determine the contribution payable in respect of employees of an Establishment. Before determining the liability u/s 45A of the Act, it is necessary to give reasonable opportunity of being heard to the Employer. So the compliance of the principles of natural justice by the Corporation before determination of such contribution is not ruled out. In the case on hand, it is no doubt true that the Appellant was given such opportunity by the Respondent by letter dated 10.11.1986 proposing to determine and recover the amount of contribution payable in respect of the employees for the period from 25.11.1984 to 26.1.1985 at Rs. 519.75/- and for the period from 27.1.1985 to 31.8.1996 at Rs. 1131.93 and Rs. 4912.50/- totaling Rs. 6564.28/-. In the said letter, it is stated that the Appellant has failed to produce the relevant records of contribution payable before the Insurance Inspector, who visited the Establishment on 12.8.1986. To this letter, the Appellant has sent a reply dated 12.12.1986 stating that the Appellant is not liable to pay contribution from 1.1.1982 to 31.8.1986 as his Establishment is not covered under the Act and no Insurance Inspector visited his Establishment on 12.8.1986.

15. The Regional Director, ESI Corporation had sent a notice in Form C-18 determining the contribution covering the same period 25.11.1984 to 26.1.1985 at Rs. 519.75/- from 27.1.1985 to 31.1.1985 at Rs. 113.79/- and from 1.2.1985 to 31.8.1986 at Rs. 13334.20/- totaling Rs. 13967.14/- assumed wages at Rs. 880/- for 11 employees. It is pertinent to point that the previous notice was not cancelled. The Appellant has sent a lawyer's notice dated 17.1.1991 informing the Respondent that the Insurance Inspector may inspect the records at the office of the Appellant after prior intimation and he would produce whatever

records available for inspection. The Appellant has been directed to appear on 9.4.1991 at 11.00 a.m. with all records. The Appellant by letter dated 29.3.1991 had requested the Regional Director, ESI Corporation to furnish the following particulars:

1. Particulars of II employees indicated in the C.18 notice at the date on which they were employed.
2. The basis for assuming Rs. 880/- on wages per month per employee.
3. Copy of the report if any submitted by your Inspector on the basis of which you have concluded that my factory is covered under the ESI Act for the period from 25.11.1984 to 31.8.1986.

16. In the above letter, he has specifically requested to furnish him the copy of the Inspection Report and not to hold the personal hearing till such copy is furnished. Admittedly, the Inspection report was the basis for determining the contribution and according to the Appellant, no such report was furnished to him despite his repeated request. In his petition filed u/s 75 of the ESI Act, he has stated that he has not been furnished with the copy of the report. Ground No. 3 reads as follows:

The Respondent failed to observe principles of natural justice. He did not furnish the clarifications sought for repeatedly by the Petitioner nor did he furnish the copy of the Inspection Report which the Petitioner asked for in order to give further reply without giving the clarifications and the copy of the Inspection Report and without replying the Petitioner's letter dated 29.3.1991, the Respondent passed the impugned order dated 6.9.2000 after several years.

17. In the Written Statement filed by the Respondent, non furnishing of Inspection Report is not denied, but only stated that the said report has been filed in EIOP. No. 96/1986. It is further stated that the Inspector visited the Appellant's Establishment in 1994, but even the said report has not been furnished to the Appellant. The Appellant in fact disputed the fact that the Inspector had visited the Establishment.

18. At this juncture, it is worthwhile to refer to Section 45A of the Act. It reads as under:

Determination of contributions in certain cases:

(1) Where in respect of a factory or Establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of Section 45 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 functions 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.

19. The determination contemplated by Section 45A will have to be made based on the materials available while determining the liability u/s 45A of the Act. The principles of natural justice will have to be followed. Before determining the liability u/s 45A of the Act, the Employer will have to be given a reasonable opportunity of being heard in consonance with the principles of natural justice. In this case, the Appellant/ Employer has been insisting the Respondent to furnish him the copy of the Inspector's report, but the same has not been furnished to him. In such view of the matter, it has to be seen whether the party affected namely the Employer has been given a just and fair opportunity to state his plea. Having regard to the above said facts and circumstances of the case, I am of the view that no just and fair opportunity has been given to the Appellant before determining the liability of the Appellant.

20. In the instant case from the evidence placed on record, it cannot be inferred as to what are the relevant materials which formed the basis for the Corporation to decide the matter u/s 45A of the Act. It is the duty of the authority to ascertain from all material available to it and decide the liability. Despite the fact that the Appellant disputed the liability, the Respondent has not produced those materials even before the ESI Court to show that the calculations were determined by the authorities based on relevant materials and that the Act is applicable to the Appellant Establishment and further that the calculation of the contribution were not wrong.

21. The learned Counsel for the Appellant contended that though the Appellant has not produced the records as required by the authorities, however disputed the visit of the Insurance Inspector on the alleged date and also the report. He submitted that the details regarding arriving at the liability of the Appellant and the calculations of the contribution were not furnished and produced by the Respondent even before the ESI Court.

22. It is the specific case of the Appellant that he has not employed more than eight persons and he was also not served with the copy of the report of the Inspector, which formed the basis for the impugned show cause notice, the determination u/s 45A of the Act and the demands that followed. In order to find out whether the provisions of the EST Act are attracted, the report must contain the list of employees , the designation, the length of service, emoluments and the signature of the employees. It is also required to give particulars of other persons, if persons other than the Employer are present. But, in the instant case, as the said report has not been produced before the ESI Court, there is no material to find out as to whether all those details are found in the said report. There are no materials produced to show on what basis liability of the Appellant is determined and the contribution was arrived at.

23. On the other hand, the only evidence available was Ex.P1 attendance register for the year 1984 and 1986 produced by the Appellant. The said attendance register was scrutinized by the Labour Inspector on various occasions, that is, on three different dates. The ESI Court failed to notice the said scrutiny made by

the authorities concerned and erroneously had come to the conclusion that Ex.P1 is not an authenticated document. The attendance register has not been impeached by the Respondent in the cross examination of PW.1 RW.1 Insurance Inspector did not deny about the scrutiny of the Attendance Register made by the Labour Inspector, but only said that he is not aware of it. He had admitted that he has not inspected the Appellant Establishment and it is some other Inspector who made the inspection. In the absence of any other material to impeach the attendance register Ex.P1 produced by the Employer, the finding of the ESI Court that Ex.P1 is not an authenticated one cannot be sustained.

24. The last point sought to be raised is regarding the finality of the order passed thereon for the earlier periods wherein the applicability of the Act to the Appellant was affirmed. The period of coverage was 1.1.1982 to 24.11.1984. The ESI Court held that more than eleven employees were employed and accordingly determined the contribution payable by the Appellant Establishment which was confirmed by this Court also by the Division Bench in LPA. No. 149/1999. In that case, the report of the Insurance Inspector was available and this Court held that the Employer failed to adduce evidence to substantiate his contention that the Act was not applicable to his Establishment. The earlier decision cannot operate as res-judicata in regard to the claim for the later period. In matters of recurring liabilities the adjudication for any one period need not necessarily operate as res-judicata in respect of another period. A reference was made to Section 1(6) of the Act by the learned Counsel for the Respondent and contended that once an Establishment is covered under the Act, all obligations regarding payment and contribution etc. by Employer are required to be complied with till the Establishment ceases to be covered. Section 1(6) was inserted by ESI (Amendment) Act 1989 and it is only prospective and not retrospective. Therefore, it cannot be said that in view of Section 1(6) of the Act, act once applied shall continue to apply.

25. The attendance register, the only evidence available disclosed that the Appellant had not employed more than eight persons and therefore, the ESI Act is not applicable to the Appellant. Therefore, the impugned order of the ESI Court warrants interference and liable to be set aside.

26. In the result, this Civil Miscellaneous Appeal is allowed, setting aside the impugned order dated 25.11.2005 made in EIOP. No. 408/2001 by the learned Presiding Officer, Principal Labour Court, Chennai. No costs.