
(2006) 05 DEL CK 0177
In the Delhi High Court
Case No : FAO. No. 724 of 2002

Tarru

APPELLANT

Vs

E.S.I.C.

RESPONDENT

Date of Decision : 22-05-2006

Acts Referred:

Employees State Insurance (General) Regulations, 1950 — Section 31A
Employees State Insurance Act, 1948 — Section 2(2), 2(22), 44, 45, 45A

Citation : (2006) 05 DEL CK 0177

Hon'ble Judges : Sanjiv Khanna, J

Bench : Single Bench

Advocate : Saurabh Prakash, for the Appellant; K.P. Mavi, for the Respondent

Final Decision : Dismissed

Judgement

Sanjiv Khanna, J.

1.The present Appeal u/s 82 of the Employees State Insurance Act, 1948 (hereinafter referred to as the Act, for short) has been filed by M/s.TARRU (hereinafter referred to as the appellant, for short). The Appeal was admitted on 16th February, 2004 and the following substantial questions of law were framed :

(a)Whether the claim against the Appellant is barred under the provisions of Section 77 of the Employees State Insurance Corporation Act, 1948

(b)Whether the provisions of Section 45-A of the Employees State Insurance Corporation Act, 1948 are applicable to the facts and circumstances of the case

2. The facts as found by the learned ESI Court are as under:

3. On 22nd Nov., 1992, Employees State Insurance Corporation (ESI Corporation for short) wrote to the appellant stating that the Insurance Inspector had inspected records of the appellant on 5th February, 1992 and discrepancies were observed in payment of insurance contribution for the period January, 1991 to February, 1991. The appellant was accordingly asked to deposit contribution of

Rs. 29,374/- u/s 2(22) of the Act, being 7.25% of Rs. 3,93,165/- on contract wages, Rs. 3600/- being the payment made to the security agency, Rs. 4292/- paid as labour charges and Rs. 4094/- being the payment made for packaging.

4. The appellant protested against the said demand vide letter dated 12th December, 1992, inter alia, stating that the appellant had been regularly paying her ESI Contribution.

5. Thereafter, for almost five years, no correspondence was exchanged between the parties. The ESI Corporation also did not take any steps for recovery of the said amount. Subsequently, on 8th July, 1997 notice was sent stating that sum of Rs. 29,374/- as demanded by letter dated 22nd November, 1992 had not been paid by the appellant.

6. The respondent Corporation, sent another notice dated 20th August, 1998 for payment of Rs. 52,316/-. This included Rs. 29,374/- towards contribution, Rs. 22,912/- towards interest and notice fee of Rs. 30/-. Similarly, a claim for payment of Rs. 1455/- for the period December, 1995 to April, 1997 was made.

7. The appellant made a representation dated 25th September, 1998 and after not getting a favorable response on or about 8th October, 1998 filed an appeal under Sections 75 and 76 of the Act before the Civil Judge, Delhi holding charge as ESI Court. The said appeal was dismissed vide Order dated 15th May, 2002. The contention of the appellant that the demand was barred by limitation was rejected by the Civil Judge holding that the demand was raised pursuant to an order passed u/s 45A of the Act and limitation period does not apply in such cases. Regarding the issue of payment of contribution on Rs. 3,93,165/-, the case of the ESI Corporation that the appellant had only deposited contribution in respect of the regular employees and not in respect of contractual employees. The Civil Judge accepted this contention of the ESI Corporation holding that no documentary evidence produced by the appellant to show and establish that ESI contribution was paid in respect of the contractual payments also. Adverse inference was drawn against the appellant. It was further held that under the Act, the appellant was the principal employer and even if he had employed two agencies, she was liable to deduct contribution towards ESI. Question No. 1

8. The learned Counsel for the appellant relied upon proviso to Explanation (b) u/s 77(IA) of the Act. Relevant portion of Section 77 of the Act reads as under-

77. Commencement of proceedings.- (1) The proceedings before an Employees' Insurance Court shall be commenced by application.

(1A) Every such application shall be made within a period of three years from the date on which the cause of action arose. Explanation - For the purpose of this sub-section,-

(a) x x x

(b) the cause of action in respect of a claim by the Corporation for recovering

contribution (including interest and damages) from the principal employer shall be deemed to have arisen on the date on which such claim is made by the Corporation for the first time; Provided that no claim shall be made by the Corporation after five years of the period to which the claim relates;

(c) x x x

9. Section 75 of the Act provides for filing of an application before the Employees State Insurance Court on various questions or disputes specified therein. Section 77(1A) prescribes period of limitation and states that an application shall be filed before the Employees State Insurance Court within a period of three years from the date cause of action arises. The Explanation to Section 77(1A) seeks to explain the expression 'cause of action' for the purpose and as used in the said section. Explanation (b) to Section 77(1A) of the Act provides that cause of action in respect of any claim by the ESI Corporation for recovery of contribution shall be deemed to arise on the date the claim is made by the Corporation for the first time. Thus, the period of three years for filing of an application u/s 75 of the Act commences when ESI Corporation for the first time issues notice to the principal employer in respect of a claim. Subsequent notice(s) do not extend the period of limitation for filing of an application u/s 75 of the Act.

10. Proviso to Explanation (b) to Section 77(1A) prescribes a period of limitation of five years for claims made by the ESI Corporation.

11. The proviso to Explanation (b) to Section 77(1A) of the Act has come up for interpretation before several High Courts. Some High Courts have taken the view that the proviso applies only when a claim petition is filed by the Employees State Insurance Corporation u/s 75 of the Act. The Courts in support have referred to the heading of Section 77 of the Act. The other view is that the proviso to Section 77(1A) Explanation (b) applies to any claim made by the Employees State Insurance Corporation and not merely to proceedings initiated by the said Corporation u/s 75 of the Act. (Refer Tata Projects limited versus Employees State Insurance Corporation reported in 2005 (3) CLR 576 (AP) ; The Regional Director, ESI Corporation Vs. Chemfab Alkalies Limited (Public) Limited, and Regional Director, E.S.I. Corporation Vs. Kerala Electrical and Allied Engineering Co. Ltd. and Others,

12. I need not however go into this controversy to decide question No. 1, as I find that in the present case the Corporation had made a claim within a period of five years. The documents filed by the appellant show that an inspection was conducted in the premises of the appellant on 2.5.2002. After examining books of accounts, the inspector concerned prepared a detailed report with regard to the contribution payable for the period 1.1.1991 to 31.12.1991. The inspector noticed the contributions that had already been paid on different dates from 1.1.1991 to 31.12.1991 amounting to Rs. 17,505/-. The said contribution had been paid on total wages of Rs. 2,41,431/-. This contribution of Rs. 17,505/- included Rs. 5,432.80 paid by the employees and Rs. 12,072.20 paid by the

employer i.e. the appellant. On examination of the books of accounts it was noticed that no contribution had been deducted on contract wages of Rs. 3,93,165/- mentioned at pages 18 and 20 of the register relating to the period 5.1.1991 to 6.12.1991. Contribution had also not been deducted for security charges paid to a security agency, a packing company and on amounts paid to electrician, mistri etc. The total amount, as per the inspection report of the inspector, on which contribution had not been paid was Rs. 4,05,151/-. In the inspection report itself the inspector concerned calculated the contribution payable on the said amount at the rate of 7.5%, i.e. Rs. 29,374/-. Copy of this report was filed by the appellant herself, before the Employees State Insurance Court.

13. Thereafter the ESI Corporation sent a notice dated 22.11.1992 for payment of Rs. 29,374/- as the contribution payable by the appellant. I have examined this notice. It is the case of the appellant that this notice is u/s 31A of the ESI(General) Regulation, 1950. This is not correct. The notice is on a printed form and has several paragraphs, each dealing with the different provisions/ aspects of the Act. Paragraph 5 of the notice reads as under:

Contribution on the following wages falling u/s 2(2) of the ESI Act paid in connection with the work of your factory has not been paid which may please be paid @ 7-1/2% of the total amount.

Amount	Date	of	payment	Contribution	S.	No.
					1.	Rs.
3,93,165-00				Contract wages		
2. Rs. 3,600-00				Security services @ 7.25%		
3. Rs. 4,292-00				Labour charges		
4. Rs. 4,094-00				Payment and Pack. Charges.	Rs. 29,374-00?	
						Total
4,05,151-00						

14. With the issue of notice dated 22nd November, 1992 a claim was made by the ESI Corporation against the appellant. The said claim was made within five years of the period to which it relates. i.e. January, 1991 to December, 1991. The claim, Therefore, was within the limitation period as mentioned in proviso to Explanation (b) to Section 77(1A) of the Act. After the claim was made it was open to the appellant to challenge and question the same u/s 75 read with Section 76 of the Act before the Employees State Insurance Court. The scheme of the Act has been examined by the Supreme Court in the case of Employees' State Insurance Corporation Vs. M/s. F. Fibre Bangalore (P) Ltd., . It was held that it is the statutory obligation of the employer/establishment to deposit the Employers and Employees Contribution within the statutory period. The Act does

not require passing of an order by the ESI Corporation before deposit of contribution. On the question as to who should approach the Employees State Insurance Court for adjudication, the Supreme Court held that though Section 75 of the Act does not envisage and specifically provide as to the party who has to approach, but by necessary implication the employer shall have to approach ESI court when he denies his liability or the applicability of the provisions of the Act or the quantum of contribution required to be deposited. Thus, it is for the employer to approach the insurance court and seek adjudication when a claim is made. It was held that the ESI Corporation need not in each case, even if there was a dispute go to the insurance court and have the dispute adjudicated. The interpretation given by the Supreme Court, it was felt would make the enactment effective, otherwise it would defeat the object and purpose of the Act. With reference to Section 45A of the Act, it was held that the same was in nature of best judgment assignment, which was required to be passed when a factory/ establishment does not file returns, and or does not maintain registers and records in accordance with the provisions of Section 44 or the same were not submitted or the inspector was prevented from examining the same or complying with provisions of Section 45 of the Act.

15. The subsequent letters written by the ESI Corporation after 22.11.1991 were in nature of further requests being made by the said corporation to the petitioner to deposit the contribution or for payment of interest etc. It was for the factory/ establishment to approach the insurance court once a claim had been made by the ESI Corporation on the appellant vide letter dated 22.11.1992,

16. It appears that the appellant did not approach the insurance court immediately after the letter dated 22.11.1992 was received but kept on writing and corresponding with the ESI Corporation denying liability. The ESI Corporation also did not take steps to recover the amount u/s 45B of the Act and later on issued further notices in 1997. The appellant was also asked to appear and produce books of accounts for the said period and on failing to do so, an order u/s 45A of the Act was passed. Passing of the order u/s 45A of the Act need not also be examined as in the present case a claim had already been made by the Corporation on 22.11.1992. I also Therefore, do not go into the question whether the limitation period prescribed in proviso to Explanation (b) to Section 77(1A) would apply to orders passed u/s 4A of the Act. Prima facie, however, it does not appear that the said limitation period would not apply keeping in view the object, purpose and the scope of Section 45A of the Act. The said section only comes into operation where a person has no registers, or where the records are not properly maintained or there is non-compliance of Section 44 of the Act etc.

17. Similarly a demand was also raised by the Corporation for the period December, 1995 to April 1997, pursuant to inspection carried out on 9.6.1997 vide letter dated 8.7.1997 of Rs. 1,455, being a contribution payable at the rate of 5-1/2% on of Rs. 26,450/- This notice is again within the limitation period as provided to Explanation (b) to Section 77(1A) of the Act.

18. Before the State Insurance Court and as per the application filed u/s 75 of the Act, the appellant had claimed that the contribution of Rs. 17,505/- paid was in respect of the contractual employees to whom wages of Rs. 3,93,165/- had been paid. It was the case of the appellant that though no contribution was liable to be deducted on payments to contractual workers that had been paid on per piece basis, yet this deduction was made and the contribution was deposited. On closer scrutiny, I find that the stand of the appellant is not correct. The inspection report itself shows that the contribution of Rs. 17,505/- was in respect of wages of Rs. 2,41,431/-. The inspection report also shows that contractual wages for the period 1.5.1991 to 6.12.1991 had been entered into in the register at pages 18 to 20 and Rs. 3,93,165/- was paid to the contractual employees. The two figures i.e. Rs. 2,41,431/- and Rs. 3,93,165/- do not tally and amount of Rs. 17,505/- does not include contribution payable on Rs. 3,93,165/-. Thus, it is not correct to state that the appellant had paid contribution on the wages paid to the contractual workers amounting to Rs. 3,93,165/-.

19. In this regard reference may also be made to the statement of witnesses recorded before the insurance court. The appellant had only produced one witness, PW-1, Mrs. Asha Chopra. I have examined her statement. Mrs. Asha Chopra has not stated that contribution was deducted on Rs. 3,93,165/- paid to the contractual workers and was deposited with the ESI Corporation. Apparently she was conscious of the fact that no deduction was made on payments made to contractual employees. The original books of accounts i.e. the register was not produced by the appellant. I find the witnesses produced by the Insurance Corporation, namely, Mr. Sukhbir Singh and Om Prakash have categorically stated that the contribution deposited by the appellant related to wages paid to regular employees and no deduction was made in respect of payment made to contractual employees of Rs. 3,93,165/-.

20. In view of the above I decide the first question against the appellant and in favor of the respondent.

21. The second question raised is not required to be decided in view of the finding on the first question. In the present case the claim was made by the Corporation within limitation and I Therefore need not examine whether limitation period mentioned in Explanation (b) to Section 77(1A) would apply to orders passed u/s 45A of the Act. I Therefore also need not examine and go into the question whether Section 45A of the Act was applicable to the facts and circumstances of the present case. 21. The appeal filed by the appellant is accordingly dismissed. No costs.