(2013) 10 BOM CK 0261

In the Bombay High Court

Case No : First Appeal No. 728 of 1994

The Deputy Regional Director	APPELLANT
Vs	
Hotel Rama International	RESPONDENT

Date of Decision : 23-10-2013

Acts Referred:

Citation : (2013) 10 BOM CK 0261

Hon'ble Judges : Mridula Bhatkar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Mridula Bhatkar, J.—This appeal is filed by the Deputy Director, E.S.I.C., Nagpur against the order dated 7.7.1994, passed by Judge, ESI Court & Member, Industrial Court, Aurangabad (for short "Trial Judge").

2. Respondent no. 1 is an establishment and is running a hotel at M.I.D.C., Industrial area, Chikalthana, Aurangabad. The first inspection was conducted on 19.3.1979 and a letter was sent on 17.3.1980 asking the hotel to pay contribution of Rs. 1,46,309.38 ps. for the period 1.2.1976 to 31.1.1980. The appellants gave first notice on 9.5.1980 to respondent no. 1 demanding contribution towards insurance of the employees working in the hotel. After amendment to the Employees'' State Insurance Act, 1948 in 1980, for the purpose of contribution, the unit of respondent no. 1 was covered w.e.f. 1.2.1980. Thereafter on 22.12.1980, the inspection was conducted by the Inspector of respondent No. 1 Corporation after considering the documents and the spot inspection, he submitted final report. On the basis of the said report, by letter dated 17.3.1983, contribution of Rs. 8,074/- for the period of January, 1981 to October, 1982 and contribution of Rs. 1,46,309.38 ps. for the period of 1.2.1976 to February, 1980 was demanded from the respondent hotel. The hotel establishment gave reply dated 28.4.1983 to the letter of demand and requested for personal hearing and reconsideration of the matter. So, personal hearing was given on 16.7.1983. The representative of the establishment attended the said

hearing. The representative asked for some record and sought time and thereafter no hearing had taken place. Thereafter, the appellants sent letter dated 25.7.1983 demanding details from the establishment to which respondents replied by letter dated 31.7.1983. The respondent-establishment took stand that the contribution sought was illegal and was not payable. So, the appellants again served notice on 6.9.1983 claiming arrears of the contribution of Rs. 1,54,383.51 ps. for the period 1.2.1976 to 31.1.1980. Thereafter, as the contribution was not paid, the appellants served an order u/s 45-A of the ESI Act, for payment of the said amount on 28.10.1983.

3. The aforesaid orders were challenged by the respondents before the Trial Judge, on the ground that the determination of the contribution u/s 45-A of the Act, is baseless and incorrect. It was contended that in the amended E.S.I. Act, "kitchen" was covered under the Act from 1980 and so, the amount was payable only after 1980 and not from 1976. It was contended that not more than 20 workers were employed in the kitchen and the appellant Corporation had committed mistake in calculating the number of the utility servants as kitchen servants. There is a difference between the kitchen employees and utility employees and, therefore, the respondent establishment is not liable to pay any contribution. It was also contended that no personal hearing was given and the authority has no power to determine the contribution, as also the order passed by him is not well reasoned and is defective.

4. On hearing both the parties, the Trial Judge, allowed the application and struck down the notice and demand of contribution for the period 1.2.1976 till 31.1.1980, as the same had been found not proper and legal. The issue of payment of contribution for the period of 1.1.1981 to October, 1982 was not pressed as the same was paid. Hence, this appeal.

5. Mr. Sonawane, learned Counsel for the appellants has submitted that the respondent hotel establishment is liable to pay contribution of four years i.e. from 1.2.1976 to 31.1.1980. He submitted that by notification issued u/s 1(3) and 1(5) of the Act, E.S.I. Act is made applicable to industrial area of Chikalthana. He submitted that as soon as the Act was made applicable, it was the duty of all the factories and the establishments covered under the Act, to register themselves by filing application. However, the respondent did not take requisite steps in that respect. The appellants have power under the Act, especially under sections 44 and 45, to inspect the premises of a factory or establishment and to find out how many workers are working in the factory or establishment and as per the number of the workers and their period of employment to make the demand for contribution towards health insurance.

6. Learned Counsel for the appellants submitted that the Trial Judge has erroneously held that it is the duty of the appellants to furnish the inspection report and the details on the basis of which the demand of the contribution was made. A personal hearing was given to the respondent establishment on 16.5.1983. P.W. 1 Mr. Sudish Kalappa Gokhale has admitted that he remained

present for the personal hearing on 16.5.1983. Thus, it is not open for the respondents to raise that contention. He further submitted that the Inspector has every right to inspect the premises and make recommendations considering that report, as more than 20 workers were found working in the entire hotel from 1976 and period of coverage was finally held to be from 1.2.1976 to 30.1.1980. Learned Counsel further submitted that the Trial Judge has committed mistake in shifting the burden of proof on the appellants with regard to giving information to the respondents. He submitted that nowhere in the Act, responsibility is cast on the Corporation to furnish the information or give inspection report to the factory or the establishment in respect of the details and recommendations. He pointed out that at Exhs. 43 and 44 of the record and proceedings of the Trial Judge, inspection report along with three annexures was produced by the Corporation and in annexure III, chart of the employees, showing their strength, on the basis of inspection was mentioned. Though this information was produced by the appellants, the Trial Judge has failed to consider this aspect and has wrongly stated that the burden to furnish the details was on the appellants and the same was not discharged.

7. Learned Counsel has further submitted that, in fact, as per section 45-A of the Act, Corporation is not liable to furnish any information or details to the establishment or factory. Section 45-A enables the Corporation to demand contribution on the basis of the information available to it. Thus, the burden is, in fact, on the establishment to give the correct information about the employees who were working with it. Till today, no information is supplied by the respondent hotel. The stand taken by the respondent establishment that the appellants have no authority to pass the order and the finding recorded by the Trial Judge, that the appellants have no authority to pass the order in the absence of any Gazette publication, is not correct.

8. Learned Counsel submits that the appellant authority has a power to determine the contributions and demand the same u/s 45-A. Learned Counsel submitted that the observation of the Trial Judge in paragraph 6 of the judgment, on the point of supply of copy of report to the establishment, is incorrect. In support of his submissions on the point of powers u/s 45-A of the ESI Act, learned Counsel for the appellants relied on the following judgments:-

i) Employees'' State Insurance Corporation vs. Rasu Tools Ltd., reported in LAWS (APH)-1999-7-18, decided on 23.7.1999,

ii) M/s. Garage Kamat Vs. Regional Director Employees State Insurance Court and another,

9. Learned Counsel for respondents submitted that the appeal is not maintainable on the ground that the appellants could not state what substantial question of law is involved in this appeal. He submitted that in view of section 82 of the E.S.I. Act, the appeal cannot be entertained, unless a substantial question of law is involved. He argued that while giving notice u/s 45-A of the ESI Act, it is

necessary for the Corporation to give personal hearing and not with pre-determination the order u/s 45-A is to be passed. He submitted that in the present case, the appellant-Corporation has decided the matter with closed mind and no proper hearing was given to the respondents. He relied on the letters sent by the respondent-hotel to the Corporation about the personal hearing. He submitted that it was the duty of the authority to give proper opportunity to the respondents to place the material on record and hear them on merit. No recovery can be made by the Corporation with pre-determination. I place reliance on the judgment of the Division Bench of this Court in the case between B.M.K. Industries Pvt. Ltd. and E.S.I. Corporation, reported in 1979(39) F.L.R. 258, wherein it is held that the phraseology used in section 45-A of the Act clearly indicates that the employer will have to be given an opportunity before the amount is determined by the Corporation. Section 45-A does not contemplate empty formality of determination of the amount, but it should follow principles of natural justice. The powers of the Corporation are not un-guided, but are required to be exercised in a fair manner. He submitted that a copy of the inquiry report was never furnished to the hotel and this is prejudicial to the hotel. Learned Counsel has submitted that the order passed by the Trial Judge is valid and legal and it be maintained. Mr. Dankh, learned Counsel for respondent no. 1 further argued that the Officer, i.e. Assistant Regional Director, who issued the impugned orders dated 28.10.1983 and 2.12.1983 in respect of recovery of the amount of contribution was not competent to issue the orders. He submitted that u/s 45-A of the E.S.I. Act, a specific delegation of powers to the Officer under the Act is necessary and in the absence of valid delegation, the concerned Officer has no powers to issue recovery certificate. He submitted that the appellants are not able to point out or no valid notification of the delegation of powers is produced. Hence, the order passed by the learned Trial Judge be maintained.

10. Before the learned Judge of the E.S.I. Court, the present respondents have challenged the authority of the Deputy Regional Director to pass orders u/s 45-A of the Act. It was held by the learned Trial Judge that it was necessary for the Corporation to produce a Gazette under which the powers were delegated to the Officers and so, it was held that in the absence of such proof, the orders were passed without having authority. Learned Counsel for the appellants, in the course of the arguments, produced documents under separate application, seeking permission to submit the copies of the Government Gazette in respect of delegation of powers and copy of the relevant pages of the Revenue Manual, to prove the delegation of powers. The presumption of said documents was allowed under Order 41, Rule 27 of the Code of Civil Procedure. The learned Counsel for the respondents has submitted that the said resolution is in respect of section 45-B or 45-C and it is not u/s 45-A of the Act.

11. On perusal of the Revenue Manual, it shows that the Deputy Regional Director was authorized and the powers were delegated to him as per the hierarchy below the Director General. u/s 45-A there is a determination of contribution and the Deputy Regional Director is empowered to determine the

amount of the contributions payable. However, a copy of the Revenue Manual which is produced before the Court refers to a Gazette notification dated 28.6.1991 and the meeting of the Corporation was held on 6.3.1999 adopting the resolution. The said resolution was in supersession of earlier resolution dated 14.12.1999 and by that resolution the powers to determine the amount of contribution u/s 45-A were delegated to Deputy Regional Director and Assistant Regional Director. Copies of the Gazette delegating the powers u/s 45-B and 45-C are produced on record. However, the issue involves about the powers u/s 45-A. Thus, when there is a specific finding given by the learned Trial Judge, that in the absence of proof of the Gazette showing delegation of powers, fact of delegation of powers is not proved. It was necessary for the Corporation to produce the relevant Gazette and the resolutions showing that at the relevant time, i.e. in the year 1983 such powers were delegated to Assistant Regional Director.

12. u/s 82 of the Act, an appeal lies to High Court from the order of an Employees'' Insurance Court, if it involves a substantial question of law. In the memo of appeal, no such substantial question of law is carved out. However, learned Counsel for the appellants submitted that in the present case, a substantial question of law is in respect of error committed by the E.S.I. Court in shifting burden of proof on the appellant Corporation. Thus, a substantial question of law as it was not formulated at the time when the appeal was admitted on 15.6.1995, it is formulated at the time of hearing of submissions of the appellants, as follows:-

Whether the learned Trial Judge has committed error in shifting burden of proof on the Corporation in respect of furnishing information?

13. Admittedly, E.S.I. Act was made applicable to Chikalthana area of Aurangabad in 1976. By way of amendment, it was made applicable to hotel industries in 1980. However, the kitchen was covered under the E.S.I. Act prior to 1980, if more than 20 employees were working in the kitchen. Both the parties have examined their respective witnesses. One Sudish Kalappa Gokhale, who was then working in the respondent establishment is a material witness, who has appeared before the authority and has argued the case for the Corporation. Apart from Mr. Gokhale, the respondents have examined other two witnesses and appellants have examined one Prakashchandra Bhurelal Pathak, who was working as a Manager in local office of E.S.I. Corporation.

14. The E.S.I. Inspector first time visited the respondent establishment on 19.3.1979. However, after visit, no observation report was sent by E.S.I. Authorities to the respondents. Thereafter on 22.12.1982, second inspection was carried out and on 17.3.1983, E.S.I. authorities had informed that the scheme of E.S.I. was made applicable to the respondents from 1.2.1976. There is no dispute over the payment of the contribution after 1980. The dispute was only for a period of four years, i.e. from 1.2.1976 to February, 1980. Since the E.S.I. Act was made applicable to the hotel industries in 1980, the respondent

establishment was liable to pay E.S.I. Contribution from 1980. The dispute for these four years was due to coverage of kitchen under the E.S.I. Act prior to 1980. Respondent-hotel was having a kitchen from 1976 to 1980 and, therefore, it was considered that the contribution under the said Act was applicable. However, for the purpose of coverage of kitchen under the Act, it is necessary for the Corporation to show that during the relevant period, 20 or more than 20 persons were employed in the kitchen. To prove this fact, appellants have relied on the reports of inspection which was carried out by Inspector Mr. P.P. Kameshwarrao and one Mr. Chavan, which are marked as Exhs. 43, 44 and 45. Witness Prakashchandra Pathak, examined on behalf of the appellants, has deposed that in the year 1976 there were 16 persons employed in the kitchen and 15 were for utility service and the employees for utility service were clubbed and it was shown that there were more than 20 workers employed in the kitchen. The said fact is totally denied by the respondent hotel. Witness Gokhale has stated in his evidence that the first letter dated 17.3.1983 (Exh. 28) informing the hotel about the applicability of the scheme from 1.2.1976 was replied by the respondent hotel by letter dated 28.4.1983 (Exh. 29). Thereafter, a personal hearing was given at Nagpur to the representative of the respondent hotel. He has stated that he attended the said hearing. However, as further more details were not available with him, he sought a date for further hearing. Thereafter, no date of further hearing was communicated to him. So, the respondents sent two letters dated 31.7.1983 (Exh. 31) and 26.8.1983 (Exh. 32) requesting for further hearing. However, without giving an opportunity for further hearing, order of recovery dated 28.10.1983 was issued. Much was argued about who was to give the information about the number of the workers and the names of the workers. It is true that u/s 45-A of the Act, the Corporation can determine the amount of contribution on the basis of "information available" and the establishment itself has knowledge about its own staff. The names of the employees and the number of the employees is within the knowledge of the respondents. The learned Trial Judge has considered the letter sent by the Corporation to the hotel about the coverage of the Act and informing that it''s kitchen is also covered from 1976 to 1980 as there were more than 20 workers employed in the kitchen. However, the learned Trial Judge has also referred the letter sent by the respondents specifically denying the fact of employment of 20 persons in the kitchen at the relevant time. A copy of the inspection report was not supplied to the hotel. Therefore, the respondents did not have an opportunity to verify and compare its own record with the inspection report. Though it is not obligatory on the part of the Corporation to furnish the copy of the inspection report and it is the duty of the Corporation u/s 45-A of the Act to determine the amount of the contribution, it was rightly considered by the learned Trial Judge that the Corporation should have followed the principles of natural justice. In the present case, witness Sudish Gokhale examined on behalf of the respondents has specifically stated that he had gone to Nagpur and has put up the case of the hotel. However, he wanted some time. Thus, it was obligatory on the authority to be fair in giving adequate opportunity of hearing to the respondents.

15. Thus, there is evidence adduced by the respondents, that they have specifically denied that the kitchen workers were different than the utility workers and at the relevant time, 20 workers were not employed in the kitchen. In fact, the witness of the Corporation has given the bifurcation that 16 employees were working in kitchen and 15 were in utility service. However, the burden is on the Corporation to show that the utility service and kitchen workers are considered as one unit and utility service workers come under the head of "kitchen workers". Thus, the burden to prove this fact is on the Corporation and it was necessary for the Corporation to have discharged the said burden. Thus, the case of the appellants fails to meet out substantial question of law and considering the other issues which are raised by the respondents, there is no merit in the appeal.

16. In the case of M/s. Garaje Kamat (supra), relied on behalf of the appellants, the learned Single Judge of this Court has held that 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 the establishment or not. A reliance can be placed on this ratio as it is earlier referred, the bifurcation of the kitchen employees and the utility services employees is brought on record and, therefore, the burden rightly shifted on the Corporation to prove the fact that at the relevant time there were more than 20 employees in the kitchen and so, it was covered under the E.S.I. Act from the year 1976 to 1980. Thus, the substantial question of law is answered in the negative.

17. In the result, the appeal fails and the same is dismissed with no order as to costs.

18. In view of above, Civil Application No. 12214 of 2013 stands disposed of.