

(2015) 09 BOM CK 0226

In the Bombay High Court

Case No : Appeal Under E.S.I. No. 2 of 2009

The Regional Director, Employees State Insurance Corporation	APPELLANT
Vs	
William"s Beach Retreat Pvt. Ltd.	RESPONDENT

Date of Decision : 28-09-2015

Acts Referred:

Employees State Insurance Act, 1948 — Section 45-A, 75, 77, 82, 82(2)

Citation : (2015) 09 BOM CK 0226

Hon'ble Judges : C.V. Bhadang, J.

Bench : Single Bench

Advocate : Anarkali Agni, Senior Advocate and Divya Bakal, Advocate, for the Appellant; Lea Diniz, Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

C.V. Bhadang, J.—By this appeal, under Section 82 of the Employees" State Insurance Act, 1948 (the Act, for short), the Employees State Insurance Corporation (Corporation), is challenging the judgment and order dated 18.12.2008 passed by the Employees State Insurance Court (E.S.I. Court) in E.I.C. No. 4/2005.

By the impugned judgment, the application under Section 75 read with Section 77 of the Act filed by the respondent has been allowed, thereby holding that the respondent/original appellant is not liable to pay the contribution on the expenses incurred during the relevant period and further declaring that the order dated 05.01.2004 passed by the Corporation under Section 45-A of the Act is bad and void and further holding that the respondent is entitled to a refund of the amount as claimed in the application.

2. The brief facts are that the respondent is a Company registered under the Indian Companies Act, 1956 and owns and manages a Beach Resort. The Inspector of the Corporation had visited the business premises of the respondent on 06.01.2003 and had inspected the records for the period from March, 2001 to

March, 2002 in the presence of the representative of the respondent namely, Mr. Seby Rodrigues (AW-1). The Inspector drew inspection note, which was signed by the representative on behalf of the respondent. During the inspection, it was noticed that the respondent had incurred expenses of Rs. 4,55,897/- under eleven different heads as set out in para 11 of the application. According to the appellant-Corporation neither the break-up nor the bills and vouchers in respect of the expenses were produced. The representative of the respondent had informed the Inspector that the amount represented expenses and not wages. It was claimed that the respondent owns plant and machinery, furniture, office equipments, swimming pool and is also having landscaping, which is managed by its employees. These assets are subject to day to day maintenance and other incidental expenses. In short, it was contended that no contribution was payable as such, on the said amount.

3. The appellant by a notice dated 01.07.2003 demanded a contribution of Rs. 29,634/- on the said amount. It appears that during the personal hearing, it was tried to be explained that the amount represented either expenses or the amount paid to the technicians or mechanics, who were engaged for repairs and maintenance of the plant and machinery of the office equipments on a "task basis", which was purely a casual nature of work. The appellant did not accept the explanation and the representative of the respondent, Mr. Deepak Naik was asked to submit a statement bifurcating costs towards material, and that of labour and to pay the contribution on the basis of self assessment. It appears that the respondent deposited a total amount of Rs. 6,097/- on 09.09.2003 by assessing the labour component at Rs. 93,800/- being 20% of Rs. 4,55,897/-. In spite of this, the appellant passed the impugned order on 05.01.2004 under Section 45-A of the Act determining the contribution of the balance amount after adjusting the amount already paid. Consequently, the balance amount of Rs. 23,537/- was recovered.

4. Feeling aggrieved by the order dated 05.01.2004, the appellant approached the E.S.I. Court by filing an application under Section 75 read with Section 77 of the Act for the reliefs aforesaid.

5. The appellant resisted the application. It was contended that the respondent failed to produce documentary evidence at the time of inspection of the records. It was contended that the payments under different heads could not be expenses as no bills or vouchers were furnished. It was submitted that the persons engaged were covered under the Act and there was no material to show that they were engaged purely for casual nature of work.

6. The E.S.I. Court framed as many as five issues (Exhibit-14). On behalf of the respondent, Mr. Seby Rodrigues (AW-1) and one Mr. Agostinho Fernandes (AW-2), Accountant were examined. The respondent also produced certain documents. On behalf of the appellant, the Inspector-Mr. Nikhil Kumar was examined as RW-1.

7. Insofar as Issue No. 1 is concerned, which is about applicability of the Act to the respondent, it was found that the issue does not arise as the same was not in dispute. The E.S.I. Court answered the Issue Nos. 2, 3 and 4 in the affirmative thereby holding that respondent had proved that the persons were employed on a task basis. It was also held that the applicants were not liable to pay any contribution and were entitled to a refund of Rs. 29,634/-. It was also held that the order dated 05.01.2004 was bad in law. In the face of such findings, the application came to be allowed. Feeling aggrieved, the appellant is before this Court.

8. I have heard Smt. Agni, the learned Senior Counsel for the appellant and Ms. Diniz, the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have perused the record including the evidence led and the impugned judgment.

9. It is submitted by Smt. Agni, the learned Senior Counsel for the appellant that the E.S.I. Court has ignored important and material admission by the witnesses examined on behalf of the respondent. The learned Senior Counsel has referred to the observations in para 20 of the impugned judgment in order to submit that once the E.S.I. Court had found that there was an admission that the expenses were actually wages paid to the employees and their names had not been shown in the Register of wages, the E.S.I. Court could not have observed that this would not justify a hasty conclusion that the payments were wages or these persons were on regular or temporary employment. It is submitted that while a stray statement in the evidence of RW-1, Nikhil Kumar that payments made under various heads of maintenance could qualify as payments made to casual labourers for doing casual nature of work had been acted upon, a different yardstick is applied while appreciating the evidence of the witnesses of the respondent. It is submitted that the perusal of the various heads as set out in para 11 of the application which includes electrical maintenance as also, entertainment and barbeque expenses, would comprise of regular activities in the context of the business of a Beach Resort. It was thus, contended that even assuming that the regular work is undertaken through casual workers, the same would attract contribution. Insofar as reliance placed on the memorandum dated 16.11.1981/26.06.1982, it is submitted that the same would not be applicable, in view of the admission that the entire expenses are wages. The learned Senior Counsel has submitted that the finding recorded by the E.S.I. Court, if found to be perverse, or recorded on a grossly incorrect appreciation of the evidence, the same would partake of a substantial question of law. Reliance in this regard is placed on the decision of this Court in the case of Ramdas Ramrao Parika Vs. Local Officer and Others, . Reliance is also placed on the decisions of the Hon"ble Supreme Court in the case of Regional Director, Employees" State Insurance Corpn., Madras Vs. South India Flour Mills (P) Ltd., and in the case of Employees" State Insurance Corpn. Vs. M/s. Harrison Malayalam Pvt. Ltd., in order to submit that the casual workers would be covered under the Act.

10. On the contrary, it is submitted by Ms. Diniz, the learned Counsel for the respondent that Mr. Nikhil Kumar (RW-1) has clearly admitted that payments accounted under the various heads of maintenance would qualify as payments made to casual labourers for doing casual nature of work. The witness (RW-1) further admitted that since bills were not produced, he "presumed", that these amounts also represented wages. It is submitted that in view of this categorical statement by the Inspector, no fault can be found with the finding recorded by the E.S.I. Court that the payments were made to the workers for doing "casual nature of work". She therefore submitted that the appeal does not involve any substantial question of law, which is the requirement of Section 82 of the Act and as such, the same deserves to be dismissed.

11. I have given my anxious consideration to the rival circumstances and the submissions made.

12. An appeal under Section 82 of the Act lies only when the matter involves a substantial question of law as provided under Section 82(2) of the Act. There cannot be any manner of dispute with the proposition that a finding of fact if found to be perverse can partake of the nature of a substantial question of law. However, by the very nature of things this would depend upon the facts and circumstances of each case. Thus, although a perverse finding may amount to a substantial question of law, the question whether the finding is perverse or not would be individual to each case.

13. The issue in this appeal basically turns upon the question whether the amount of Rs. 4,45,897/- was entirely towards expenses or comprised of wages and whether such wages were paid to the employees for doing a work purely of a casual nature. There was no dispute that if, the amount paid was in respect of a work purely of casual nature, no contribution would be payable. The submission on behalf of the appellant is that looking to the various heads as set out in para 11 of the application, the work in the context of the business of a Beach Resort cannot be of a casual nature, but would be a part of regular work, which is undertaken and conducted at a Beach Resort. For example, the gardening expenses, the entertainment expenses, the barbeque expenses etc. The question is also whether the respondent was able to furnish the break-up of the expenses and if not, whether the benefit of memorandum dated 16.11.1981/ 26.06.1982 could be extended to the respondent.

14. Insofar as the question of applicability of the memorandum is concerned, the submission on behalf of the appellant is that once the entire expenses are admitted to be wages, the circular would not apply. I would tend to disagree on facts. I have carefully gone through the evidence of AW-1, Seby Rodrigues and AW-2, Agostinho Fernandes and I could not find an admission that the entire expenses were towards wages. The admission by Seby Rodrigues (AW-1) is that the maintenance of plant and machinery, furniture, office equipments, swimming pool and landscaping was looked after by the temporary employees and that the names of these employees were not shown on the muster roll and the wage

register. This admission cannot tantamount to saying that the entire expenses of Rs. 4,45,897/- were towards wages. This is more so, because in the very next breath Seby Rodrigues (AW-1) has denied the suggestion that these expenses were required to be shown as part of wages instead of different heads of expenses. Thus, the appellant cannot possibly contend that the memorandum dated 16.11.1981/26.06.1982 would not be applicable on account of admission on behalf of the respondent that the entire expenses were towards wages.

15. Turning to the evidence, on one hand, we have admission of Seby Rodrigues (AW-1) that maintenance of plant and machinery, furniture, office equipment, swimming pool, landscaping was looked after by the temporary employees and on the other there is an admission by Nikhil Kumar (RW-1) that the payment under the various heads of maintenance would qualify as payments made for doing casual nature of work. RW-1 has stated that "since the bills were not produced, he presumed that these amounts also represented wages". He has also stated that he was not aware if the respondent was given information about the circular (memorandum) by virtue of which the respondent could pay the contribution, on the basis of the same.

16. The learned Senior Counsel for the appellant has taken strong exception to the finding of the learned E.S.I. Court in para 20 of the impugned judgment which reads as under:

"20. Though Seby AW-1 was not in employment then with the applicants, nonetheless there was no rebuttal of his testimony in material particulars giving the breakup of the expenses incurred under various heads, be it electrical maintenance, gardening expense, repairs and maintenance, entertainment, barbeque and message charges and duly justified by explanation on oath. At the same time his admission that the expenses shown in his Affidavit tabularly were actually the wages paid to the temporary workers and their names had not been shown in the Register of Wages would not justify a hasty conclusion that the payments were wages and or that these persons were on their regular or temporary employment."

17. It is contended that while refusing to act on admission of AW-1, the E.S.I. Court has placed reliance on admission by RW-1 by observing in para 23 of the impugned judgment as under:-

"His (RW-1) admission that these payments accounted under various heads of maintenance could qualify as payments made to casual labourers for doing the casual nature of work and finally that he presumed that they represented wages merely because the bills were not produced before him would highlight the weakness in the defence case. Furthermore, his want of knowledge if the applicants were given any information about the circular would once again support the applicants case in that regard. Last but not the least, his admission that he had not attended the personal hearing given to the applicants and that he did not know what transpired during its course would not advance the defence

case any way."

18. I have considered the submission. I find that the oral evidence has to be read as a whole, in the context of the documentary evidence, as also the issues involved. Neither the oral evidence of a witness nor a stray admission can be read in isolation and bereft of the context in which it is made. There may be cases wherein the evidence ought to be documentary in nature, as for seeking production of the bills and vouchers and muster and wage registers, in which case the oral evidence would fall into insignificance or would be subservient to the documentary evidence. In the present case, a perusal of various eleven heads of the expenses as set out in para 11 of the application would indeed show that they would be a part of regular work available/undertaken at the establishment of the respondent. However, as claimed by AW-1 in his evidence and looking to the heads of expenses, the entire amount cannot be comprised of wages. For example, electrical maintenance, general repairs and maintenance as also gadget expenses may involve incurring expenses on material/electrical gadgets like replacement of bulbs, starters, chokes and other spares as claimed by AW-1. Thus, in my considered view, this is a case where the respondent had initially failed to set out the bifurcation of the amount into wages and the expenses on material/electrical gadgets etc. It can further be seen that by a covering letter dated 04.03.2009 (Exhibit-25 colly), a break-up was given indicating the component of labour charges as Rs. 93,800/-, in which contribution of Rs. 6,097/- was paid eventually on 08.09.2003. Thus, the net result is that looking to the heads of expenses, it cannot be said that the same involved work, which may be purely of casual nature. It does appear that the heads of the expenses on the various activities can be a regular feature, looking to the nature of the business of the respondent. Although, the respondent had initially failed to give the break-up, the respondent has subsequently paid the contribution of Rs. 6,097/- by setting out the labour component at Rs. 93,800/-. Thus, the finding in para 24 of the impugned judgment that the payments were made for a purely casual nature of work cannot be accepted. It would be significant to note that the E.S.I. Court has found that "at the highest, it ought to have determined the contribution only on the labour charges". The E.S.I. Court has also found that "at the highest the appellant (respondent before the E.S.I. Court) had to adhere to the circular and collect the contribution restricted to 25%". The E.S.I. Court has also noticed that the respondent had remitted an amount of Rs. 6,097/- by demand Draft and an amount of Rs.23,537/- was recovered from the Bank (which was otherwise not payable by them). Thus, in my considered view once the E.S.I. Court had found that at the highest the appellant could have determined the contribution only on the labour charges, the application could not have been allowed in its entirety, as in the application the refund of the entire amount of Rs.29,634/- is claimed and is granted by the learned E.S.I. Court. In that view of the matter, I find that the impugned order to the extent of allowing the application in its entirety (in the face of the finding that the appellant could have determined the contribution only on the labour

charges) would not be sustainable.

19. In the result, the following order is passed:-

- (a) The appeal is partly allowed.
- (b) The impugned judgment and order dated 18.12.2008 is hereby modified.
- (c) The application (E.I.C. No. 4/2005) filed by the respondent is partly allowed.
- (d) The respondent would be entitled to refund of an amount of Rs.23,537/-.
- (e) In the circumstances, there shall be no order as to costs.