

(2016) 12 CAL CK 0035
In the Calcutta High Court
Case No : W.P. No. 747 of 2011

Vikrampore Engineering and Infrastructural Co. Pvt. Ltd.	APPELLANT
Vs	
Employees" State Insurance Corporation	RESPONDENT

Date of Decision : 22-12-2016

Acts Referred:

Employees State Insurance Act, 1948 — Section 45-A, Section 45-AA

Citation : (2017) 1 CLR 752 : (2017) 152 FLR 978 : (2017) LabLR 617

Hon'ble Judges : Mr. Debangsu Basak, J.

Bench : Single Bench

Advocate : Mr. T.K. Chatterjee, Advocate, for the Respondents; Mr. Soumya Majumdar, Mr. Biswaroop Bhattacharyya and Mr. Uttam Sharma, Advocates, for the Petitioners

Final Decision : Dismissed

Judgement

Debangsu Basak, J. - The petitioners have assailed an Order dated April 20, 2011 passed under Section 45-A of Employees" State Insurance Act, 1948 (ESI Act, 1948) and a Circular dated January 3, 2011 issued by the Joint Director, Employees" State Insurance Corporation.

2. Learned Advocate for the petitioners has submitted that, the first petitioner is engaged in the business of building construction. The first petitioner is not covered by the ESI Act, 1948. However, ESI authorities had sought to make an enquiry in respect of the employees of the first petitioner. The enquiry under the ESI Act, 1948 was for the period from June 2008 to March 2010. He has referred to the Circular dated January 3, 2011 and has submitted that, the circular cannot be given a retrospective effect since the period of enquiry in respect of the petitioners was prior to the date of the circular. He has submitted that, the first petitioner was sought to be brought under the purview of the ESI Act, 1948 by virtue of the Circular dated January 3, 2011. Since the Circular dated January 3, 2011 does not have a retrospective effect, the first petitioner cannot be proceeded against in terms of such circular for a period prior to the date of the

circular.

3. Learned Advocate for the petitioners has referred to Section 16 of the Act of 1948 and has submitted that, a notification is required to be published for an association to be covered under the same. He has submitted that, no such notification exists in respect of the nature of business carried on by the petitioners. He has submitted that, a building construction site is not a factory. He has referred to the definitions given in Sections 1(3) and 1(5) of the Act of 1948. He has submitted that, workers engaged by the petitioners at the construction site of the petitioners are governed by the provisions of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996. He has submitted that, the petitioners do not come within the definition of shop under the Shop and Establishment Act.

4. So far as the availability of a statutory alternative remedy by way of an appeal by the petitioners is concerned, learned Advocate for the petitioners has submitted that, since a point of lack of jurisdiction of the ESI authorities has been questioned in the present writ petition and since the invocation of the ESI Act, 1948 against the petitioner is in question, the Writ Court is not denuded of its power to grant appropriate reliefs under Article 226 of the Constitution of India.

5. Learned Advocate for the respondents has submitted that, the impugned Order dated April 20, 2011 is appealable under Section 45- AA of the ESI Act, 1948. The petitioners have chosen not to avail of such remedy. He has referred to the notice dated February 16, 2010 issued by the ESI Corporation to the petitioners and has submitted that, the petitioners were informed about the inspection conducted by the Insurance Inspector on January 8, 2010. He has submitted that, the petitioners being informed that the petitioners fall within the definition of establishment, as extended by a notification dated January 20, 1983, the petitioners did not challenge the same. He has submitted that, the petitioners had accepted the position that, the first petitioner is within the purview of the Act of 1948 and had acted accordingly. It is now late in the day for the petitioners to contend that, the ESI Corporation has no jurisdiction. In any event he has submitted that, the petitioners and the nature of business carried on by the petitioners are within the scope and ambit of the ESI Act, 1948. He has further submitted that, the impugned order was passed after hearing the petitioners. It has taken into consideration the facts scenario prevailing in respect of the employees of the petitioners for the specified period. The impugned order has come to a finding which has not been demonstrated to be perverse. Furthermore, the petitioners have an alternative statutory remedy available. No explanation has been afforded by the petitioners as to why the petitioners will not explore the statutory alternative remedy. The Writ Court should not exercise its discretion.

6. The ESI authorities had found the first petitioner to be a factory/establishment covered under the ESI Act, 1948. The authorities had issued a show-cause notice

dated September 22, 2010 to the first petitioner. The period involved is for from June 2008 to March 2010. The first petitioner was afforded a personal hearing on October 12, 2010, February 11, 2011 and on March 31, 2011. The petitioners had submitted a letter dated February 11, 2011 disputing the coverage on the ground that, the employees employed by the first petitioner are construction and casual workers.

7. In the hearing, the petitioners could not produce any record to establish that, the employees of the first petitioner were engaged as construction and casual workers. The authorities had found the first petitioner to have engaged 21 employees for the period from June 2008. The impugned order records that, the petitioners had failed to produce ledgers and cash book for the relevant period. On pursuing the balance sheet of the first petitioner that had been produced, the authorities had come to a finding that the first petitioner is liable to contribute in the manner as calculated therein. The impugned order does not refer to the Circular dated January 3, 2011 in arriving at the finding that, the first petitioner is covered under the Act of 1994. In fact, prior to the issuance of the show-cause notice dated September 22, 2010 the first petitioner was issued a notice dated February 16, 2010 where attention of the petitioners was drawn to the fact that, the first petitioner was covered under the Act of 1948. The authorities had referred to a notification dated August 10, 1955 stating that, all establishments within the area of Kolkata come under the provisions of the Act of 1948. The attention of the petitioners was also drawn to the notification dated January 20, 1983 where the Government had extended the provisions of the Act of 1948 to other establishments under Section 1(5) of such Act.

8. The petitioners have not challenged the notification dated August 10, 1955 and January 20, 1983 by which establishments in Kolkata were brought under the purview of the Act of 1948. Admittedly, the first petitioner has its registered office at a place in Kolkata. The petitioners have accepted that the first petitioner comes within the purview of the Act of 1948 by virtue of the notification dated August 10, 1955. The contention on behalf of the petitioners that, since the first petitioner is covered under the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 and, therefore, is not covered by the ESI Act, 1948 is not accepted. No material has been placed on record to suggest that, the first petitioner will not be covered for the period from 1948 to 1996 assuming the contention of the petitioners to be correct.

In such circumstances, I find no merit in the present writ petition. W.P. No. 747 of 2011 is dismissed. No order as to costs.