

Appellant Vs. Respondent

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Court : Kolkata

Decided On : Apr-12-2017

Judge : Rakesh Tiwari

Appellant : Appellant

Respondent : Respondent

Judgement :

IN THE HIGH COURT AT CALCUTTA CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE GA3771of 2016 APO317of 2016 Smt. Basu Rani Paul
Corporation & Ors. -Vs- Employees State Insurance Present : The Honble Rakesh
Tiwari, J.

AND The Honble Mir Dara Sheko, J.

For the appellant : Mr. Sutirtha Das, Advocate For the respondent : Mr. Arindam
Moitra, Advocate Heard on :

07. 02.2017 Judgment on :

12. 04.2017 Delivered by Honble Justice Rakesh Tiwari, J.

1. This appeal has been preferred by the appellant Basu Rani Paul, challenging the order dated November 15, 2016 passed in Writ Petition No.380 of 2012 (Basu Rani Paul - Vs- Employees State Insurance Corporation and another).

2. The facts of the case are that appellant petitioner hereinafter referred to as PPC India preferred the writ petition aforesaid inter-alia praying for a direction to the effect that Employees State Insurance Act 1948 (hereinafter referred to as the ESI Act) is not applicable upon the petitioner establishment.

3. The PPC is a proprietorship firm having its office at Ramchandrapur, Narendrapur, South 24 Parganas where plastic injection mouldings are manufactured and employs six employees for this purpose. However, vide memo dt. July 6, 2011 issued by the Assistant Deputy Director/Authorised officer, Regional Office of Employees State Insurance Corporation was received by the establishment, proposing to proceed u/s 45A of the ESI Act for determination of the contribution payable in respect to employees of the establishment.

4. On receipt of the show cause notice aforesaid the petitioner replied the same vide his representation dt. August 18, 2011 claiming that number of employees employed by the establishment never exceeded six at any point of time and vide memo dt. October 7, 2011 petitioner was informed that she had also not paid the contribution as per provisions of the ESI Act and had even not submitted the monthly details of contribution from October 2010 to April 2011. The ground on which the judgment is assailed is that the writ court erred in law and is on facts in proceeding with the matter as if the inspector had found 29 employees working in the establishment for the purpose of applicability of the Act. According to the appellant this is contrary to the fact as there is no independent finding of enquiry officer that twenty nine number of employees were ever working in the establishment.

6. It is stated that the findings arrived at by the enquiry officer is only on the basis of statement of one Mr. Mukherjee said to be engaged by the establishment who is neither connected with the establishment nor is known to its management and as such the findings of the enquiry officer and the writ court on the basis of the aforesaid inspection report alleged to have been prepared behind the back of the appellant appears to be at the instance of the respondent authorities and that the salary register maintained in the establishment was not considered in its true and proper perspective by the writ court.

7. It is urged that from the said salary register it is proved that employees employed by the establishment never exceeded six in number and that no records had been produced by the respondent authorities to show that establishment had ever employed 29 employees in or in connection with the work of the establishment hence the Act is not applicable to it and as such it is not liable to pay the amount determined by the authority u/s 45A of the Act.

8. Reliance has been placed upon sub-section 12 of the section 2 of the ESI Act 1948 which defines the term factory., meaning any premises, including the precincts thereof wherein ten or more persons are employed on any day of the preceding twelve months and in any part of which a manufacturing process is carried on or is ordinarily so carried on, but does not include a mine subject to the operation of the mines Act 1952 or a railway running shed. Hence in the circumstances, it is argued that since petitioner never employed any ten or more number of persons at any time in its establishment, he has no liability under the Employees State Insurance Act, therefore the memos containing claims of different amount issued by the recovery officer constitutes violation of principles of natural justice on the part of the respondent authorities.

9. Counsel for the appellant has submitted that whether the establishment is covered under the ESI Act or not had neither been specifically decided nor dealt with by the authority as such the petitioner again moved a representation dt. October 28, 2011 enclosing therewith statement of salary/wages paid by the establishment to its six workers for the financial year 2005-2006 to 20102011. However, without considering the representation, the authority by memo dt. December 8, 2011, in exercise of power u/s 45A of the ESI Act determined an amount of contribution at Rs. 31,103/- allegedly payable in respect of the employees of the establishment.

10. It is further stated that without considering the representation of the petitioner and the question of applicability of the Act with regard to which the dispute was pending the respondents have illegally issued memo dt. March 30, 2012 wherein the claim of Rs. 53,161/- + interest at the rate of 13.05 per day with effect from March 1, 2012 was illegally demanded and also a further sum of dues by the

recovery memo dt. 13th April 2012.

11. The petitioner reserving her right of submissions upon obtaining the relevant documents appears to have called upon the respondent authorities to at least produce the documents or records on the basis of which it had come to the conclusion that the establishment is under the purview of the Act but in spite of it, impugned order dt. 15th November, 2016 was passed in writ petition No.380 of 2012 against which the instant appeal had been preferred along with an application for stay of the order aforesaid till disposal of the appeal.

12. It is lastly argued that section 45A of the Act provides that no such order shall be passed by the corporation in respect of any period beyond 5 years from the date of which the contribution became payable, but in the instant matter respondent authorities demanded the amount which is beyond 5 years from the date on which the contribution becomes payable and in any case as the employees of the company do not exceed six in number since its inception, the provisions of ESI Act are not attracted the authorities cannot make the establishment liable for the amount of State Insurance alleged to be due from it.

13. Ld. Counsel for the respondent ESI Corporation submitted that the writ court had rightly come to the conclusion on the basis of the records summoned by it that the petitioner was employing twenty nine employees as reported by the inspector and not six as claimed by it. In support of this contention he referred to the report dt. 28th March, 2002 wherein name of 29 employees working in the establishment has been noted by the ESI inspector. These employees as per attendance register maintained separately in note book (merit). of the establishment are shown to be working there. The relevant observation of the inspector in the preliminary inspection report dt. 20.03.2002 with regard to the number of employees is as under:EMPLOYEES STATE INSURANCE CORPORATION PRILIMINARY INSPECTION REPORT C.I. No.:

41. Date of first inspection:

20. 03-2012 State/Regional No.: West Bengal Date of Inspection : Region :
Inspection Zone : Tollygunge Period covered by the Division/L.O. : inspection :

6. i) ----- ii) ----- iii) -----

iv) No.Of persons employed with wages at such Place(s) . :

1. Subhas

11) Biplob

21) Renu

2) Tapan

12) Gita

22) Purnima

3) Biswanath

13) Momota

23) Campa

4) Narayan

14) Santona

24) Rabi

5) Sunil

15) Chabi

25) Shyamali

6) Abani

16) Reba

26) Kokoli

7) Roghu

17) Sandhya

27) Antal

8) Bholanath

18) Ratna

28) Nisha

9) Jatub

19) Tuku

29) Saraju Roy

10) Sushanto

20) Mamoni 7. -----(Merit) 8. Month-wise employment position : April-2001-29 Nov-2001-19 for the period covered by May-2001-26 Dec-2001-19 inspection separately in respect June-2001-24 Jan-2002-17 Of Principal Employer and July-2001-20 Feb-2002-20 Immediate Employer, if any, August-2001-21 March-2002-19 spelling out the persons Sept-2001-20 employed for wages at the Octo-2001-20 Factory/Establishment. upto-20-03-2002 9. Date/Dates on which 10/20 or :

01. 4-2001 (29) more were employed for wages in the Factory/Establishment premises including the precincts thereof.

10. Exact date from which the :

01. 4-2001 (P) Factory/Establishment recommended for coverage and if not covered, reasons thereof.

11. List of Records/Registers : Attendance Register maintained inspected and the period for in a Note Book (merit) verified which inspected. From April-2001 to

March-2002 upto 20-03-02 12. Records/Registers not inspected : with period and reasons for the same.

13. Officials(s) interviewed, their names and designations.

14. Whether Form-01 obtained and : Sri. S. P. Mukherjee (Supervisor) : Telephone-4771724 enclosed, if not already furnished Bankers Name:- Indian Overseas by the Employer. Bank Chowringhee Branch 15. Any other remarks. : The factory may be treated as covered w.e.f 01-04-2001 Encl : As indicated in the Report. Date : SIGNATURE:_Sd (illegible) _ Seal & Signature of the Establishment Sd (illegible) Sd (illegible) 14. NAME OF THE INSURANCE INSPECTOR/L.O. MANAGER: Upon hearing the Ld. Counsel for the parties and on perusal of record we find that a Preliminary inspection of the establishment was made by the insurance inspector of Employees State Insurance Corporation on 20.03.2002. The attendance register produced by the corporation showed six employees working in the establishment, out of these three were on managerial post i.e the proprietor, manager and accountant. The other remaining three were shown to be employees of the establishment.

15. The ESI inspector discovered another attendance register maintained by the establishment titled note book (merit). showing attendance of twenty nine persons employed in and in connection with the work of the establishment. It was verified by him for the period April 2001 to March 2002 upto 20.03.2002 and on this basis he recommended coverage of the establishment w.e.f 01.04.2002.

16. The enquiry officer in the impugned order also considered the statement made by one Mr. Mukherjee at the time of the preliminary inspection and on the basis of the report dt. 20.03.2002 of the inspector, came to the conclusion that establishment was covered under the ESI Act.

17. It appears from record that the copy of the inspection report was also provided to the establishment immediately after inspection. It has not been disputed by the establishment that the petitioner is the factory and is engaged in the manufacturing processing as defined in the Factories Act. The contention of the employer that the authorities has not specifically decided as to whether the establishment is covered

under 1948 Act appears to be incorrect. Admittedly the factory of the petitioner was inspected on 20.03.2002 and inspector found from the records of the establishment i.e the note book that it was employing 29 employees in the establishment in connection with its work and recommended the factory to be covered. It is pursuant to this report of inspection that notice was issued to the petitioner appellant and the recoveries were issued on the basis of the fact that the appellants establishment was covered as it was employing 29 persons on the date of inspection and was engaging in the manufacturing process within the meaning of factory.

18. As regards the question raised by the counsel that no order could be passed by the ESI in respect of any period beyond 5 years from the date of which contribution becomes payable is concerned, suffices to say that the inspection had been made on 20.03.2002 by the ESI inspector who had observed at Serial No.15 of the inspection report that the factory may be treated as covered w.e.f 01.04.2001. Thus this contention of the Ld. Counsel that the respondent authority demanded the amount which is beyond 5 years from the date of which the contribution becomes payable is incorrect. In any case the amount became payable where it was discovered that the petitioner was maintaining duplicate sets of records and therefore, the plea that the establishment is not liable to pay for any amount beyond 5 years cannot be accepted as this would not apply to any concealment of facts and record under the Act. It pertains to the situation where the act of the establishment in payment of ESI in respect of his employees is bonafide.

19. The contention of the establishment that neither Sri S. P. Mukherjee is known to the management nor he has any nexus with the working of the establishment is factually incorrect. It appears that the establishment is maintaining two sets of records. One is the attendance register in which only names of six persons i.e manager, accountant and proprietor himself working on managerial post and three employees are shown in it as workers. The second set is maintained in a separate note book (merit)., showing payment and attendance of employees wherein on 01.04.2001 29 employees are shown to have been working in the establishment in and in connection of its work.

20. If the establishment was not actually inspected as alleged by the appellant then there is no explanation as to the discovery of note book containing names of twenty nine employees and receipt of the inspection note by Sri Mukherjee who had put the seal of the establishment on token of its receipt. It is not the care of the establishment that note book was not formed by the ESI inspector and the seal was theirs.

21. From the above discussion it is apparent that it is only for avoiding the application of the ESI Act, the employer had fabricated their documents in two sets, one for official purpose in which three employees were shown to be working in addition to those three, on managerial post, for denying applicability of the Act and the other, in the note book in which the attendance of twenty nine employees actually working in the establishment was shown. The establishment did not dispute that it was not maintaining the said note book or objected to it when the inspector verified the same or when they received the copy of preliminary inspection report dt. 20.03.2002 in their establishment. Rather they took a stand that Sri S. K. Mukherjee was not their employee and had no connection with them or with the work of the establishment which is factually proved to be incorrect on the basis of record aforesaid.

22. In our considered opinion the authority in exercise of power u/s 45A of the Act has rightly come to conclusion in the impugned order that the establishment was liable to be covered for the purpose of ESI dues under the ACT. The writ court also rightly observed that the appellant establishment could not work with only three employees. It is for the reason that the production in the establishment was to such an extent that it required a large number of employees.

23. There is no earthly reason to believe that the sole proprietor will engage three persons on managerial post to look after two, three labourers which are also included in the aforesaid six numbers of employees as per the first set of attendance register maintained by the employer which is falsified by the inspection report, finding 29 employees working in the establishment and the note book. of the establishment discovered during inspection. Therefore, the judgment is not based on surmises and conjectures. It is apparent that the labourers collecting the

final product manufacturing process, for must its be required assembly counting after of for the moulded injections, their packing & storing and also for the purposes of unloading raw material and loading of finished goods. Supervisor and security guards would also be required. Apart from this dispatch and other miscellaneous works for running the establishment in maintenance of machines and records. Therefore, we do not find any illegality or any infirmity in the order impugned.

24. Since the employer/appellant has chosen not to avail the statutory remedy available to it before the Tribunal under ESI Act and has come to directly to the writ petition we do not think that at this stage it would be feasible to relegate the appellant to the alternative remedy particularly on the basis of findings of the authority, u/s 45A of the Act and in the writ petition as well as in this appeal also wherein it has been found that the order impugned does not require any interference.

25. For all the reasons stated above the appeal is dismissed, upholding the findings in the impugned orders as a result of our findings, the ESI Corporation is directed to recover the amount due from the establishment under the recovery notices and any other amount due with interest up to date at the rate applicable within a period of one month from the date of passing of this order and judgment treating the establishment covered as under ESI Act as per the report of the inspector dt. 20.03.2002.

26. Urgent Xerox copy be made available to the parties on priority basis, if applied for, on payment of usual charges. (Rakesh Tiwari, J.) (Mir Dara Sheko, J.)

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