

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO.No.439/2010

M/S. SUNSHINE PROCESS Appellants
Through: Mr. Manish Kapoor, Adv.

Versus

DIRECTOR GENERAL, ESI CORPORATION & ORS. Respondents
Through: Nemo.

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

ORDER
% **01.12.2010**

C.M.21478/2010(exemptions)

Allowed.

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1. This appeal has been filed by the appellant under Section 82 of the Employees State Insurance Act, 1948 (hereinafter referred to as 'the Act') for assailing the judgment dated 07.10.2010 passed by the ESI Court in ESIC No.83/2005 whereby a petition filed by the appellant under Section 75(2) of the Act was dismissed.

2. Briefly stating the facts giving rise to the filing of this case are that the establishment of appellant which is already covered under the provisions of the Act was regularly inspected by the officials of the ESI Corporation (for short 'the corporation'). The officials of the respondents also carried out an inspection on 17.12.2004 when it was found that 16 employees had been working in the premises of the appellant whose names were not shown in the wage roll and accordingly a letter was issued by the respondent to take action against the appellant under Section 68, 45-A, 84 and 85 of the Act. A show cause notice was then issued to the appellant by the respondents on

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03.2005 *inter alia* proposing to determine the contribution on *ad hoc*

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basis from 01.04.1999 to 28.02.2005 with regard to 16 employees who were found working in the factory premises of the appellant on 17.12.2004 and whose name was not appearing in the wage roll.

3. Even though, a reply was given to the aforesaid show cause notice by the appellant but vide order dated 25.05.2005 the respondents determined the liability of the appellant under Section 45-A of the Act and demanded a sum of ₹2,70,270/- to be paid by the appellant for contribution towards the said employees. The appellant was also asked to pay interest on the said amount.

4. It is against this order, the appellant filed a suit under Section 75(2) of the Act before the ESI Court which came up for hearing before the Court, the Court then framed following issues:

“1. Whether the recovery sought by the corporation vide its letter dated 06.7.05 for ₹ 3,96,801/- is liable to be set aside/quash?OPP

2. Relief.”

5. After recording the evidence as led by the parties, the ESI Court decided issue No.1 against the appellant primarily for the reason that the onus of proving the said issue was upon the appellant but they failed to discharge the onus and failed to produce the record before the Court showing that what was the number of employees in the relevant period including those engaged and doing the job work. In this regard, the Court also observed that PW-1, who was the only witness examined by the appellant was evasive. Referring to his statement, the Court has observed that the witness, in his deposition, stated that they used to get the job done on job work basis but have not produced the bills of the job work booked in his cash books. The witness admitted that he has not entered the names of the employees in the salary register despite admission that the job work was being carried out at their premises. The witness stated that while he used to get his office repaired and would make the payment and at one point of time, he also employed 25

persons. He categorically admitted that he entered their names in the registers but the said register was not brought by him in the Court. The Court also observed that the witness even failed to produce the salary register for the period 1999-2003. He vaguely stated that he does not remember when he appointed 16 employees and when their names were entered in the record. It may be observed here that number of employees as noticed by inspector of the respondents as on date of inspection is not disputed.

6. In these circumstances, taking note of the judgment in the case of Smt. Niranjana Kaur vs. M/S New Delhi Hotels Ltd. and ors. AIR 1988 Delhi 332 and Gopal Krishnaji Ketkar Vs. Mohammed Haji Latif and Others, AIR 1968 SC 1413 the ESI Court held that it is duty of the party holding the best evidence available with him to produce the same and in the event of not producing the same evidence, to suffer and that adverse inference can be drawn by the Court in this regard.

7. Referring to the cross-examination of PW-1, the Court further observed that:

"In cross-examination he admitted that inspection was carried out correctly as per his record. If any calculation has been carried out by the department wrongly by ignoring the some of the registers he could have very much produced the same before this court. The record produced pertains from the period April 2004 and thereafter and he should have brought the record before this court showing the actual number of employees working in the relevant period. If the previous Inspector has not reported and get the calculation done, it will not absolve the petitioner from its liability. It has come on the record that on the day of inspection, 16 employees were found working and the submissions that they were not engaged earlier was to be proved by petitioner by producing the relevant record so that the exact date of appointment could have come. Thus, from the findings above, I do not find any substance in the arguments of petitioner and impugned demand cannot be quashed. Thus, this issue is decided against the petitioner and in favour of the respondent."

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8. Before this Court also, the record which ought to have been produced has not been produced by the appellant. Even though, it is not a dispute raised by the appellant that 16 employees were found working in their premises whose name was not shown in salary register at the time of inspection, the only submission made by the appellant is that the calculation of the amount payable is calculated by the respondent does not have any sanctity. However, a perusal of the calculation goes to show that the calculation has been made on the basis of minimum wages, number of workmen and the period in question. Thus, the said calculation also cannot be faulted.

9. In these circumstances, there is no merit in the appeal and the same is hereby dismissed at this stage itself.

10. No costs.

DECEMBER 01, 2010

'anb'


MOOL CHAND GARG, J