

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ FAO 182/2011

Judgment delivered on: 8th December, 2011

EMPLOYEES STATE INSURANCE CORPORATION
& ANR.

..... Appellant

Through: Mr.K.P. Mavi, Adv. with Mr. B.P. Mishra,
Adv.

versus

M/S GOLD STAR HOTEL PVT. LTD.

..... Respondent

Through: Mr. Gulshan Chawla, Adv.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

KAILASH GAMBHIR, J. (Oral)

1. By this appeal filed under Section 82 of the Employees State Insurance Act, 1948 the appellant seeks to challenge the order dated 6th December, 2010 whereby the learned ESI Court quashed the demand raised by the appellant and the respondent was not held liable to pay any damages or interest as was raised by the appellant under ESI Act being not in conformity with the Notification of the ESIC dated 17.7.1990.

2. The sequence of events that has led to the filing of the present appeal is that the respondents filed a suit for permanent and mandatory injunction against the appellants praying for an injunction to restrain the appellants from initiating any recovery proceedings and directing the appellants to withdraw the demand raised by them, which suit was dismissed vide order dated 31.10.2001 on the ground that the respondents failed to lead any evidence in their support. That thereafter the respondents filed a petition under section 75 of the ESI Act which was allowed vide order dated 6.12.2010 and feeling aggrieved with the same, the appellant has preferred the present appeal.

3. Arguing for the appellant, Mr. K.P. Mavi, learned counsel has confined his arguments on two basic issues. The first contention of the counsel for the appellant is that the second petition filed by the respondent under Section 75 of the ESI Act was barred under Order 9 Rule 9 CPC as prior to the filing of the said petition, the respondent had earlier filed a suit for permanent and mandatory injunction which was dismissed by

the ESI Judge vide order dated 31st October, 2001 as the respondent had failed to lead any evidence in support of its case set up in the plaint for quashing of the demand. The second argument taken by the counsel for the appellant is in the alternative to his first submission and he has urged that if the second petition filed by the respondent is not barred under Order 9 Rule 9 CPC then in the alternative the said petition filed by the respondent at least was barred by the principle of res judicata as envisaged under Section 11 of the CPC.

4. Counsel for the respondent on the other hand has taken a stand that none of the said two provisions would be applicable to the facts of the present case. Counsel submits that the bar envisaged under Order 9 Rule 9 would arise only if the suit of the respondent had been dismissed by the Court under Order 9 Rule 8 CPC and not otherwise. The contention raised by the counsel for the respondent is that the earlier suit for permanent and mandatory injunction filed by the respondent was not dismissed on account of the absence of the respondent or its counsel but because the respondent had failed to lead any

evidence in support of the case set up in the plaint. Answering the second argument of counsel for the appellant, counsel for the respondent submits that even the second petition filed by the respondent under Section 75 of the ESI Act was not barred by the principles of res judicata as the previous Court where the suit for permanent and mandatory injunction was filed by the respondent was not a competent Court of jurisdiction to take a decision on the validity of the demand raised by the appellant and, therefore, filing of the later petition before the ESI Court, which was a competent Court of law cannot be held to be barred by the principle of res judicata.

5. I have heard learned counsel for the parties at considerable length and given my thoughtful consideration to the arguments advanced by them.

6. Before furthering the discussion, it would be relevant to reproduce the relevant provisions as under:

“11. Res judicata.

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try

such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I- The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI- Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

[Explanation VII.- The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.-An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.]

ORDER IX -APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE

8. Procedure where defendant only appears

Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

9. Decree against plaintiff by default bars fresh suit

(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit. and shall appoint a day for proceeding with suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.”

As would be manifest from a bare reading of the above provisions that under Order 9 Rule 9 CPC, there is a bar on the plaintiff to bring a fresh suit in respect of the same cause of action only in a case where the suit filed by such a plaintiff is wholly or partly dismissed under Order 9 Rule 8 CPC. Under Order 9 Rule 8 CPC the Court dismisses the suit filed by the plaintiff only when the defendant appears and the plaintiff does not appear when the suit is called for hearing. In the facts of the

present case the suit for mandatory and permanent injunction filed by the respondent before a Civil Court was not dismissed because of the absence of the plaintiff or its counsel, but because of the fact that the respondent/plaintiff had not led any evidence in support of their case and in the absence of any evidence the Civil Court did not find any reason to quash the demand raised by the appellant/defendant towards the contribution of the employees covered under the ESI Act. Once the said dismissal of the suit was not under Order 9 Rule 8 CPC, then Order 9 Rule 9 CPC would not create any bar in the way of the respondent to file a fresh petition under Section 75 of the Employees State Insurance Act, 1948. This Court, therefore, does not find any merit in the first contention raised by the counsel for the appellant.

7. This Court also does not find any substance in the argument advanced by the counsel for the appellant that the civil suit for permanent and mandatory injunction was filed by the respondent before the ESI Court, as would be manifest from the designation of the Judge in the order dated 31st October,

2001 describing the concerned Judge as a ESI Judge. It is a matter of common knowledge that Sr. Civil Judge or any other Court which is assigned the powers to try cases under the Employees State Insurance Act is in addition to powers exercised by such Court as a Civil Court. In the case at hand, at the relevant time of passing of the order dated 31st October, 2001, the Court of Sr. Civil Judge had passed the order acting as a Civil Court and not as a designated Court under the Employees State Insurance Act and as a matter of convenience, below the name of the Judge both the designations that of Sr. Civil Judge/ESI Judge have been mentioned.

8. The other argument of counsel for the appellant that the petition filed by the respondent under Section 75 of the Employees State Insurance Act was barred by the principles of res judicata is equally devoid of any force as indisputably the Civil Court where the suit for permanent and mandatory injunction was filed by the respondent was not a competent Court of jurisdiction to take a decision on the validity of the demand raised by the appellant. The bar of res judicata as

envisaged under Section 11 of the CPC would arise only where the Court deciding the former suit must be a Court of concurrent jurisdiction i.e. jurisdiction of both the Courts i.e. first Court and the subsequent Court must be concurrent; both with regard to the pecuniary limit and the subject matter. In the present case, in view of the bar envisaged under Section 75(3) of the ESI Act the Civil Court was not competent to try and entertain the suit for permanent and mandatory injunction filed by the respondent and, therefore, the said Civil Court was not a competent Court of jurisdiction. Consequently, the order dated 31.10.2001 passed by the Civil Court could not have created any bar in the way of the respondent to file a petition under Section 75 of the ESI Act although challenging the same demand.

9. In the light of the aforesaid discussion, this Court does not find any merit in the present appeal and the same is hereby dismissed.

KAILASH GAMBHIR,J

DECEMBER 08, 2011

rkr