

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 2887 OF 2015
WITH
CIVIL APPLICATION NO. 15030 OF 2015

Jalgaon District Government Servants'
Co-operative Credit Society Ltd. ... Appellant

Vs.

The Recovery Officer, Employees State
Insurance Corporation and others. ... Respondents

Mr. V.D. Hon, Sr. Counsel i/b. Mr. A.V. Hon, Advocate for the
appellant.

Mr. Vlas D. Sonawane, Advocate for respondent no.2.

CORAM : A.V. NIRGUDE, J.
DATE : 20-09-2016.

Per Court :

1. Admit for deciding following substantial questions of
law:

A. Whether issues framed by the trial court need change and to
what extent?

B. Whether the delay in filing of the application deserves to be
condoned?

C. Whether the case is required to be remanded back to the trial
court?

2. Heard at length.

3. This appeal challenges judgment and order dated
31/08/2015 passed by the learned Judge, Employees State
Insurance Court, Jalgaon, holding that the appellant society is

covered under the provisions of Employees State Insurance Act, 1948 (for short "the ESI Act").

4. The facts leading to this litigation in short can be stated as under:-

5. The appellant is a co-operative society established by government servants' working in Jalgaon district. The society takes subscription from its members and it also advances loans on soft interest rates to its members. The society has an office in Jalgaon town. The society has number of branch offices situated in various Taluka places in the district. Admittedly, the society employed about 120 employees all over the district. The State of Maharashtra issued notification dated 01/12/1989 and made applicable from 01/01/1990 provisions of the ESI Act to such establishment that are described in the notification and which are situated in the local limits of certain Districts and towns in Maharashtra. Jalgaon district is also included in the notification. The notification further gives description of establishments to which the provisions of ESI Act, 1948 would apply. Three types of establishments are described in the schedule of the notification:

I) Any premises including the precincts thereof whereon ten or more persons, but in any case, less than twenty persons are employed or were employed for wages on any day of the preceding twelve months, and in any part in which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on; but excluding subject to the operation of the Mines Act, 1952 (35 of 1952) or a railway running shed or an establishment which is exclusively engaged in any of the manufacturing process specified in clause (12) of section 2 of the Employees State Insurance Act, 1948 (34 of 1948).

II) Any premises including precincts thereof whereon twenty or more persons are employed or were employed for wages on any day of

the preceding twelve months, and in any part in which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on; but excluding subject to the operation of the Mines Act, 1952 (35 of 1952)

III) The following establishments wherein twenty or more persons are employed, or were employed for wages on any day of the preceding twelve months, namely:-

- (i) Hotels,
- (ii) Restaurants
- (iii) Shops,
- (iv) Road Motor Transport establishments.
- (v) Cinemas including preview theatres, and
- (vi) Newspaper establishment as defined in section 2(d) of the working journalists and other Newspaper Employees (conditions of services) and Miscellaneous Provisions Act, 1955 (45 of 1955).

With reference to Jalgaon district the areas to which the provisions would apply are described as under:

The areas within the Jalgaon District:

- (a) Limits of Municipal Council of Jalgaon.
- (b) The revenue village, Mahrur.
- (c) Survey nos. 191 and 192 of village Pimparla and 75 and 77 of village Nimkhedi.
- (d) The area comprised within the limits of Chalisgaon Municipal Council.
- (e) Survey Nos. 319 and 329 of Chalisgaon Taluka.
- (f) Survey no. 192 of Khadki Budruk (Shivar) of Taluka Chalisgaon.

6. On 12/03/2012 or there about respondent-recovery officer appointed under Employees State Insurance Act, 1948 issued prohibitory order under section 45 of the Employees State

Insurance Act, 1948 and directed the appellant society that they should deposit with the recovery officer a sum over Rupees Six Lakhs. In other words, the respondent-recovery officer was of the view that, the establishments of the appellant society are covered under the notification and therefore the appellant society should start paying E.S.I. Contribution.

7. It is also an admitted fact that first demand notice under the Act was sent to the appellant long back in 2005.

8. The appellant society filed an application under section 75 of the Act for seeking declaration that the provisions of Employees State Insurance Act, 1948 are not applicable to its establishments. The learned judge issued notice and the respondents submitted a reply opposing the application even on the ground expiry of limitation period. Certain issues were framed and evidence allowed to be led.

9. The society examined its Manager as witness. On the other hand, respondent-recovery officer did not lead any evidence but placed reliance on certain documents.

10. So, the question before the lower court was whether all or some of the branch offices of the appellant society would be covered under the notification. Such question was certainly a question of fact. The issues that could have been framed are as under:

- I) Are all offices of the society covered by the notification?
- II) Whether offices which are not situated within the local limits of the areas described under the notification are also covered by the notification?
- III) Whether the application was moved within limitation?

11. I found that such issues were not framed at the trial court level. Therefore, the entire trial and appreciation of evidence went haywire.

12. The case of this nature is required to be decided on merits and although the application was made rather belatedly the delay ought to have been condoned. I am inclined, to hold that this is a case where the delay deserves to be condoned.

13. The appellant society is in existence since last many years and is running prosperous business. It is said that on 08/09/2005 they received a show cause notice from the respondent-recovery officer demanding contribution, they apparently ignored this demand. They realised the peril only when the prohibitory order was passed in 2012. It is thereafter, they realised their responsibility to either deposit the amount or to challenge the demand within the parameters of Employees State Insurance Act, 1948. They rather belatedly challenged the demand etc. in 2012. No doubt there was delay but the question that they raised was important enough to ignore the delay. Even the respondent showed their lethargy in not pursuing the case in required earnestness. This is evident from the fact that the first demand was made in 2005 and decisive action was taken only 2012.

14. It is pertinent to note that there are several actions that could have been taken in the meantime by the respondent-recovery officer. It is an admitted fact that prior to issuance notification there was no question of any demand coming to the appellant. It is only after the notification that they arose the alleged liability. So the recovery officer was under obligation to initiate action as contemplated under sections 44, 45 and 45-A of the Act. In other

words, soon after first demand was made the recovery officer ought to have taken concrete steps to establish E.S.I. claim against the appellant society. Since this was apparently not done the application under section 75 deserves to be decided on merits alone. I am therefore, holding that the application cannot be dismissed on the question of delay.

15. The evidence that came on record does not appear sufficient to decide these issues. The case is therefore required to be decided afresh.

16. The learned Judge of the lower court shall not make any observation about the delay or condonation of delay in making of the application. The same is already condoned.

17. The learned Judge should decide first two issues on the basis of evidence that has come on record and additional evidence if adduced.

18. In view of this, the appeal is partly allowed and the impugned order is set aside.

19. The case is remanded back to the lower court.

20. The amount deposited in this court should be transferred to the Insurance Court, Jalgaon where the same would be invested in a nationalized bank for a period of one year.

(A.V. NIRGUDE)
JUDGE