HON'BLE SRI JUSTICE S. RAVI KUMAR

CIVIL MISCELLANEOUS APPEAL No.1426 of 2008

JUDGMENT:

This appeal is preferred against order dated 29.04.2008 in O.P.No.5 of 2006 on the file of Principal Senior Civil Judge, Vijayawada.

2. Respondent herein submitted application under Section 75(1)(g) of Employees' State Insurance Act, 1948 (hereinafter referred to as 'Act') questioning demand made by appellants herein under Section 45A of Act.

3. Brief facts leading to this appeal are as follows:

Respondent herein is a dealer of Hindustan Petroleum Corporation Limited, distributing petrol as well as diesel on retail basis. According to appellants, its Inspector made an inspection to the unit of respondent on 21.04.2003 and submitted a preliminary inspection report, according to which, there were eleven persons employed in the unit of respondent with effect from 01.04.2003, but respondent did not pay the contribution as per the provisions of Act, therefore a show-cause notice was issued demanding a sum of Rs.31,714/- as per notice dated 05.07.2005 and a sum of Rs.35,393/- as per notice dated 14.02.2006 towards contribution due from respondent under Section 45A of Act and fifteen days time was granted to show cause why such amount should not be collected. But, respondent did not submit any explanation in spite of service of notice, therefore, appellant-Corporation passed an order under Section 45A of Act determining a sum of Rs.31,714/- towards contribution for the period from 01.04.2003 to 30.09.2004 due from respondent and the same was communicated to him with a request to pay the amount after receipt of above order. Respondent herein questioning the said order presented application under Section 75 of Act before Principal Senior Civil Judge, Vijayawada, who is competent authority, and the learned Principal Senior Civil Judge, Vijayawada, on a consideration of material on record i.e., evidence produced by both parties, recorded a finding that appellants cannot rely on preliminary inspection report, therefore, same is liable to be rejected and held that as per evidence on record only seven employees are working in the respondent's unit and therefore, the provisions of Act has no application to that unit and the order of the appellant-Corporation directing respondent herein to pay contribution is not correct and consequently set aside the order dated 05.07.2005. Aggrieved by the same, present appeal is preferred.

4. Respondent in spite of service of notice neither appeared in person nor through any Advocate.

5. Heard advocate for appellants.

6. The main substantial question of law contended by the appellants is as follows:

> "The Substantial Question of Law U/s.82 of the ESI Act which arises for consideration of this

> Honourable Court is, "the Respondent having paid an amount of Rs.41,927/- on 6-1-2006, cannot evade further payment of contributions as per Section 1(6) ESI Act. This being the position, has the EI Court not erred in directing the Petitioner Corporation herein to refund this amount to the Respondent herein? Is the Honourable Court below vested with any jurisdiction U/s.75 of ESI Act to declare as to whether a particular unit is covered under the provisions of the ESI Act or not?

Advocate for appellants mainly contended that when amount is determined under Section 45A of Act by Employee's State Insurance Corporation, the same is final and the same cannot be questioned in ESI Court. The other contention of appellants is that when the employer himself furnished the information under Form-1 as required under Employees' State Insurance (Gen.) Regulations, 1950, wherein it is recorded that eleven employees are employed in the unit, the contention that there are only seven employees is not tenable and the ESI Court erroneously recorded a finding that provisions of Act are not applicable to respondent. It is further submitted that ESI Court has no power to grant any declaration and it over-stepped into its jurisdiction, therefore, the impugned order dated 20.04.2008 is liable to be set aside.

7. Now the point that would arise for my consideration in this appeal is:

> *Whether the order dated 29.04.2008 in O.P.No.5 of 2006 on the file of Principal Senior*

Civil Judge, Vijayawada, is legal, proper and correct?

POINT :

8. The first and foremost objection of appellants is that when the order under Section 45A of Act has become final, it is not open to question the same under ESI Court. To substantiate the same, appellants relied on a judgment of Hon'ble Supreme Court in **ESI Corporation v. C.C. Santhakumar**[1]**,** in this case, the Hon'ble Supreme Court held as follows:

> "Section 45-A of the Act contemplates a summary method to determine contribution in case of deliberate default on the part of the employer. By Amendment Act 29 of 1989, Sections 45-C to 45-I were inserted in the Principal Act, for the purpose of effecting recovery of arrears by attachment and sale of movable and immovable properties or establishment of the principal or immediate employer, without having recourse to law or the ESI Court. Therefore, it cannot be said that a proceeding for recovery as arrears of land revenue by issuing a certificate could be equated to either a suit, appeal or application in the court. Under Section 68(2) and Sections 45-C to 45-I, after determination of contribution, recovery can be made straightaway. If the employer disputes the correctness of the order under Section 45-A, he could challenge the same under Section 75 of the Act before the ESI Court".

9. From a reading of the above para, it is clear that to recover the amount so determined under Section 45A of Act recovery can be made straight away and there is no need to file any suit or application in the Court, but if the

employer disputes the correctness of the order under Section 45A of Act, the same can be challenged in ESI Court under Section 75 of Act. Here, the employer disputed the correctness of the order passed under Section 45A of Act before ESI Court, therefore, the objection of appellant with regard to jurisdiction of ESI Court is not tenable and decision relied on by appellants is no way helpful to appellants.

10. The next contention of appellants is that ESI Court cannot give any declaration that particular unit is covered or not under ESI Act. But, as seen from the impugned order, no such declaration is given, it only decided as to the application of provisions of Act. As per Section 2(12) of Act, factory means any premises including the precincts thereof whereon ten or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on, and such factory is liable to pay contribution.

11. Here, it is the specific case of employer that there are only seven employees working under respondent herein and they were not eleven employees as contended by appellants. Appellants specifically contended that employer himself furnished form-1 on 21.04.2003, in which, it is stated that eleven persons are employed for wages with effect from 01.04.2003. On behalf of

appellants, RW.1 was examined and Exs.B.1 to B.8 are marked. RW.1 is no other than the person, who made inspection on 21.04.2003. As seen from his evidence, Ex.B.1 is the preliminary inspection report dated 21.04.2003, Ex.B.2 is intimation in Form No.C-11, dated 03.06.2003, Ex.B.3 is claim in Form No.18, dated 05.07.2005, Ex.B.4 is the order dated 05.10.2005 under Section 45A of Act, Ex.B.5 is the show-cause notice dated 13.12.2005 (office copy), Ex.B.6 is the certificate of recovery in form No.C-19 dated 27.11.2005, Ex.B.7 is the claim in Form C-18 dated 14.02.2006 and Ex.B.8 is letter dated 06.01.2006 from the employer. Though appellant contended that employer submitted form-I, which shows that there are eleven employees working on 21.04.2003, that Form-1 is not finding place in the documents marked on behalf of appellants. Further as per Section 44 of the Act, the employer shall submit to the Corporation a form containing particulars relating to persons employed by him to any factory or establishment and maintain registers. Admittedly, the form as submitted under Section 44 of the Act is not filed and it is only in the inspection report dated 21.04.2003 there was a mention about employees. As seen from the record, PWs.1 and 2 categorically stated that only seven employees are working in the respondent unit and their evidence is supported and corroborated with other public documents like Exs.A.9, A.10 and A.11. When such evidence is produced on behalf of respondent herein, appellants except relying on self-serving testimony of RW.1, who said to have inspected the unit and his self-serving report marked as Ex.B.1, no other material is produced to show that there were eleven employees working in the unit of respondent herein. Even RW.1 in his cross-examination specifically stated that he do not remember the number of employees working in the unit at the time of his inspection. If really, the recitals recorded in Ex.B.1 are true and correct, RW.1 would not have stated like so in the cross-examination. When respondent herein specifically contended that RW.1 obtained signature of PW.2 on a blank form and the same was utilized for preparation of Ex.B.1, the statement of RW.1 that he did not remember the number of employees working in the unit at the time of his inspection would have a great bearing. Learned Senior Civil Judge, on a elaborate consideration of these aspects recorded a finding that the provisions of Act, 1948 have no application in view of the fact that only seven employees are working in the unit as per the record. I do not find any wrong appreciation of material by the ESI Court nor any perversity in the findings of the Court below. On a scrutiny of the material, I am of the considered view that trial Court has not committed any error either on facts or on law in setting aside the order of appellant dated 05.07.2005 and ordering refund of amount, to be interfered by this Court.

12. For these reasons, it is held that there is no

question of law involved in this appeal leave alone substantial question of law.

13. Therefore, this appeal is dismissed as devoid of merits.

14. Miscellaneous petitions pending, if any, shall stand closed. No costs.

S. RAVI KUMAR, J

17th August 2016.

mar

---

[1] (2007) 1 SCC 584