IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 495 OF 2003

The Regional Director
Employees State Insurance Corporation .. Appellant
vs.
M/s. Somesh Forge Pvt. Ltd. .. Respondents

Mr. H. V. Mehta for Appellant.
Mr. Shankar Katkar h/f. Mr. Suresh Pakale for Respondents.

CORAM : M. S. SONAK, J.
DATE: 06 FEBRUARY 2017

P.C :

1] Heard learned counsel for the parties.

2] With the consent and at their request, the appeal is disposed of finally.

3] The main question in this appeal is whether for the relevant period the respondent had indicated at least 20 employees so as to be liable for coverage under the provisions of the Employees State Insurance Act 1948 (said Act).

4] Mr. Mehta, learned counsel for the appellant submits that the Inspector who inspected the respondents establishment had noted and made endorsement on the attendance register from which it was clear that on 1 July 1985 there were 20 employees engaged in the respondents' establishment. Mr. Mehta submitted that this Inspector had also made a report that there were 20 employees at the establishment on 1 July 1985. Finally, this Inspector deposed to these facts before the ESI Court. The director of the respondents who appeared and deposed in the matter said that he is in a position to produce the attendance register but failed to produce the same. For these reasons, Mr. Mehta submits that adverse inference was liable to be drawn against the respondents. Further, Mr. Mehta submits that it was not even the case of the respondents that the appellant in computing 20 employees had counted the director as one of the employees. Mr. Mehta submits that there was absolutely no material to this effect and despite absence of material, the learned ESI Court has held against the appellant on this count as well. For these reasons, he submits that the impugned order is liable to be set aside.

5] Mr. Katkar, learned counsel for the respondents made reference to paragraph 12 of the impugned judgment and order, wherein it is stated that the respondent had filed on record the original attendance register and on the basis of the same, it was clear that only 19 employees including the casual and permanent employees were found to be present on 1 July 1985. Mr. Katkar submits that this finding of fact is duly supported by the evidence on record and therefore the impugned order may not be interfered with. Mr. Katkar pointed out that after 1989, the respondent has admitted coverage and there is no dispute that the respondent complies with the provisions of the said Act on the said basis.

6] In this case, there is absolutely no material on record to establish that the respondent had indeed produced on record the attendance register which was countersigned by the Inspector of the appellant. In fact, if the deposition of the director of the respondents is perused, it is clear that the director had stated that he is in a position to produce such register but however, there is nothing in the deposition or otherwise in the record to suggest that such attendance register duly countersigned by the Inspector was in fact produced on record. The finding recorded at paragraph 12 is therefore vitiated by perversity since, it is based upon *'no evidence'.*

7] In the course of cross-examination of the Inspector, a suggestion was put to him that in computing the 20 employees, he has also counted the director of the respondents. Further, there is material on record that the attendance register was offered for inspection to this Inspector by one employees of the respondents by name of Oldwin Bothello. Significantly, the said Oldwin Bothello has not been examined on behalf of the respondent. Further, the director who deposed in the matter categorically stated that he was not even present when the Inspector arrived for inspection. If this was the position, one fails to understand as to why a suggestion was put to an Inspector that in computing 20 employees, the Inspector has counted the director as one of the employees. The impugned order records that the Inspector, who was examined as the witness on behalf of the appellant has admitted that while counting 20 employees he has included the director of the respondent company. In the entire deposition, there is no such admission. Accordingly, even this finding is vitiated by perversity or in any case, misreading of the evidence on record.

8] The attendance register, which was admittedly in possession of the respondents and which the respondents' director stated that he was in a position to presume was in fact a clincher in the present matter. This is because it is admitted that upon such attendance register, the Inspector made his countersignature. The respondents were duty bound to such attendance register and they having failed to do so, an adverse inference was liable to be drawn against them.

9] There is also substance in the contention raised by Mr. Mehta that the very application / appeal lodged by the respondents before the ESI Court was barred by limitation. The limitation is to run from the date of the original order and not from the date of any reminders that may have been addressed to the respondents.

10] Thus, both on merits as well as on the grounds of bar of limitation, there was no justification for the ESI Court to have made the impugned order. The impugned order is accordingly set aside. The appeal is disposed of. There shall however be no order as to costs.

(M. S. SONAK, J.)

Chandka