THE HON'BLE SRI JUSTICE N.BALAYOGI

CIVIL MISCELLANEOUS APPEAL No.489 OF 2007

JUDGMENT:

This appeal is preferred against the order dated 11.10.2006 in Original Application No.1 of 2004 on the file of the Principal Senior Civil Judge, Kurnool, wherein the finding of the lower court is that the respondent - corporation failed to establish through cogent, oral and documentary evidence that in the applicant's Hostel kitchen ten persons are employed and consequently, held that the demand of contribution of Rs.25,562/- under Ex.A3 dated 30.02.2004 is illegal and not valid.

2. The contentions of the appellant/respondent No.1 in a nutshell are as follows:

(a) The testimony of P.Ws.1 to 3 is interested, self-serving and untrustworthy. The Principal Senior Civil Judge, Kurnool, ought to have seen that the respondent/applicant employed more than ten workers and involved in manufacturing of food with the aid of power, hence, liable to pay the contributions. When the Inspector of the E.S.I. visited the respondent/applicant institution on 22.11.2002, he gave Ex.B2 declaration in Form No.1, whereunder he has stated that the respondent/applicant employed ten persons in the kitchen of the college and the same is recorded by him in the Inspection Report – Ex.B4 and in the Visit Notes – Ex.B3. At the time of inspection, the Correspondent of the applicant society – P.W.2

and the Principal of the Junior College were present and they failed to produce the wage register of the kitchen employees, though they have subscribed their signatures in Ex.A2. Hence, the burden of proof is on the applicant-society, but not on the Corporation under Section 102 of the Indian Evidence Act, 1872.

(b) The appellant/Respondent No.1 further contended that under Section 45(2) of the E.S.I. Act, when the employer failed to furnish the information relating to the employees and payment of wages, the Insurance Inspector has no option except to submit his report with the particulars available with him. Hence, the non-mentioning the names of employees and their particulars cannot be put against to the Corporation in their absence of furnishing of such particulars by the employer. In Ex.B.4, the Insurance Inspector categorically stated that the applicant Society failed to give the particulars and produce the wage register of the kitchen employees. Hence, the decision relied upon by the applicant Society in 1999 (3) LLJ P-235 has no application to the facts of this case.

(c) The appellant/Respondent No.1 further contended that E.S.I. Act is a social welfare legislation with an object to provide certain benefits to the employees, hence, the object of the said Act cannot be defeated by mere technicality, especially in the light of the above object of the legislation.

3. The contentions of the respondent/applicant in a nutshell are as follows:

(a) The case of the respondent/applicant is that it is a Registered Educational Society in the name and style of 'Santhi Nikethan Education Society'. The strength of the students in the said college is 100. The 2nd respondent – Deputy Director to the appellant's Corporation, who is 2nd respondent in O.A.No.01 of 2004, issued orders vide No.52-21657-09, dated 06.01.2003, including the applicant Society within the purview of the E.S.I. Act and directed to furnish the requisite particulars, for which, the applicant Society submitted explanation on 12.03.2003 under Ex.A2, stating that one Adilakshmamma – P.W.3 is maintaining the kitchen, since 2002 and the kitchen staff is less than ten in number.

(b) The respondent/applicant further contended that the Insurance Inspector obtained the signature of Rahul without explaining the contents therein. At the time of inspection, the Inspector noted the persons who are cutting the grass in the Society compound. After long gap of more than ten years after establishment of the college, the 2nd respondent issued a show-cause notice on 06.01.2003, to which the society submitted an explanation on 12.03.2003 and the second respondent further issued a show-cause notice on 13.02.2004, under Ex.A3, demanding payment of Rs.25,562/-.

4. The case of the appellant, who was respondent in the O.A.No.01 of 2004, is that under Section 75(2)(b) of E.S.I. Act, the applicant is liable to deposit 50% of the arrears claimed by the

Corporation in the E.I. Court, then only, it is entitled to raise the dispute. When the Insurance Inspector visited the Society on 22.11.2002, the applicant failed to produce the complete relevant records, but gave a declaration in Form No.1 that the society had employed ten persons in the kitchen of the college. Therefore, a notice was issued informing that the Society comes under the provisions of the E.S.I. Act w.e.f. 22.11.2002, i.e., the date on which the Society was inspected by the Insurance Inspector. It is the further case of the appellant that in the kitchen manufacturing activity is going, which falls under Section 1(6) of E.S.I. Act, since the preparation of food item is carried on with the aid of power using along with the electric grinder and L.P.G. Gas Cylinders.

5. Basing on the rival contentions, the following points emerged before the lower court for consideration:

1. Whether the applicant society employed ten employees in the kitchen?
2. Whether cooking of food in the Hostel kitchen of the applicant society is with the aid of power and energy and for commercial purpose?
3. Whether under Section 75 of the E.S.I. Act 50% of the arrears is to be deposited into the court to maintain this application?
4. Whether the respondents are barred by time to claim arrears of contribution under Ex.A3?

6. In support of the applicant, P.Ws.1 to 3 were examined and Exs.A1 to A3 were got marked. On behalf of the respondents R.Ws.1 and 2 were examined and Exs.B1 to B4 were got marked.

7. Now, the point that arises for determination of this Court is:

"Whether the order of the lower court suffers from any legal infirmity warranting interference of this Court?"

8. Sri P.Yellappa, Secretary of the applicant college, was examined as P.W.1, Sri P.Rahul, one of the Directors of the Santi Nikethan Education Society, was examined as P.W.2 and Smt.Adilakshmamma, was examined as P.W.3. The evidence of P.Ws.1 and 2 is corroborated to the extent that the applicant's Educational Society is registered under Societies Registration Act, 1860, in the year 1991 and P.W.1, though not filed any authorization letter, according to his own evidence and which is not disputed by cross-examination, wherein it is stated that he was authorized to represent the Society and P.W.2 is associated with the affairs and administration of the college.

9. The clinching evidence of P.W.1 is that the Society is managing Junior College since 1991 and prior to 2002, the college was under the supervision and management of one, Vavilala Krishna Murthy and P.W.1 alone is managing the college, since 2002. But, whereas, P.W.2 in his evidence stated that he was one of the Directors of the Santhi Nikethan Education Society since 2002 and he was associating with the affairs and administration of the college from 1991 to 2002, during which time, one Vavilala Krishna Murthy, was the Correspondent and Managing Director of the college. After Vavilala Krishna Moorthy tendered his resignation to the post of Correspondent and left the college in the year 2001, P.W.2 became the Correspondent of the said college in October 2002. It is the evidence

of P.Ws.1 and 2 that since Society could not run the college on commercial lines by giving wide publicity, the strength of the college declined over the years and according to P.W.1, the strength is reduced to 100 students, but according to P.W.2, the strength comes down from 200 students to 92 in the year 2002.

10. Both P.Ws.1 and 2, in their evidence, admitted that on 22.11.2002, the Insurance Inspector visited the college, but P.W.1 says that he was not present and has not received any notice.

11. The burden is heavily on the appellant – ESI Corporation to establish that the applicant-society employed 10 or more employees in the hostel kitchen. To prove/substantiate the case of the Corporation it has examined ESI Inspector as R.W.1 and the in-charge Manager of ESI, Kurnool, as R.W.2.

12. In the case of ***E.S.I. Corporation Vs. Hotel Amred*** (1998 II LLJ 1157) it was held that where in cases to which provisions of Section 45-A of the Act are attracted, the Corporation by an order made in accordance with that Section determines the amount of contribution payable and that claim is disputed by the employer, it would not be necessary for the Corporation to seek a resolution of the dispute before the insurance court. Such a claim is recoverable as arrears of land revenue. If the employer disputes the claim it is for him to move the Insurance Court for relief. In other cases other than cases where determination of the amount of contributions under Section 45-A is made, the Corporation, if its claim is disputed by the

employer, should seek an adjudication of the dispute before the Insurance court before enforcing recovery.

13. In the instant case, there is the evidence of R.Ws.1 and 2. The consistent evidence of R.W.1 is that he visited the society on 22.11.2002. At the time of visit he found that the kitchen of the college is functioning with 4 male and 6 female employees numbering 10. He also observed food in the kitchen was prepared with the aid of electric grinder and L.P.G. cylinder. At the time of visit, Rahul, the Correspondent of the applicant-society and B.Shafi Ahmed, the Principal of the Junior College were present. But, they failed to produce wage register of the kitchen employees. The said Principal and Correspondent signed the employees registration form under Regulation 10(b) marked as Ex.B2. In Ex.B1 there is specific mention that P.Rahul - P.W.2 was the correspondent and P.Yellappa - P.W.1 is the Secretary. The said form under Ex.B1 is signed by P.Rahul – P.W.2.

14. Ex.B2 is the regulation 10 (b) wherein it is mentioned that Santhi Niketan Junior College, Dupadu, Kurnool District is the registered address and there is a residential junior college with hostel established in 1991 with Rc/No.92/E3-2/1991. P.Rahul is recorded as Correspondent and against column-9 i.e., Whether power is used in the factory/establishment if so, since when, it is noted ‘Yes’, besides that also noted ‘LPG cylinder and grinder was being used. Therefore, there is use of power and the employees employed noted at column

No.13 as consisting of 4 male and 6 female workers. It is also mentioned that since 1.11.2002, the ten workers were working and in 2002 at the time of visit, 10 were recorded as on 22.11.2002. B.Shafi Ahmed under the seal and stamp of Junior College as Principal, Santhi Nikethan Junior College has signed. According to respondent-Corporation, Exs.B1 and B2 were signed by P.Ws.1 and 2, wherein it is mentioned that 10 workers are working as on 22.11.2002 at the time of visit of R.W.1. But the evidence of P.Ws.1 and 2 is that there are less than 7 workers and P.Rahul - Correspondent failed to understand the nature and object of the inspection conducted by the Insurance Inspector and the Insurance Inspector has not disclosed his identity and purpose of inspection and P.Rahul, without applying his mind, put his signature on the paper without verification as to its contents. One, Adilaxmamma – P.W.3 was by then maintaining the kitchen and the society surprised to receive orders vide No.52-21657-09, dated 6.1.2003.

15. In the evidence affidavit of P.W.1 it is stated that the 1st and 2nd respondents failed to appreciate the fact that the kitchen is in fact a residential hostel catering to the needs of less than 100 students and that one Smt. Adilakshmamma was maintaining the same and that there was considerable contribution of work by the students themselves, which enable them to reduce the cost of their boarding and lodging. The hostel kitchen *per se* is not a commercial establishment and its inclusion under the purview of Employees' State Insurance Act is illegal. Further, evidence of P.W.1 is that after the

long gap of more than 10 years, issuing of the notice dated 6.1.2003 and show cause notice dated 13.2.2004 stating that the alleged kitchen is coverable under ESI Act and the demand for payment of a sum of Rs.25,562/- is illegal and contrary to the known provisions of law. But, during the cross-examination, P.W.1 admitted that at the time of inspection Rahul – P.W.2 was the correspondent of the college and Shafi Ahmed was the Principal of the college at the time of inspection of the insurance inspector. Therefore, the admission of P.W.1 goes to suggest that P.Rahul – P.W.2 and Shafi Ahmed – Principal were signed on Exs.B1 and B2 and wherein employees employed are mentioned as 10. Since they are not disputing their signatures, in the absence of any convincing evidence, it goes to show that they have understand the details mentioned in Exs.B1 and B2 and signed on it knowing fully well that R.W.1 is the Inspector who inspected the college on 22.11.2002.

16. During cross-examination, P.W.1 admitted that Ex.A2 was signed by their Correspondent P.Rahul who is examined as P.W.2. Ex.A2 is with regard to implementation of ESI Act applicable to Santhi Nikethan Education Society. In the said Ex.B2 which was admittedly signed by P.W.2 it was mentioned that there were more than 200 students previously, which has come down to 100 students later, because the previous correspondent has established his own college about half a kilometer away from the college. Even then the college strength was 200 and more, the kitchen staff never exceeded

eight members. One Adilaxmamma – P.W.3 has been maintaining the kitchen.

17. P.W.2 clearly stated in Ex.A2 that on the date of inspection R.W.1 informed him that on the instructions of the District Collector, he wanted to collect the names of the persons found to be working in the premises of the college and had the Inspecting Officer disclosed the identity and the purpose of inspection, he would have furnished all correct particulars. Without verifying the list and in good faith, he has appended his signature as desired by the Inspecting Officer. It is claimed that the Inspector noted the names of workers working in the hostel as furnished by P.W.2 and stated in Ex.A2. He also admit that he has forgotten about the reference cited and could not submit his explanation to the notice issued. Under Ex.A3 they have issued notice calculating the contribution from November, 2002 and made a claim of contribution payable as Rs.25,562/- taking the average wages per month at Rs.3,575/- for the ten employees for 11 months and with interest at 6.5%.

18. Similarly, P.W.2 also admits that he is the Correspondent of the institution from October, 2002. In the cross-examination, he stated that at the time of inspection he informed to the Inspector that there are only three workers working in the kitchen. In Ex.B1 there is specific mention that 10 workers were working in the kitchen. The evidence of P.W.3 is that she is maintaining the hostel with 3 to 5 workers, whose services are more than sufficient to cook and serve the

students. Even the strength is 200, she used to maintain the kitchen with 3 to 5 workers. Besides that, she used to get 1 or 2 workers from the neighboring villages and get the hostel work done by them on daily wages. So, P.W.3 indirectly admits that there are 3 to 5 workers regularly work and besides that 1 or 2 workers she used to engage on daily wages to maintain the kitchen. Therefore, it is clearly justifies the inspection report under Ex.B4 and visit note under Ex.B3 that 10 workers – 4 males and 6 females were working at the time of visit of R.W.1. Even according to the evidence of P.W.3 there may be 4 to 7 workers but not 10 workers as mentioned in Ex.B3.

19. The contention of the appellant is that the descriptive particulars of workers is not mentioned in Ex.B4 – Inspection report and Ex.B1. For that, there is the evidence that R.W.1 admits that he prepared Ex.B1 containing the ownership details of the applicant – society. After completion of inspection, he submitted a preliminary report under Ex.B4, besides preparing Ex.B3 – visit note.

20. R.W.2, who is the present Manager in-charge of Kurnool branch, has no personal knowledge of the facts. According to the evidence of R.W.1 supported by Exs.B1 and B2 established that the kitchen of hostel of the applicant society was employed with four male and six females, in total 10 persons. From the evidence of R.W.1 and Ex.B2, no names and addresses of 10 employees were found recorded in the hostel kitchen. The respondent's contention is that Ex.B2 is signed by the Correspondent P.Rahul and the Principal

B.Shafi Ahmed. A perusal of the oral evidence of P.W.2 shows that he affixed the signature on Ex.B2, but he denies the contents of Ex.B2. P.W.2 also stated that they have not produced the wage registrar and muster rolls of the workers. According to R.W.1, no register is produced before him. It is the evidence of R.W.1 that he noticed the presence of ten employees in the kitchen.

21. In the case of ***Regional Director, E.S.I. Corporation Vs. Karnataka Ash Best Ash Cement and another*** (1999(3) LLJ 235) it was held that a list of employees prepared by the ESI Inspector in the course of his visit to an establishment, in order to find out whether the provisions of the E.S.I. Act are attracted to it, must contain the name, father's name, place from which the employee hails, the designation, the length of service and the signature or thumb impression of the employee, as the case may be, if at that time other persons other than the employees are present, the names and addresses of at least two of them with their signatures and also the signature of the Proprietor or Manager or the person of the establishment should be obtained at the end of the list and a copy of which be furnished to the establishment. It was further held that E.S.I. Inspector in the course of his visit shall record the names of the employee' father's name, place from which the employee hails, the designation, the length of service and the signature or thumb impression of employee, as the case may be, to be taken.

22. But, in the case on hand, admittedly no such descriptive particulars are recorded by R.W.1 in Ex.B2 as well as other documents like Ex.B1, B3 and B4. It is obligatory and mandatory on the part of R.W.1 to record the name, father's name, place from which the employee hails, the length of service and signature or thumb impression of employees as the case may be and also to record other persons other than the employees who are present, the names and addresses of at least two of them with their signatures and also the signature of the Proprietor or Manager or the person of the establishment should be obtained at the end of the list and a copy of which be furnished to the establishment. The Inspector also did not obtain the signature or thumb impression of the employees on the inspection report or visit note. I find that the ratio laid down in the above case is directly applicable to the facts of the instant case.

23. Admittedly, the institution started in the year 1991. R.W.1 visited the society for the first time on 22.11.2002. Earlier, there was no such inspection. Therefore, the relevant time is 22.11.2002 when the R.W.1 – Inspector visited the society. As per Ex.A3 claim of contribution is made on 13.2.2004. For the notice issued there is no reply or objection from the society. In such circumstances, the Commissioner is perfectly legal in finding that applicant failed to mention the provisions which prescribe limitation to determine the limitation.

24. In the facts and circumstances discussed above, I am of the considered view that the ESI Court having considered both oral and documentary evidence on record, marshalling the facts, came to the conclusion that the respondent-corporation failed to establish through oral or documentary evidence that in applicant hostel's kitchen 10 persons are employed and the claim is within time and that the demand of contribution of Rs.25,562/- under Ex.A3 dated 30.02.2004 is illegal and not valid. The impugned order is legal, valid and do not suffer from any legal infirmities warranting interference.

25. In the result, the Civil Miscellaneous Appeal is dismissed, while confirming the order dated 11.10.2006 in Original Application No.1 of 2004 on the file of the Principal Senior Civil Judge, Kurnool. No order as to costs.

26. In the facts and circumstances, this order does not preclude ESI Corporation to determine the contributions by following the fresh inspection and investigation.

27. Consequently, miscellaneous petitions pending, if any, shall stand closed.

N.BALAYOGI, J

12.04.2018

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