HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

CMA No. 553 of 2006

JUDGMENT :

This is an appeal filed against the order dated 02.03.2005 in ESI.OP.No.82 of 2001 passed by the Senior Civil Judge, Cuddapah.

The brief facts of the case are that the petitioner filed ESI.OP.No.82 of 2001 under Section 75 of the employees State Insurance Act, 1949 against the respondents. The main contention of the petitioner is that the Pulverizing Mill was closed from 10.12.1992 till date. It is also his contention that when the Mill was closed and rendered de-functional, the doors of the Mill were shut and no staff were appointed and no salary was disbursed, therefore, the question of deduction of ESI contribution from the wages of the labourers does not arise and this aspect was repeatedly brought to the notice of the respondents and it was also represented to the respondents that no payment of contribution by the petitioner was warranted.

Respondents filed its counter stating that no matter which is in dispute between a principal employer and the Corporation in respect of any contribution or any other dues shall be raised by the principal employer in the ESI Court, unless he has deposited with the Court 50% of the amount due from him as claimed by the Corporation and the petitioner without depositing 50% of the amount, approached the Court with unclean hands and therefore, the petitioner is not entitled to the equitable relief. It is further alleged that the petitioner is amenable to the coverage under Section 1(3) and 2(12) of the Employees State Insurance Act (for short 'the ESI Act") as per the contents of the inspection report dated 02.12.1997. It is also the contention of the respondent that again Insurance Inspector visited the factory on 26.01.2001 and found that the factory is running under the name and style of "Krishnappa Minerals" which was earlier called as "Krishnappa Asbestors and Barytes Limited" and hence, the factory attracts the provisions of Section 2(12) of ESI Act.

On behalf of the petitioners, PWs.1 to 4 were examined and Exs.A1 to Exs.A.7 were marked. On behalf of the respondents, one witness RW.1 was examined and Exs.B.1 to B.8 were marked. After considering the documentary and oral evidence, the lower Court dismissed the petition holding that the petitioner failed to satisfy the Court that the petitioners' Pulverizing Mill is not running in that disputed period. It is this order that is now impugned in the appeal.

I have heard Smt. V.Uma Devi, learned counsel for the appellant and Sri V.Ch.Naidu, learned counsel for the respondents.

There is not much dispute about the facts in this case. The only issue that was seriously argued by both the learned counsel is on the fact whether the factory of the appellant was in operation or not.

It is the contention of the learned counsel for the appellant that the factory in question was shutdown and that the same was not in operation at all. Hence, they need not pay any contribution.

Learned counsel for the respondents on the contrary pointed out that there is no positive evidence filed by the appellant to show that the factory was shutdown. It is his contention that the appellant on whom the burden lies did not discharge the burden proving that the factory was actually shutdown. He points out that as per the documents filed, particularly, Exs.B.1, B.4 and B.5, it is clear that the factory was in operation. He also points out that the oral evidence is also not clear in this case.

After hearing both the counsel and perusing the record, the following is evident. Ex.B.1 is a document, which is a notice issued to the appellant-company by the ESI authorities. It refers to an inspection conducted on 21.12.1997 by the local office of ESI Corporation. The Inspecting Officer has obtained the signatures and thumb impressions of 26 employees, who were working on the date of his visit. Out of this, 12 are female and 14 are male workers. Their signature and thumb impressions were collected and annexed to this document. This document was forwarded to the Regional Director for necessary action.

Ex.B4 is another report prepared by the local office of the respondent and forwarded to the Director of ESI Corporation. This document reveals that the Officer concerned visited the factory on 20.01.2001 and found that the factory was working with power. Eight (8) employees were found at the time of the inspection. He found that the workers were manufacturing baraytes powder by crushing lumps with the aid of the power. This Officer also states that he visited the Office of the Inspector of factories and ascertained that the name of the factory has been changed to 'Krishnappa Minerals" from "Krishnappa Asbestors and Barytes Limited".

Ex.B.5 is another document, which is a letter dated 16.07.2001 addressed by the Local Office, Cuddapah to the Regional Director, E.S.I Corporation. This refers to the visits of the Manager on 23.06.2001, 27.06.2001 and 11.07.2001. The Officer states that he visited the factory after giving due intimation to the Director of the company. Although he found that the factory was not actually working, the Officer noticed that raw materials and finished goods were lying in the factory.

Therefore, the learned counsel submits that an analysis of these three documents would show that from 1997 to 2001, the factory was functioning and it was not shutdown, as alleged.

Coming to the oral evidence, the learned counsel pointed out that PW.1, who is the Director of the appellant company clearly admitted that he has not filed any documentary evidence to show that the unit was shutdown between January, 1997 to February, 2000. The witness also admitted that if the electricity consumption charges bills for the period January, 1997 to February, 2000 were filed, the fact whether the unit was actually working or not would come to light.

In addition, the learned counsel also pointed out the evidence of PW.4, who is a Chartered Accountant, who was examined to prove the fact that the factory is not working. This witness admits that after 1991-92, no Income Tax returns were filed by the petitioner. In his chief-examination, he however states as follows:

"I am told that the firm of the petitioner-company is not functioning." In his cross-examination, he also admits that the Chartered Accountant cannot force the appellant-company to file their Income Tax returns. Therefore, as per the learned counsel for the respondent, it is clear that the evidence of this witness is not very helpful to prove that the factory was shutdown and he has no personal knowledge about the functioning of the factory.

Learned counsel for the appellant argued that they have filed documents like Ex.A7, which shows that power was disconnected from 29.03.1996 and Ex.A.4, which shows that on 31.01.1993, the Mandal Executive Magistrate issued proceedings under Section 145 Cr.P.C that there is a threat of peace and tranquility and therefore, an order was passed under Section 145 Cr.P.C restraining the disputing parties from entering the premises of the appellant factory.

The analysis of this document as per the learned counsel shows that the Mandal Revenue Officer issued proceedings in 1993 pertaining to a dispute between the employees and the Director of the appellant-company. No proof was filed to show that the situation continued even in the period the impugned demand is made by the respondents/ESI Corporation. The fact that power is cut on March 1996 also does not lead to a conclusion that the factory is shutdown, more so, in the period in which the demand is made as per the learned counsel.

This Court finds considerable force in the submission made and agrees that the burden is squarely upon the appellant to prove that the factory was shutdown. The appellants could have introduced positive evidence to show that they have laid off all the workers and that they have followed the procedure prescribed under law and notified the statutory authorities that the factory is shutdown. In the absence of any such evidence, this Court cannot come to a conclusion that the factory was in fact shutdown in the period in which demand is made. This Court agrees with the findings of the lower Court and holds that the appellant has failed to prove that the factory was shutdown in the period in which the demand is made.

The mandatory deposit of 50% of the amount due as per Section 75 (2b) of the Employees' State Insurance Act, 1948 is also not made. The ESI Court was therefore right in holding that the petition is not maintainable.

The order of the lower court is a reasoned order. This Court does not find any merits in the appeal and accordingly the same is dismissed. No order as to costs.

Consequently, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 24.01.2018
KLP