IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.04.2019

C O R A M

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

CMA. No.1428 of 2011

The Regional Director,
Employees' State Insurance Corporation,
143, Sterling Road, Nungambakkam,
Chennai - 600 034. ... Appellant/Respondent

Vs.

M/s.Ashanivas Social Welfare Centre,
Rep.by its President and Director,
Rev.Dr.Kurian Thomas,
No.9, Rutland Gate, 5th Street,
Chennai - 6. ... Respondent/Petitioner

PRAYER: Civil Miscellaneous Appeal filed under Section 82 of the Employees Insurance Act, 1948, against the order of the Presiding Officer, Principal Labour Court, Chennai (Employees State Insurance Court constituted under ESI Act) dated 28.08.2009 and made in EIOP.No.66 of 2002 and to set aside the same.

For Appellant : Mr.G.Bharadwaj

For Respondent : Mr.Anand Gopalan for
Mr.T.S.Gopalan & Co.



J U D G M E N T

This Civil Miscellaneous Appeal has been filed against the order of the Presiding Officer, Principal Labour Court, Chennai (Employees State Insurance Court constituted under ESI Act) dated 28.08.2009 made in EIOP.No.66 of 2002.

2. The Employees' State Insurance Corporation is the appellant before this Court. The appellant/Insurance Corporation inspected the respondent premises on 25.01.1985 and found that more than 20 persons were working on the Sewing machines run by pedal, to stitch leather goods. It was stated that leather was cut to glove size on job order taken from various parties, stitched into gloves and returned to them and charges were collected. Therefore, they came to the conclusion that the respondents were collecting charges for the particular work engaging 20 workers and hence confirmed that the respondent falls within the purview of the ESI Act and submitted a report. The respondent on notice filed a reply to the inspection report. Subsequent to that appellant/Corporation did not take any action on the issue. On 10.07.1987 the appellant/Corporation issued a Form C-11 notice allotting Code No.36665-23 attaching the respondent establishment to its Mount Road Office. Even then, the respondent did not file any returns nor remitted any contribution. Once again an inspection was conducted on 28.03.2000. Again the respondent submitted a letter on 28.03.2000 stating that the Deputy Director of appellant/Corporation one Mr.I.Josegtat cleared the matter and after a gap of 15 years, fresh inspection was conducted. After receipt of the reply from the respondent a show cause notice in Form C-18 was issued on 01.08.2001 demanding a contribution of Rs.4,07,742.50/- for the period between 1987-88 to 2000-2001. The respondent submitted its reply on 20.08.2001 claiming that they are doing Social Work giving training to some poor girls in the slums and it is a charitable and non-profit organization and does not come under the purview of the ESI Act. Another show cause notice in Form C-18 was issued for the period between 1985-87 for a sum of Rs.30,888/- payable by the respondent. Again the same reply was issued by the respondent and the respondent has not appeared before the appellant/Corporation with records. Therefore, based on the inspection report dated 28.01.1985 and inspection conducted on 28.03.2000, appellant passed an order under Section 45-A of the Employee Insurance Act demanding a sum of Rs.4,07,742.50/- as contribution for period between 1987-88 and 2000-2001.

3. The respondent/employer challenged the demand made under Section 45-A of the Act before the ESI Court on the ground that it is time barred and that they would not come under the purview of the ESI Act.

4. Before the Employee Insurance Court, the respondent examined one witness (PW.1) and marked Exs.P.1 to P.17. On the side of the appellant, Insurance Inspector was examined as RW.1 and Exs.R1 to R13 were marked. The Employees Insurance Court found that the products manufactured by the respondent institution was not for sale and sent as gift to Switzerland,

France, Belgium and Germany and in return organization gets donation to run social welfare schemes and that the show cause notice was issued after a period of 15 years is barred by limitation. The Court further relied on judgment of High Court of Bombay in a case reported in 2008 LLR 362 (Regional Director, E.S.I. Corporation Vs. Tulsiani Chambers Premises Co-operative Society) which held that the co-operative society rendering services to the members such as operating lifts, water supply, electricity, cleaning, sweeping and security being essential services is not covered under ESI Act. Further, in terms of Section 87 of the ESI Act, the State Government has power to exempt any factory or establishment from the area of operation of this Act and till that the petitioner organization with regard to the objects and activities could not be considered as a shop or covered establishment. Therefore, Employees Insurance Court held that the delay of 14 years in issuing Form C-18 is inordinate and unexplained. Following the judgment of the Hon'ble Supreme Court reported in 2007 II L.L.J 3 SC (Spic Pharmaceuticals Division and Authority under Section 48 (1) of A.P.Shops and Establishments Act, 1988 and another) held that the demand made by the appellant/Corporation and determination of contribution under Section 45-A of the Act are wholly untenable and allowed the petition filed by the respondent.

5. Aggrieved over the same, the ESI Corporation is before this Court, on the following question of law:-

(i) Whether the impugned order of the ESI Court is sustainable in law in the absence of any evidence apart from the averments made by the respondent?

(ii) When the decision of the Supreme Court reported in 2007 II LLJ Page 3 has any relevance to the facts of the case in question?

(iii) Whether the decision of the ESI Court not liable to be set aside on the sole ground that the same is not based upon any evidence, legal or tangible?

6. I heard the rival submissions.

7. It is an admitted fact that the respondent institution is running tailoring and embroidery sections employing men and women. To substantiate the same, the appellant/Corporation, marked Ex.R11 which is a brochure issued by the petitioner. The brochure discloses that the respondent institution is conducting vocational training courses; that they have separate tailoring and embroidery units; that they possess 25 tailoring machine and that they involve themselves in manufacturing activities. The relevant portion of the pamphlets are extracted as under:-

> " We have 25 tailoring machines where nearly 25 girls are being trained in cutting, tailoring and needle work. It is a nine months course. We do send the

trainees for Government Technical examination. Once they are trained, we absorb them into our production wing attached to the tailoring unit. We do undertake work for our beneficiaries from different factories and institutions. We do manufacture industrial aprons, anode bags, filter cloths, curtains, gloves, uniforms. This brings regular income for our beneficiaries in the centre.

We have 50 girls working in this Embroidery unit where we manufacture exquisite wall hangings in the form of applique work. The products of this unit is distributed among our benefactors in Switzerland and France. We have also a training wing attached to our embroidery unit, where 25 girls are undergoing training in Needdlework and applique work. Once they are trained we absorb them to our production wing of the embroidery section."

8. From a reading of the above paragraph, it is clear that different factories and institution provides work to the respondent institution and that they manufacture industrial aprons, anode bags, filter cloths, curtains, gloves, uniforms, which brings regular income to the beneficiaries in the centre. When such publication is made by the respondent institution, it is incumbent on them to produce the records and account books, to show that whether they have employed men and women for manufacturing activities or not and also as to whether they employed for training the downtrodden and helpless people. Without producing any records, the respondent has submitted the replies stating that they are running a charitable and non-profit organization and will not fall under the purview of ESI Act. It is pertinent to note that the appellant/Corporation has categorically held that more than 20 people were working on tailoring machine with peddle and hence, the respondent falls within the definition of factory as per Employees Insurance Act, 1948. Even though, inspection was conducted on 1985, the appellant/Corporation did not act on that within a reasonable time. The Form C-18 notice calling for explanation was issued only as per inspection conducted on 20.03.2000 which culminated in the order determining the contribution under Section 45-A of the Act.



9. Before the Employee Insurance Court, respondent relied only on the correspondences, Section 45-A of the order issued to them and Exs.P.12 and P.17 attendance register and salary register for the period between 1998 and 2002. Other than that the respondent has not produced any material document to show that they have not employed more than 20 people in their institution from 1985 till the date of filing the petition nor it is disputed that such people were not engaged for wages. The

Employee Insurance Court without discussing any of the document marked before it and without determining the issue of coverage as per the provision of the Act went on to rely on the judgment of High Court of Bombay in a case reported in 2008 LLR 362 (Regional Director, E.S.I. Corporation Vs. Tulsiani Chambers Premises Co-operative Society) and held that the respondent institution is not to be considered as a shop or covered establishment. In our considered opinion, the finding of the Employee Insurance Court is factually incorrect. Till date it is not in dispute that the respondent institution has engaged more than 20 persons for carrying out the work. As an institution, it is also not the case of the respondent that only volunteers were engaged in training slum people in vocational courses.

10. On the other hand, Ex.R.11 makes it clear that they were involved in manufacturing activities and that they get regular income to help the beneficiaries. In that event, the finding of the Employees Insurance Court is contrary to the evidence available before it.

11. Insofar as the period of limitation is concerned, before amendment of the Act in the year 2000 there was no limitation. It is well settled that under Section 45-A of the Employee State Insurance Act, the appellant/Corporation is entitled to collect the contribution after the determination at any point of time and there is no limitation for that. Likewise for collecting the interest as well as the penalty also there was no time limit. But after conducting the inspection in the year 1985, whether the silence maintained by appellant/Corporation for a period of 15 years is reasonable or not? and whether the delay in making the demand after a gap of 15 years is barred by limitation or not are to be tested. The Employees Insurance Court, relying on the judgment of the Hon'ble Supreme Court reported in 2007 II L.L.J 3 SC [Spic Pharmaceuticals Division and Authority under Section 48 (1) of A.P.Shops and Establishments Act, 1988 and Another], held that the authorities under the Employee State Insurance Act should be that of watch dog and not of a blood hound and held that it is time barred. However, the surrounding circumstances has to be looked into. No doubt that an inspection was conducted on 25.01.1985, thereafter, on 10.07.1987 Form C-11 was issued to the respondent professionally bringing them under the coverage of Employee State Insurance Act. Further the appellant/Corporation has also alloted a Code No.36665-23 calling upon them to make contribution to the employees, employed by them. Inspite of the fact that the respondent was very much aware of the notice received, claimed themselves as charitable and non-profit organization and failed to maintain

the records. Even though there is a delay in issuing a show cause notice under Form C-18, it will not take away the power of appellant/Corporation from demanding the contribution. Even though two show cause notices dated 01.08.2001 and 15.05.2002 were issued by the appellant/Corporation they have chosen to pass an order only with regard to show cause notice dated 01.08.2001. Relying on the enquiry report dated 28.01.1985 and not on the inspection conducted on 28.03.2000. It is incumbent on the appellant/Corporation to give a definite figure as to the number of workmen and wages. Without ascertaining the factual details based on the inspection conducted on 1985, the order came to be passed. Even though there is no limitation prescribed in the Act, in similar circumstances, Hon'ble Supreme Court restricted the claim for a reasonable period.

12. The Hon'ble Supreme Court reported in [2007 (1) SCC 584] Employee State Insurance Corporation Vs. C.C.Santhakumar, has categorically held that:-

> "35. "5. A 'reasonable period' would depend upon the factual circumstances of the case concerned. There cannot be any empirical formula to determine that question. The court/authority considering the question whether the period is reasonable or not has to take into account the surrounding circumstances and relevant factors to decide that question.
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> 6. In State of Gujarat v.Patil Raghav Natha 4 (1969) 2 SCC 187 it was observed that when even no period of limitation was prescribed, the power is to be exercised within a reasonable time and the limit of the reasonable time must be determined by the facts of the case and the nature of the order must be determined by the facts of the case and the nature of the order which was sought to be varied. This aspect does not appear to have been specifically kept in view by the Division Bench. Additionally, the points relating to applicability of the [Andhra Pradesh Assigned Lands (Prohibition of Transfers) Act, 1977], and even if it is held that the Act was applicable, the reasonableness of the time during which action should have been initiated was also not considered. It would be hard to give an exact definition of the word 'reasonable'. Reason varies in its conclusions according to the idiosyncrasy of the individual and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic stands now like the jingling of a child's toy. But mankind must be satisfied with the reasonableness within reach; and in cases not covered by authority, the authority, the

decision of the Judge usually determines what is 'reasonable' in each particular case; but frequently reasonableness 'belongs to the knowledge of the law, and therefore to be decided by the courts'. It was illuminatingly stated by a learned author that an attempt to give a specific meaning to the word 'reasonable' is trying to count what is not a number and measure what is not space. It means prima facie in law reasonable in regard to those circumstances of which the actor, called upon to act reasonably, knows or ought to know. [See Municipal Corpn. of Delhi V. Jagan Nath Ashok Kumar (1987) 4 SCC 497] and Gujarat Water Supply & Sewerage Board V. Unique Erectors (Gujarat)(P)Ltd (1989) 1 SCC 532. As observed by Lord Romilly, M.R. In Labouchere V. Dawson it is impossible a priori to state what is reasonable as such in all cases. You must have the particular facts of each case established under the circumstances. Reasonable, being a relative term is essentially what is rational according to the dictates of reason and not excessive or immoderate on the facts and circumstances of the particular case. ”

36. According to Advanced Law Lexicon by P.Ramanatha Aiyar, 3rd Edn., 2005 reasonable time means as follows:

“ 'That is a reasonable time that preserves to each party the rights and advantages he possesses and protects each party from losses that he ought not to suffer.'

'Reasonable time' is defined to be so much time a sis necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case.

If it is proper to attempt any definition of the words 'reasonable time', as applied to completion of a contract, the distinction given by Chief Baron Pollock may be suggested, namely, that a 'reasonable time' means as soon as circumstances will permit.

In determining what is a reasonable time or an unreasonable time, regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the fact of the particular case.

The reasonable time which a passenger is entitled to alighting from a train is such time as is usually required by passengers in getting off and on the train in safety at the particular station in question.

A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than 'directly'; such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea.

Reasonable time always depends on the circumstances of the case. (Kinney)

It is unreasonable for a person who has borrowed ornaments for use in a ceremony to detain them after the ceremony has been completed and the owner has demanded their return.

The expression 'reasonable time' means so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case."

13. The 'Reasonable time' is defined to be so much time as is necessary under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In the instant case, the appellant/Corporation performed duty within the reasonable time which is expected to be done. The appellant/Corporation after conducting inspection in the year 1985 had conducted the next inspection in the year 2000 and issued show cause notice in the year 2000 and there is no explanation for the delay. Even though there is no limitation, as per the judgment of the Hon'ble Supreme Court in [2007 (1) SCC 584] Employee State Insurance Corporation Vs. C.C.Santhakumar, the claim should have been within a reasonable period. Therefore, following judgment of the Hon'ble Supreme Court, this Court considers it appropriate to restrict the claim for 5 years prior to date of inspection and accordingly, the demand can be made only from the year 1995.

14. Since we have already found that the respondent institution employing more than 20 people for the manufacturing activities conducted by them and the finding of the Employee Insurance Court that the respondent institution does not come under the coverage of ESI Act is set aside.

15. In view of the above finding, the Civil Miscellaneous Appeal is allowed and the order of EIOP.No.66 of 2002 dated 28.08.2009 is set aside. The matter is remitted to the appellant/Corporation, for fresh consideration and the respondent is directed to produce relevant accounts and

documents from the year 1995 before the authority within a period of one month from the date of receipt of a copy of this order. On such production, the appellant/Corporation is entitled to take all further actions in accordance with law. No costs.

Sd/-
Assistant Registrar(CS-VI)

//True copy//

Sub Assistant Registrar

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To
The Presiding Officer,
Principal Labour Court,
Chennai.

+1cc to M/s.T.S.Gopalan & Co, Advocate SR.No.33190

+1cc to Mr.G.Bharadwaj, Advocate SR.No.33546

CMA. No.1428 of 2011

NMI(CO)
GMY(28/06/2019)