

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

FIRST APPEAL NO.83/2020

The Assistant Director, Employees State Insurance Corporation Sub Regional Office,
Nagpur and another

Vs.

M/s Extensio Software (I) Private Limited (formerly known as MYHTTP Web-
Technology (I) Private Limited, Nagpur.

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Mrs B.P. Maldhure, Advocate for appellants
Shri P.D. Meghe, Advocate with Ms Aarti Singh, Advocate for
respondent.

CORAM : M.S. KARNIK, J.

DATED : 19/04/2022

The appellant is Assistant Director, Employees State Insurance Corporation, ('ESIC' for short). The challenge in this appeal by the ESIC is to a judgment and order dated 25/04/2019 passed by the Industrial Court No.1, Nagpur ('ESIC Court' for short). Shorn of unnecessary details, suffice it to observe that there was a dispute regarding determination of employees contribution for the period from 01/08/2000 to 30/09/2007, the claim from the employer amounting to Rs.2,70,699/-. A show cause notice in Form C-18 came to be issued by the ESIC to the respondent M/s Extensio Software (I) Private Limited (hereinafter

‘Company’ for short) for determination of the contribution for such period. The Company submitted its reply on 08/04/2008 at Exhibit 5/H and requested for time to produce the records. It appears that no such records were produced by the Company. Thereafter, the ESIC assessed the contribution of Employees State Insurance for the period from June 2005 to September 2007 amounting to Rs.1,02,960/- and in absence of reply from the Company, the authority determined the contribution finally amounting to Rs.1,02,960/-. This determination was challenged by the Company by filing an application before the ESI Court under Section 45 of the Employees State Insurance Act, 1948 (hereinafter referred to as ‘ESI Act’).

2. After hearing the parties, the ESI Court remanded the matter to the authority for fresh decision. The ESI Court found that pursuant to the show cause notice dated 24/03/2008, another show cause notice was issued in Form C-18 on 24/07/2008 for the period from August 2000 to September, 2007. The ESI Court proceeded on footing that as a result of such show cause notice dated 24/07/2008, the earlier show cause notice dated 24/03/2008 stands cancelled. It observed that the copy of the subsequent show cause notice dated 24/07/2008 has not been placed on record by the ESIC nor there is an explanation put forth by them about the necessity of issuance of another

show cause notice. The ESI Court inferred that the show cause notice dated 24/07/2008 was never received by the Company and hence proper opportunity of hearing was not given to the Company before passing the Order under Section 45-A of the ESI Act. The ESI Court therefore set aside the impugned orders and remanded the matter back to the authority for fresh decision on the basis of show cause notice dated 24/07/2008 after giving opportunity to the parties as per the principles of natural justice.

3. Pursuant to the order passed by the ESI Court, an application was filed by the ESIC before such Court being Misc. Civil Application No.02/2019 for carrying out correction of the dates. In such application it is stated that the date of the show cause notice is wrongly mentioned as 24/07/2008 which in fact should have been 24/03/2008. In such application, it is further stated that the date 24/07/2008 finds a mention in paragraph Nos.12, 13, 14 and 16 and in the operative part of the order which needs to be corrected as 24/03/2008. The Company did not oppose the application. By an order dated 08/08/2019, the ESI Court allowed the application and effected necessary corrections in the judgment and order which is now impugned in this appeal.

4. The learned Counsel for the appellant was at pains to point out that the ESI Court proceeded on a

factually wrong premise that the copy of show cause notice dated 24/07/2008 was never served on the Company and hence committed an error in remitting the matter to the authority for a fresh consideration. The learned Counsel submits that once the necessary corrections came to be effected and the ESI Court having realized that there was no such show cause notice dated 24/07/2008, the entire order becomes vulnerable as the premise on which the matter is remanded no longer exists. In her submission, the only reason for the remand by ESI Court is non receipt of the show cause notice dated 24/07/2008 by the Company for which the ESI Court granted an opportunity to the employer to meet the show cause notice. She reiterated that once the necessary corrections are made and reference to the show cause notice dated 24/07/2008 is taken to mean as show cause notice dated 24/03/2008, then in that case, as the show cause notice dated 24/03/2008 was duly served on the Company, pursuant to which the Company did not respond despite adequate opportunity, then there is no question of contravention of principles of natural justice or breach thereof. In such view of the matter, in her submission, this is a fit case which calls for interference. Therefore, in her submission, the question of remitting the matter to the authority does not then arise.

5. Learned Counsel for the Company argued in support of the impugned order.

6. Heard. Perused the pleadings and the impugned order. Before advertng to the contentions raised, it would be material to refer to Sub Section (2) of Section 82 of the ESI Act, which reads thus:

“Section 82 (2)- *An appeal shall lie to the High Court from an order of an Employees' Insurance Court if it involves a substantial question of law”*

7. Let me examine if the present Appeal involves a substantial question of law. A reading of the impugned order passed by the ESI Court would reveal that much emphasis has been placed on the show cause notice dated 24/07/2008 for arriving at a finding that since such notice was never served on the Company, it resulted in breach of principles of natural justice necessitating a remand to the competent authority. Viewed from this angle, there definitely is some substance in the contention raised by the learned Counsel for the appellant. The question is whether in the facts of the present case and having regard to the nature of the order passed, the error that is pointed out by the learned Counsel would be such to constitute a substantial question of law.

8. The record indicates that the show cause notice dated 24/03/2008 for determination of contribution was duly served on the Company and even the reply was submitted by the Company on 08/04/2008 with a request for time to present the records before the authority. The ESI Court then records that another show cause notice dated 24/07/2008 was issued without disclosing any reason as to why the earlier show cause notice dated 24/03/2008 had to be cancelled. It is here that the ESI Court proceeded on a factual incorrect premise. The said error has subsequently been set right in Misc. Civil Application No.02/2019 moved by the ESI Corporation when it was pointed out that there was a mistake in the date of the show cause notice which was wrongly stated to be 24/07/2008 instead of 24/03/2008. By such Misc. application, the ESI Corporation only requested for the change in the date. At that point of time it was not the submission of the ESI Corporation that the consequence of correcting the error would be such that it would render the order passed by the ESI Court bad in law. The said application for correcting the error was moved on 11/07/2019. The present appeal came to be filed thereafter on 9/10/2019.

9. Be that as it may, it is the contention of the learned Counsel for the Company that even the entire contribution as per the show cause notice has since

been recovered by the ESI Corporation pursuant to the recovery proceeding initiated. The order passed by the ESI Court records that pursuant to the service of the show cause notice dated 24/03/2008, the Company submitted its reply on 08/04/2008 with a request for time to file the relevant records before the authority. The Company failed to produce the records and consequently the orders came to be passed under Section 45-A of the ESI Act on 13/01/2011 which was the subject matter challenged before the ESI Court. Even if the contention of the appellant is accepted, still then the matter cannot be given a quietus in this appeal. The matter will have to be remanded to the ESI Court for giving an opportunity to the employer to make good his case on the breach of the principles of the natural justice while adjudicating the show cause notice dated 24/03/2008 and for a consequential finding by such Court on this issue. As the effect of the order passed by the ESI Court is ultimately to provide a proper opportunity to the Company to represent its case in response to the show cause notice dated 24/03/2008 as per the principles of natural justice; moreover, as the entire contribution has now been recovered from the Company, no prejudice would be caused to the appellant if the impugned order is sustained. Therefore, I am of the opinion that the order passed by the ESI Court does not call for interference. I do not find that the issue involved in such that it raises

a substantial question of law. Consequently, the appeal is dismissed with no order as to costs.

10. The authorized representative of the Company to remain present before the ESI Authority on 17/05/2022 at 11.am. This will be construed as a sufficient notice to the company/respondents and any further notice is dispensed with. After giving a reasonable opportunity to respond to the show cause notice dated 24/03/2008 and upon hearing the respondent No.1, the authority to decide the show cause notice expeditiously and in any event within the period of eight weeks from 17/05/2022. The respondent-Company to cooperate with the appellant No.1 and will not seek unnecessary adjournments.

All contentions are kept open.

[JUDGE]

R.S.Sahare