Andreza

IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL UNDER E.S.I. NO. 01 OF 2023
WITH
CIVIL APPLICATION NO. 65 OF 2023

Sandesh Enterprises Rep. By Proprietor Sandesh Gajanan Gaude ... Appellant

Versus

Employees State Insurance Corporation Thr. Regional Director ...Respondent

Ms. S. Bangera, Advocate *for the Applicant.*

Ms. A. A. Agni, Senior Advocate *with Mr. Junaid Shaikh, Advocate for the Respondent.*

CORAM: PRAKASH D. NAIK, J
DATED: 28th AUGUST 2023

ORDER

1. Heard learned Advocate Ms. Bangera for the Appellant and Ms. Agni, learned Senior Advocate for the Respondent.

2. This is an appeal under Section 82 of the Employees State Insurance Act, 1948, (herein referred to as '*ESI Act*'), challenging Order dated 28.03.2022 passed by the Employees State Insurance Court, Panaji, in Employees State Insurance Case No. 4 of 2019 and Order dated 21.02.2018 passed by Deputy Director ESI Corporation, Goa, under Section 45-A of the ESI Act, 1948.

3. The Appellant is the proprietor of M/s. Sandesh Enterprises carrying on business of supplying labour such as Packer, Housekeeping staff, etc. to the companies/establishment. The

Appellant had obtained license under Goa, Daman and Diu Shops and Establishment Act, 1973, for carrying its business from 21.04.2006, which licence was renewed till date.

4. The Respondent issued notice on 08.09.2017 for payment of contribution for the period of August 2012 to February 2013 and from April 2013 to March 2015. The Appellant sought time to produce records vide letter dated 28.09.2017.

5. The Deputy Director, ESI Corporation passed Order dated 21.02.2018 under Section 45-A of the ESI Act directing that the contribution amount of Rs.5,31,961/- for the period from 01/2013 to 2/2013 and 4/2013 to 9/2015 are finally determined and Appellant being one of the principal employer of the factory, is ordered to pay the said contribution within a period of sixty days.

6. The Appellant preferred appeal under Section 45-AA of the ESI Act on 23.08.2018 which was not decided.

7. The Appellant received letter dated 01.02.2019 from Respondent under Form C-19 to pay amount of Rs. 8,36,071/-.

8. The Appellant filed application under Section 75 read with Section 77 of ESI Act before ESI Court which was registered as ESI case no. 04/2019. The Appellant filed his affidavit in evidence and deposed before ESI Court. The ESI Court vide its Judgment dated 28.03.2022 distributed the application. Show cause notice was issued on 21.06.2022 for payment of the amount.

9. Case of Respondent is that the Appellant being the principal employer, failed to pay contributions as required for the period from 08/2012 to 02/2013 and 04/2013 to 09/2015. Show cause notice dated 08.09.2017 was issued to the establishment to show cause why contributions as proposed therein should not be determined and recovered for the period of default. In case of any objection to the proposed assessment, the employer was requested to explain the same and file a statement giving full particulars to the contributions actually due as per records. In case they desire to represent their case in person or through an authorised representative, an opportunity of personal hearing was afforded on 28.09.2017 to explain the case with necessary records. According to Respondent, the notices were delivered by postal authorities. However, the employer vide letter dated 28.09.2017, stated that he was out of station and requested to give him fifteen days time to produce the records. The office of Deputy Director vide letters dated 29.09.2017, 27.10.2017 and 14.11.2017, informed the employer to produce all the records regarding temporary closure of his unit before the Authorised Officer on 24.10.2017, 19.1.2017 and 21.11.2017 by informing that in case of failure, further action would be taken. The said notices have been delivered by the postal authorities as per the acknowledgment cards received by the said office. The employer did not reply to the said notices. The employer vide letter dated 21.11.2017, stated that he was covered under the ESIC in September 2010. At that time, he was supplying labour for the Prime Enterprises and his contribution was paid on their Code. He further stated that the Company was closed from June 2011. They terminated the contract. There was no work from the period June 2011 to February 2013 and April 2013 to September 2015. There were small jobs for the month of March 2013 so he prepared the challan and adjusted the same from advance payment. In October 2015, he got work order from Seaword Packaging Ltd and he prepared the challan regularly from October 2015 to March 2016 and adjusted the same from advance payment of Rs.31,000/-. He requested for some time to produce the records. The office of Deputy Director vide letter dated 05.12.2017 informed the employer that the letter of Prime Industries regarding the closing down of the firm was not sufficient to prove that he had made compliance in respect of all the employees who were engaged on lack of work orders for his unit and advised the employer to produce ledgers and profit and loss account, balance sheet for the year 2010-11 to 2015-16, bank statement and any other documents in support of their contention. The employer vide letter dated 15.12.2017, requested to give last chance. Vide letter dated 05.01.2018, the employer was requested to produce all the records and offer personal offering on 31.01.2018. The employer failed to produce the records and also failed to attend personal hearing. The said notice was received by the employer as per online tracking.

10. The Appellant has raised the following substantial questions of law :

> (a) Whether the order passed under Section 45-A of the Employees State Insurance Act, 1948 is in violation of principles of natural justice ?
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> (b) Whether an order under Section 45-A of the ESI Act could be passed on the basis of assumed wages in the circumstances where the ESI Authority have some material available before them?
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> (c) Whether the Appellant is liable to contribute in accordance with the provisions of the Employees State Insurance Act when there were no employees engaged and no work carried on by the Appellant for the period from January 2013 to February 2013 and April 2013 to September 2015?
>
> (d) Whether the ESI Court was justified in overlooking the evidence and documents submitted by the AW-1 in its order dated 28.03.2022?

11. Learned Advocate for the Appellant submitted that the impugned Orders are erroneous and required to be set aside. The

Appellant was carrying business of supplying of labour. The Appellant obtained licence under Goa, Daman and Diu Shops and Establishment Act, 1973, for carrying business from 21.04.2006. In 2010, the Appellant got contract of work with M/s. Prime Industries for supply of labour for the period September 2010 to June 2011. The terms of contract stipulates that the Appellant need to obtain registration under ESI Act. The Appellant enrolled with ESI and P. F. Department. The Appellant issued demand drafts of Rs.11,000/- dated 21.09.2010 and Rs.20,000/- dated 11.10.2010 in favour of Respondent towards advance payment of ESI contribution. ESI contribution for the period of September 2010 till June 2011 was remitted by the principal employer. Letter dated 26.07.2011 was issued by principal employer stating that they have paid contribution under their Code. The contract of labour supply was terminated from 30.06.2011. ESI allotted Code number to Appellant vide letter dated 11.10.2011. The principal employer closed down its factory from June 2011. The Appellant could not get any work contract for the supply of labour, as such, the establishment did not carry on any work for the period between July 2011 to February 2013 and April 2013 to September 2015. The ESI contribution for the period during the work engaged with the principal employer from September 2010 till June 2011, was remitted by the principal employer in its Code number. No contribution was remitted by the Appellant in its Code for the period of contribution from September, 2010 till June 2011. From July 2011 to February 2013 and April 2013 to September, 2015, no ESI contribution was remitted as the Appellant did not employ any employees during the said period. The Appellant received contract for supply of labour for loading and unloading on March 2013 for one month from M/s. Berger Paints. The Appellant has remitted ESI contributions from its employees for the period from March 2013. The Appellant did not receive any intimation from Respondent in appeal under Section 45-AA. He received letter dated 01.02.2019 from the Respondent under Form C-19 to pay the amount. The impugned Order is erroneous. The impugned Order was passed without affording fair opportunity to the Appellant. The Respondent had not issued any notice nor fixed any date of personal hearing and passed the Order under Section 45-A without giving opportunity to the Appellant to produce the documents. The Respondent has passed the Order on the assumed wages without considering that the principal employer used to remit their contributions. The principal employer had closed premises leaving the Appellant without documents. The impugned Orders are contrary to law and deserves to be set aside.

12. Learned Senior Advocate Ms. Agni appearing for the Respondent submitted that the appeal does not involve any substantial question of law. Sufficient opportunity was given to the employer to entertain an appeal under Section 82. The Court has to consider whether any substantial question of law is involved. The impugned Judgment passed by the Court is well reasoned and does not require interference. The Petitioner had not produced any document to show that the work was closed during the relevant period.

13. Ms. Agni, learned Senior Advocate has relied upon the following decisions :

> **(i) Employees State Insurance Corporation vs. M/s. Hotel Kalpaka**[1]
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> **(ii) Employees' State Insurance Corpn., vs. M/s. Harrison Malayalam Pvt. Ltd.**[2]
>
> **(iii) Employees' State Insurance Corporation vs. F. Fibre Bangalore (P) Ltd**[3]

14. The Order dated 21.02.2018 passed by Deputy Director under Section 45-A of the ESI Act refers to the fact that opportunities were given to the Petitioner to produce documents about his contention of closing down the work. The Deputy Director has referred to the number of opportunities provided to the Petitioner on various dates. The employer vide letter dated 21.11.2017 stated that he was covered

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1 AIR 1993 SC 1530

2 AIR 1993 SC 2655

3 (1997) 1 SCC 625

under ESI in September, 2010. At that time, he was supplying labour for M/s. Prime Industries and his contribution was paid on their Code. The said company was closed from June 2011 and they terminated the contract. There was no work from June 2011 to February 2013 and April 2013 to September 2015. Vide letter dated 05.12.2017, the employer was informed that letter of M/s. Prime Industries regarding the closing down of the firm was not sufficient to prove that he had made compliance in respect of all the employees who were engaged or lack of work orders for his unit and advised the employer to produce ledgers and profit and loss account, balance sheet for the year 2010-11 to 2015-16, bank statement and any other documents in support of their contention. The employer requested to give last chance vide letter dated 15.12.2017. On the basis of material on record, the Deputy Director came to the conclusion that the employer does not have any valid ground to oppose the proposed determination of contributions which was as much proposed on principles based on the material/available records of the office. The average wages that were payable to the employees is on an assumed wages of Rs.8250/- per month per employer. Hence, the Appellant was directed to contribute Rs.5,31,961/-.

15. The Appellant had stepped into the witness box by filing his affidavit in evidence. He produced certain documents. During the cross examination it was admitted that the registered address mentioned in the Petition is the same which was given to ESI Authorities. It was admitted that some correspondence addressed to him by ESI Authorities was received by him. Thus, the correspondence exchanged between the Respondent and the Appellant is addressed on registered address provided with ESI. In the cross examination, it was admitted that M/s. Prime Industries informed him vide letter dated 26.07.2011 that they paid contribution for the period from September 2010 to June 2011 in respect of employees supplied to them by the Appellant. He admitted that he was supposed to pay contribution to ESI Authorities of his employees from June, 2011. He admitted that vide letter dated 23.08.2018, he informed ESI Authorities regarding closure of his unit, however, he did not enclose any documents to show that his business was closed. He also admitted that he informed ESI Authorities about closure of his business from September 2010 vide letter dated 23.08.2018. He also admitted that vide letter dated 11.10.2011, ESI intimated him regarding allotment of separate Code to his unit. He paid Rs.31,000/- by Demand Draft to ESI towards contribution on 06.12.2012 in respect of separate Code number allotted to his unit in the year 2011, which is not cancelled till date. He paid contributions on the separate Code allotted to his unit in 2016. According to him, the work started and therefore he paid the contribution. He also admitted that as on date, his unit is working and he is paying contribution to ESI. He also admitted that his unit was never closed. On the basis of admissions given by the Appellant, the learned Principal District Judge came to the conclusion that the stand taken by the Appellant that he was unable to pay contribution from August 2012 to February 2013 and April 2013 to September 2015 due to closure of his unit, is false as he admitted on oath that his unit was never closed. The letter addressed to ESI Authorities in the year 2018 claiming that his unit was closed from September 2010 is also false document. No material was produced to show that he applied for cancellation of Code number when his unit was closed. It was also observed that once the unit or establishment is covered under the ESI Act and a Code number is allotted, the employer is duty bound to submit the returns and pay contributions regularly to the ESI Authorities till the procedure of decoding of unit is accepted. The unit of the Appellant was never closed. It was functioning during the period for which contribution was demanded and the Appellant failed to submit the report.

16. The learned Principal District Judge vide Judgment dated 28.03.2022 referred to evidence adduced by Appellant and cross-examination. The Court considered the admissions of Appellant in the cross-examination. It was observed that the entire stand taken by Appellant that he was unable to pay contribution from August 2012 to February 2013 and April 2013 to September 2015 due to closure of his unit is entirely false as he specifically admitted on oath that his unit was never closed. The letter addressed by him in that regard is false. Once the unit or establishment is covered under the ESI Act and Code number is allotted, the employer is duty bound to submit the returns and pay contribution regularly. Appellant had intimated that if he is dissatisfied with the Order under Section 45-A of ESI Act, he has a remedy to prefer an appeal within sixty days of the Order after depositing 25% of the contribution so ordered. The Appellant claimed that he wrote a letter to the Regional Director dated 23.08.2018, preferring an appeal against the Order dated 21.02.2018. Perusal of the letter shows that the appeal was not filed within sixty days as provided under Section 45-AA of the ESI Act and the deposit of 25% of contribution was not made. Thus the Appellant failed to avail statutory remedy within period of limitation. Thus the contention of Appellant regarding non-entertaining the appeal under Section 45 AA has no substance. The material on record indicate that the unit of the Appellant never closed. The Appellant was supposed to submit the returns and pay the contribution. Appellant failed to pay the contribution. Show cause notice was issued to him. He was asked to produce documents. He failed to produce any material although he wrote letter dated 23.08.2018 about the closure of unit, documents to that effect were not enclosed. It was claimed that the unit was closed from September 2010. The letter was forwarded on 23.08.2018. Amount of Rs.31,000/- was paid on 06.12.2012 towards contribution and it is admitted that the unit was never closed.

17. In the case of **Employees State Insurance Corporation vs. M/s. Hotel Kalpaka** (supra), the Supreme Court has observed that the Employees State Insurance Act is a beneficial piece of social security legislation where the liability to pay contribution related to the period when the business was running and till the date of its closure it could not be said that the demand for payment of contribution could not be enforced against the closed business. Any employer can easily avoid his statutory liability and deny the beneficial piece of social security legislation to the employees by closing down the business before recovery. That is not the intendment of the Act. It could not also be said that since business is closed and the employees had gone away, there is no liability to contribute. The liability to contribute arises from the date of commencement of the establishment and is a continuing liability till the closure.

18. In the case of **Employees' State Insurance Corpn., vs. M/s. Harrison Malayalam Pvt. Ltd.** (supra), the Apex Court has observed that under the Act, it is the duty of the Company to get the necessary details of the workmen employed by the contractor at the commencement of the contract since the primary responsibility of payment of the contribution is on the principal employer.

19. In the case of **Employees' State Insurance Corporation vs. F. Fibre Bangalore (P) Ltd** (supra), it was observed that the employer is under statutory obligation to register itself with the Corporation and keep depositing the employer's and the employee's contribution. Section 45-A is in the nature of best assessment judgment on the basis of the information collected by the Inspector.

20. The appeal is devoid of merits. There is no infirmity in the impugned Order. No substantial question of law is involved in this appeal. There is no ground to entertain the appeal under Section 82 of the ESI Act, 1948. The appeal is required to be dismissed.

ORDER

(i) Appeal Under ESI no. 1 of 2023, is dismissed and stands disposed of.

(ii) Civil Application No. 65 of 2023 is disposed off.

PRAKASH D. NAIK, J

ANDREZA PEREIRA Digitally signed by ANDREZA PEREIRA
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