

Ghuge

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO.688 OF 1992

Employees State Insurance Corporation
ESIC Building, Colaba, Bombay 400 005 ... Appellant

V/s.

Victor Industries Through its Proprietor
Y.B. Jalan, Dayabhai Compound, S.V.
Road Malad (West) Bombay 400 064 ... Respondent

Mr. Shailesh S. Pathak a/w Jay Vora for the appellant.

CORAM : AMIT BORKAR, J.

DATED : FEBRUARY 27, 2023

P.C.:

1. The Appeal arises out of an order passed by Employees Insurance Court, Bombay under Section 45-A of ESI Act, 1948, setting aside the order of Assistant Regional Director dated 17th November, 1987 demanding contribution from 15th January, 1985.

2. According the appellant, its employee visited respondent's Factory on 24th January, 1985 and found Eleven (11) persons employed by the respondent. She prepared visit book but the respondent refused counter sign on it. According to the respondent, on 16th October, 1986 another Inspector Mr. Jadhav inspected the establishment and found only Six (6) persons working in the factory. According to the appellant in spite of several communications, the respondent did not produce record and therefore, the appellant issued notice under Section 45-A

demanding amount of Rs.18,541-50/- (Rupees Eighteen Thousand Five Hundred Forty One Rupees and Fifty Paise Only) towards contribution.

3. According to the respondent Ms. Sambare never visited his factory and raised defense that his factory is not covered under the provisions of the Act.

4. On perusal of the issues framed by Employees Insurance Court, Bombay, it appears that court has placed burden of proof on a wrong party which raises substantial questions of law, which is as under.

i) In a proceeding under Section 45-A of Employees State Insurance Corporation Act, 1948, the primary burden of proof to establish that number of employees do not exceed required number is on employer or corporation.

5. The same issue appears to be covered by Judgment of Single Judge of this Court in the case of **Garge Kamat Vs. Regional Director, Employees State Insurance Court Bombay and Anr** reported in 1998 Vol. 2CLR 439. The single bench of this Court in paragraph 8 as under as under :—

“8. As regards the second point which relates to the burden of proof regarding number of employees in an establishment, there is no doubt the applicability of the said Act to an establishment would necessarily depend upon the number of employees employed in such an establishment. Certainly it is always within the knowledge of the employer as to how many employees he has engaged in his establishment. The burden regarding the proof of number of employees would definitely be upon the employer of the establishment to discharge and once

the employer establishes the number of employees employed in such establishment, it will automatically disclose whether the Act is applicable to such establishment or not. However, the fact of number of employees being primarily within the knowledge of the employer, it cannot be said that the burden to prove the same would lie upon the Corporation”.

6. On perusal of the impugned judgment and in particular issues and reasons assigned by Employees Insurance Court, Bombay it appears that the Court proceeded on the basis that it is for the corporation to prove that the employer had less than Ten (10) Employees in the factory. Since the burden of proof on wrong party constitutes substantial questions of law which has been answered by this court the impugned judgment cannot sustained. Therefore, following order.

I) The impugned Judgment and Order dated 9th January, 1992 passed by Employees Insurance Court, Bombay in Application (ESI) No.25 of 1988 is quashed and set aside.

II) The Record and Proceeding is remanded back to the learned Employees Insurance Court, Bombay for decision afresh on Application (ESI) No.25 of 1988.

III) The Employees Insurance Court, Bombay shall issue fresh notice to the respondent and shall decide the application in accordance with law after granting opportunity of hearing to both sides.

IV) The Court shall reframe the issues in accordance with law.

7. The First Appeal stand disposed of in the above terms. No costs.

(AMIT BORKAR, J.)