

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.259 OF 2021**

The Regional Director	]	
Employee's State Insurance Corporation	]	
108, Panchdeep Bhavan, N.M. Joshi	]	
Marg, Lower Parel, Mumbai - 400 013.	]	Appellant
Vs.		
M/s. Kargaindia Roadways Pvt. Ltd.	]	
(Formerly known as M/s. Soften	]	
Carriers Pvt. Ltd.) 207, Swastik	]	
Chambers, CST Road, Chembur,	]	
Mumbai - 400 071.	]	Respondent

.....

Ms. Anita M. Bafna, for Appellant.

Mr. S.C. Naidu a/w Mr. Manoj Gujar, Mr. T.R. Yadav, Ms. Divya Yajurvedi, Mr. Sudeshkumar Naidu, Mr. Pradeep Kumar i/b C.R. Naidu & Co., for Respondent.

.....

CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON : 19th April, 2023.
PRONOUNCED ON : 27th April, 2023.

ORDER:

1. Heard Ms. Bafna, learned Counsel for the appellant and Mr. Naidu, learned Counsel for the respondent.

2. The appellant had passed an order under section 45-A of the Employee's State Insurance Act, 1948 (for short "E.S.I Act"). The operative part of the said order which was passed by the Deputy Director of the appellant reads thus;

" In the above circumstances, it is fair and reasonable to conclude that the employer has no case to represent and that he has nothing to say against in the matter. Since the employer has not raised any objection and not furnished any records for verification, I am left with no other alternative but to confirm the claim as already intimated to the employer during the course of final hearings.

Considering the period of limitation applicable under the section 45 A, the contribution is being determined as per following details;

Sr. No.	Nature of Dues (Omitted Wages)	Period ----- From To		Amount of Contribution Payable	Basis For Calculation
1	Handling Charges	'12/2012	'03/2013	Rs.25,615/-	(Rs.11,82,243.00/12* 4 Months) X 6.5%
2.	Handling Charges	'04/2012	'09/2013	Rs.20,817/-	(Rs.6,40,535.00/12* 6 Months) X 6.5%
3.	Own Vehicle Expenses	'12/2012	'3/2013	Rs.3,99,799/-	(Rs.1,84,52,282.00/12* 4 Months) X 6.5%
4.	Own Vehicle Expenses	'04/2013	09/2013	Rs.4,63,449/-	(Rs.1,42,59,984.00/12* 6 Months) 6.5%
Total				Rs.9,09,680/-	

For the above reasons, I, Sanjiv Mishra, Deputy Director in exercise of the powers delegated to me by the E.S.I CORPORATION, think fit and accordingly order that contributions totaling sum **Rs.9,09,680/- (Rupees Nine Lakhs Nine Thousand Six Hundred and Eighty only)** is finally determined as arrears of contribution payable by the employer in

respect of the claim of the said show cause notice for the period 12/2012 to 09/2013 and you as one of the Principal employers is hereby ordered to pay the said amount within 60 days from the date of this order failing which it shall be caused to be recovered under Sec 45 C to 45 I of the ESI Act, 1948".

3. Respondent-original applicant challenged the said order before the Judge, Employees Insurance Court at Mumbai. The learned Judge after considering the record and hearing the respective Counsel passed the impugned order, thereby allowing the application of the respondent, *inter alia*, holding that the order passed by the appellant under Section 45-A of the ESI Act claiming contribution of Rs.9,09,680/- is unjust, improper and illegal and, therefore, it was quashed and set aside. It was, *inter alia*, directed to the respondent to withdraw the amount deposited by it with the office of the said Court under section 75 (2B) of the ESI Act, against which, the present appeal has been preferred.

4. At the outset, it is argued by the learned Counsel for the appellant that though the respondent had paid certain amount under the head of "Handling Charges" and under "Vehicle Expenses", however, the said payment involved wages and, therefore, the respondent is liable to pay the contribution.

5. Upon being asked, as to what is the substantial question of law involved in this appeal, learned Counsel has simply submitted that the issue involved is of general public importance which, according to her is the substantial question of law and, therefore, the appeal needs to be admitted. She further submits that the learned Judge has committed an error in setting aside a well reasoned order passed by the appellant under Section 45-A of ESI Act. She has invited my attention to the fact that the respondent is into a business of transportation and delivery of goods at various places all over the country for which he owns trucks and trailers. He has been paying handling charges and incurs vehicle expenses which are shown in the balance-sheets. The respondent could not justify from any document as to why the expenses were incurred by it and how it will not fall under the definition of "Wages".

6. Learned Counsel for the respondent, however, vehemently urged to dismiss the appeal as it does not involve any substantial question of law under section 82 (2) of the E.S.I Act.

7. I have considered the impugned judgment. Section 82 (2) of the E.S.I Act contemplates that an appeal shall lie to the High Court

from an order of an Employees' Insurance Court if it involves a substantial question of law. Learned Counsel for the respondent has invited my attention to a judgment of this Court in **Letters Patent Appeal No.97 of 1985 in First Appeal No.445 of 1984 in case of Dainik Deshdoot and others Vs. The Employees' State Insurance Corporation and others**¹. The Division Bench of this Court comprising then Chief Justice has laid down the meaning of "substantial question of law" by referring to a judgment of five Judges of Hon'ble Supreme Court in case of **Sir Chunilal V. Mehta Vs. Century Mills**² while considering the expression "substantial question of law" in Article 133 of the Constitution, as it stood then, it was held as under:-

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those

1 1995 I CLR 446

2 AIR 1962 SC 1314

principles or that the plea raised is palpably absurd, the question would not be a substantial question of law".

8. The Division Bench has further referred to a judgment of the Hon'ble Supreme Court in the case of **Mahindra and Mahindra Ltd Vs. The Union of India and another**³. A three Judge Bench has observed thus;

"What should be the test for determining whether a question of law raised in an appeal is substantial has been laid down by this Court in **Sri Chunilal V. Mehta and Sons Ltd. v. The Century Spinning and Manufacturing Co. Ltd.**, 1962 Supp. (3) SCR 549: (AIR 1962 SC 1314) and it has been held that the proper test would be whether the question of law is of general public importance or whether it directly or substantially affects the rights of the parties, and if so, whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views".

9. As already stated hereinabove, the learned Counsel for the appellant has not been able to formulate any substantial question of law, much less, a substantial question of law to be involved in this appeal. All that has been argued is that the question is of general public importance. The learned Employees Insurance Court has

3 AIR 1979 SC 798

rightly appreciated the evidence on record while coming to the conclusion, as stated hereinabove. The learned trial Court in paragraph 26 has observed thus;

"26. As far as order u/s. 45-A of the Act is concerned, the Opponent Authority in its order, nowhere discussed how the wage component is involved in the handling charges and own vehicle expenses. Further, nowhere discussed that, any employee defined under the ESI Act was involved. Therefore, this Court comes to the conclusion that, the Applicant succeed to show that, the amount spent by Applicant under the head of handling charges and own vehicle expenses during the period December - 2012 to September - 2013 not attract wages defined u/s. 2 (22) of the ESI Act, 1948. Further, the Applicant succeed to prove that, the order u/s. 45-A of the ESI Act dated 27/11/2017 claiming contribution of Rs.9,09,680/- is unjust, improper and illegal".

10. Section 45-A of the E.S.I Act clearly provides that Employees State Corporation may on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of the factory or establishment. Before determining the liability under section 45-A of the Act, it is necessary to give reasonable opportunity of being heard to the employer. The compliance of the principles of natural justice by the Corporation before determination of such contribution is not ruled out.

11. Thus, in view of the aforesaid discussion, no substantial question of law is involved in the present appeal and, therefore, it stands dismissed.

[PRITHVIRAJ K. CHAVAN, J.]