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

**FIRST APPEAL NO.1509 OF 2019
WITH
INTERIM APPLICATION NO.479 OF 2019
IN
FIRST APPEAL NO.1509 OF 2019**

Ahmed Khan Prop. Swan Crystal ... Appellant
V/s.
The Regional Director, The Employees
State Insurance Corporation & Anr. ... Respondents

Mr. Mahendra Agavekar for the appellant.
Mr. Shailesh S. Pathak with Jay Vora for the
respondents.

CORAM : AMIT BORKAR, J.

DATED : JANUARY 31, 2023

P.C.:

1. The appellant/employer has filed a present appeal under section 82 of the Employees State Insurance Act, 1948, challenging the judgment and order dated 26th June 2019 passed by the Employees State Insurance Court, Mumbai, in the exercise of power under section 45A of the Act.
2. Though the appeal is filed as a first appeal, it will have to be tested based on the existence of substantial questions of law. According to the Appellant, the following substantial questions of law arise for consideration by this court:

- “1. Whether the Establishment after declaring closure will fall within the definition of Manufacturing Process under Sec.2(14AA) and Factories under section 2(12) of factories Act?
 2. Whether factum of closure of Appellants establishment w.e.f 08/11/2007 can be challenged by the Respondent Corporation?
 3. Whether the ESI Court can treat the income/money earned from rent and other business activities as the wages for calculation of ESI Contribution?
 4. Whether the Respondent Corporation can assess the ESI dues on the unidentified persons?
 5. Whether the Respondent Corporation can assess the ESI dues on the income earned by way of rent?
 6. Whether the Ld. ESI Court & the Respondent Corporation can rely upon the unproved & un-exhibited document i.e. letter dated 28/07/2018 for the assessment of the ESI dues on the unidentified persons.
 7. Whether the ESI Court can reject the statutory documents such as Income tax Returns and balance sheets, which are duly exhibited?
 8. Whether the ESI Court can reject the factum of Leave & License Agreements having executed by the Petitioner with the Licensee?”
3. The relevant facts giving rise to the present appeal are as under:
4. The Appellant was manufacturing imitation diamonds (chatons) under the name and style of “Swan Crystal”. Undisputedly, the establishment was covered under the provisions of the Employees State Insurance Act, 1948 (hereafter, "ESI Act" for short) and paid his contribution in respect of employees till 8th

November 2007. Then, according to the applicant, he decided to close down the manufacturing activities, and notice of termination of employees was issued with effect from 8th November 2007. According to the applicant, the premises were let on a leave and license basis after the closure of manufacturing activities. However, in July 2013, the Appellant received notices proposing to determine contribution on an ad-hoc basis. Accordingly, after giving a personal hearing to the Appellant, the Assistant Director passed an order determining the liability of the Appellant, in furtherance of which a recovery certificate was issued determining the amounts from the applicant.

5. Aggrieved thereby, the Appellant applied to the ESI Court under sections 75 and 76 of the ESI Act mainly on the ground that the Appellant had closed down its manufacturing activities since 8th November 2007 and services of 9 employees were terminated by paying their legal dues. Therefore, without inspection of the establishment and inquiry under section 45A could not have been held, and the Appellant is, therefore, not liable for payment of the contribution amount as claimed.

6. The opponent appeared before the court and submitted that the Appellant himself, by letter dated 28th July 2008, informed the corporation that the manufacturing unit was started from 1st July 2008. However, due to the Appellant's failure to pay the contribution amount, two notices in Form C-18 for a different period were issued. The first period is from May 2009 to September-2010, seeking a contribution of Rs.1,74,282/- and the second, from October 2010 to April 2013, seeking the amount of

Rs.4,15,594/-. The ESI Court, by impugned order based on a letter dated 28th July 2008 and C-6 register, recorded a finding that the Appellant failed to prove that establishment closed down its manufacturing activities permanently from 8th November 2007 and has not engaged any employee during May 2009 to April 2013.

7. The learned advocate for the appellants submitted that the applicant did not issue the letter dated 28th July 2008. An inquiry under section 45A could not have been conducted without inspecting the establishment by appointing an inspector. The impugned order lacks details on how contribution for May 2009 to April 2013 has been fixed. The opponent's case that the Appellant employed 25 employees had been disbelieved, holding that the Appellant employed 18 employees.

8. *Per contra*, the learned advocate for the opponents submitted that no question of law, much less substantial question of law, arises for consideration. Based on the evidence, the court below has recorded a finding of fact which cannot be termed perverse, raising a substantial question of law. The finding of failure of Appellant to prove closure of manufacturing activities permanently is based on material in the form of a letter dated 28th July, 2008. Sufficiency of material is not a substantial question of law. The amount quantum of contribution for May 2009 to April 2013 is based on the documents in the form of bank account extract produced along with Exhibit-20. In the absence of contrary evidence, the Court rightly presumed that the amounts figured in the bank account are of the income arising from manufacturing activities.

9. Considering the submissions on behalf of both sides and having perused the documents on record, in my opinion, the appeal raises no substantial question of law. In so far as the substantial questions of law as sought to be framed by the Appellant are concerned, on the face of it, it appears attractive, but on deeper scrutiny, it fails to raise substantial questions of law. To consider the submission as to the authority of the Assistant Director to hold an inquiry under section 45A of the Act without appointing an inspector is concerned, it is well settled that the nature of inquiry under section 45A of the ESI Act is summary in nature. Such inquiry can be held when the employer refuses to cooperate with a corporation or fails to submit the documents required for holding an inquiry. In the absence of cooperation from the employer, the authority under section 45A is entitled to hold an inquiry based on the documents available with it. The nature and scope of the issue under section 45A of the ESI Act have been interpreted and explained by the Apex Court in the case of **ESI Corporation Vs. C C Santha Kumar**, reported in 2007 (1) SCC 584. In light of the law laid down by the Apex Court in the case of **ESI Corporation** (supra), in my opinion, no fault can be found with the nature of inquiry conducted by the authority under section 45A of the Act.

10. The next contention raised on behalf of the Appellant is that the authority has not specified in his order details of contribution for May 2009 to April 2013. On perusal of paragraph 21 of the order, it appears that the ESI Court has considered the bank statement produced along with Exhibit 20, which shows receipt of

various amounts. Such amounts are shown to be received by cheque and cash. Therefore, it was for the Appellant to produce on record material to show that his income was not from manufacturing activities, as these facts are exclusive only to the applicant. The defence of permanent closure of manufacturing activities has rightly been disbelieved based on a letter dated 28th July 2008. On perusal of the letter dated 28th July 2008 indicates that the Appellant himself communicated to the corporation that the manufacturing unit was started on 1st June 2008. Furthermore, the Appellant paid a contribution amount of Rs.4186/- for the month of October 2008, which strengthens the case of the corporation that the manufacturing activities were not permanently closed and the Appellant started manufacturing activities from 1st July 2008.

11. The learned advocate for the appellants submits that the subject of a letter dated 28th July 2008 explains the purpose for which the communication was issued and, therefore, a statement in the letter that the manufacturing activities started on 1st July 2008 has been read out of context by the authority. However, reading the letter makes it clear that there is unequivocal admission on the Appellant's part that manufacturing activities started from 1st July 2008 and, therefore, the said submission cannot be accepted.

12. The court, based on material in the form of a letter dated 28th July 2008 and bank account entries, recorded a finding of fact that the Appellant failed to prove that he had closed manufacturing activities permanently and had not engaged any

employee from May 2009 to April 2013.

13. As observed earlier, the nature of the inquiry is a summary; evidence on record in the form of a letter dated 28th July 2008 and bank account entries for a period of May 2009 to April 2013 is sufficient to record a finding that the Appellant failed to prove the fact of closure of manufacturing activities permanently. The said finding of fact cannot be treated as a finding based on no evidence. Sufficiency of evidence cannot be a substantial question of law.

14. The impugned judgment records a finding that the opponent has failed to prove the engagement of 25 employees in the relevant period. Based on the material on record, the court recorded a finding that the corporation has proved the engagement of 18 employees and, therefore, disallowed the claim of contribution regarding seven employees.

15. For the aforesaid reason, in my opinion, in the absence of substantial question of law, the first appeal need not be entertained same is dismissed. No costs.

(AMIT BORKAR, J.)