Judgment



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

FIRST APPEAL NO.1544 OF 2008

Employees State Insurance
Corporation, Sub Regional Office,
Panchdeep Bhawan, Ganeshpeth,
Nagpur, through its Dy.Director. ….. Appellant.

:: V E R S U S ::

M/s.Shah Maganlal Veljee and Sons,
a registered Partnership Firm of
Gawalipura, Amravati by its Partner
Shri Bharat Maganlal Shah,
Businessman, r/o Amravati, tahsil and
district Amravati. ….. Respondent.

=======================================

Mrs.B.P.Maldhure, Counsel for the Appellant.
None for the Respondent.

=======================================

CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 17/02/2023
PRONOUNCED ON : 18/04/2023

JUDGMENT

1. The appellant - Employees State Insurance Corporation (the ESI Corporation) challenges judgment and order dated 29.8.2008 passed by learned Member, Employees’ State Insurance Court, Amravati (Industrial Court) in E.S.I.Case No.3/1990 whereby learned Member allowed the application filed by the respondent firm declaring that the respondent firm is not liable to pay

contribution for the period from September 1974 to 31.12.1975.

2. On 12.8.2009, the appeal was admitted on following substantial question of law:

> (1) Whether the court below has fallen in error in holding that the suit is not barred by limitation?
>
> (2) Whether "Hamals" could be treated as employees falling under Section 2(9) of the Employees' State Insurance Act, 1948?

3. Brief facts necessary for disposal of the appeal are as under:

The respondent, M/s.Shah Maganlal Veljee and Sons, is a registered partnership firm and deals in manufacture and sale OF "Kumkum", "Gulal", and other similar items. Bharat Maganlal Shah, is one of partners looking after affairs of the partnership firm. The respondent firm has filed an application under Section 75 of the Employees' State Insurance Act, 1948 (of the ESI Act) contending that from 1974 till 31.12.1975 there were only three employees working as office staff. During the said period, there were less than 20 employees who were paid wages on monthly basis. The provisions of the ESI Act became applicable to the respondent firm from 1.1.1976 as number of employees engaged from 1.1.1976 were more than 20. The respondent firm has also paid contribution from 1.1.1976 upto January 1990. Despite of the said fact, the ESI Corporation is falsely claiming that the ESI Act has become applicable to the respondent firm from 1974 and "Hamals" engaged by the respondent firm were also covered by the ESI Act. The Deputy Regional Director of the ESI Corporation, vide his letter dated 6.8.1979, informed the respondent firm that "Hamals" of the factory stand covered under the ESI Act w.e.f. 1974 and, therefore, the respondent firm is liable to pay the contribution. The respondent firm made several communications informing that "Hamals" are casual labourers for loading and unloading goods and they are not employees of the respondent firm. However, in spite of the said clarification, the ESI Corporation initiated recovery proceedings vide RRC No.NRO/INS-1/23-1232-34/79 dated 8.5.1979 for recovery of total amount of Rs.3,231/- by way of contribution for the period from 1974 till 31.12.1975 along with interest.

4. The respondent firm challenged the demand by filing an application under Section 75 of the ESI Act contending that as "Hamals" are casual labourers and are not employees of the respondent firm, no contribution was payable.

5. In response to the Notice, the ESI Corporation denied the contentions of the respondent firm and submitted that the respondent firm engaged "Hamals" in its factory. However, records, regarding the names of the persons as also the amount of wages paid to each of them, are not being maintained by the respondent firm. The respondent firm had employed more than 20 employees in its factory on 1.9.1974. The "Hamals", working on the premises of the respondent firm, are directly connected with the work of the respondent firm's factory and, therefore, the "Hamals" are employees of the respondent firm within the meaning of

Section 2(9) of the ESI Act and contribution is also payable in respect of them.

6. As regards the amount claimed by the ESI Corporation, the ESI Court accepted the contentions of the respondent firm and declared that the respondent firm is not liable to pay the contribution for the period from September 1974 to September 1978 and interest thereon and the ESI Corporation was directed to refund amount of Rs.3,231/- as well as Rs.6952.80 to the respondent firm.

7. Being aggrieved and dissatisfied with the said order, the Deputy Director of the ESI Corporation has filed this appeal.

8. Heard learned counsel Mrs.B.P.Maldhure for the appellant – ESI Corporation. Though the Notice of the said appeal is served upon the respondent firm, none appeared for the respondent firm after sufficient opportunity.

9. Learned counsel Mrs.B.P.Maldhure for the ESI Corporation submitted that in the impugned order, the ESI Court has not considered the decision of the Honourable

.....6/-

Apex Court in the case of <u>**Rajakamal Transport vs. Employees State Insurance Corporation, Hyderabad**</u> reported in <u>**1996 LawSuit (SC) 785**</u> and erroneously held that the respondent firm is not liable to pay the contribution. According to her, the "Hamals" engaged by the respondent firm for loading and unloading goods, undertaken by them for carriage, and the charges paid to the "Hamals" are relevant considerations which the ESI Court has not considered and wrongly interpreted in favour of the respondent firm.

10. Perusal of the impugned order shows that there was exchange of correspondence and letters between the ESI Corporation and the respondent firm on the above said point which shows that the ESI Corporation had also demanded the details of "Hamals" engaged by the respondent firm. However, the same was not finalized. The respondent firm had given a detailed reply to the letter of the ESI Corporation and informed that the respondent firm is not liable to pay the contribution as "Hamals" are not their regular workers and the ESI Act is not applicable to the

respondent firm for the period from September 1974 to 31.12.1975 as there were less than 20 workers. The ESI Court held that the "Hamals" are not covered under the ESI Act as they are casual employees and, therefore, the contentions of the ESI Corporation cannot be accepted. Insofar as the limitation is concerned, the ESI Court observed that the period of limitation, provided under Section 77(1-A) of the ESI Act, has no relevance to the orders passed under Section 2-A of the ESI Act.

11. As per the provisions of the ESI Act, an application has to be preferred within a period of three years from the date on which the cause of action arises. The recovery certificate was issued on 8.5.1979. The application was filed on 12.3.1990.

In view of the judgment in the case of **Asian Paints (India) Ltd. v. Employees' State Insurance Corporation and another** reported in **1982 Mh.L.J. 315,** this Court has discussed the law of limitation and observed that the corporation is not the applicant in the proceedings and the limitation prescribed under Section 77 (1-A) will not apply to such a case.

The Honourable Apex Court also in the case of E.S.I.C vs C.C. Santhakumar reported in 2007(1) SCC 584 held that the period of limitation provided under Section 77 (1-A)(b) has no relevance to the order passed under Section 2-A of the ESI Act.

12. Thus, the ESI Court held that the contentions of the ESI Corporation about the limitation cannot be accepted in the light of the above said observations.

13. Having gone through the record, it reveals that the Deputy Regional Director of the ESI Corporation, vide his letter dated 6.8.1979, communicated the respondent firm that considering the number of employees including the "Hamals", the respondent firm stands covered under the ESI Act with effect from the year 1974 and demanded the contribution. Whereas, as per the contentions of the respondent firm, the "Hamals" are not workers and, therefore, they are not employees.

.....9/-

14. The definition of the word "employee" contained in Section 2(9) of the ESI Act does not make any difference causal or temporary or permanent employee. It is wide enough to include even a casual employee employed for a day for wages. Therefore, every person who is employed for wages on any work connected with the work of a factory or establishment to which the Act applies except those exempted by the definition, fall within the definition of the word 'employees'.

Section 38 of the ESI Act specifically states all employees in the factories or establishments to which the ESI Act applies shall be insured in the manner provided by the Act.

15. Having regard to the definition of the word "employee" contained in Section 2(9) and provisions of Sections 38 and 39 of the ESI Act, casual employees are governed by the provisions of the ESI Act.

16. The respondent firm has not denied that the "Hamals" were engaged by them for loading and unloading

.....10/-

the goods. The only contention of the respondent firm is that the "Hamals" are not regular workers and, therefore, not employees of the respondent firm. The Inspector under the ESI Act has visited the establishment and carried out the inspection report dated 25.11.1975 for the period September 1974 to October 1975. He observed that the weekly paid employees, who were working in the respondent firm, were 22 to 25. The Observations of the Inspector show that he had checked the ledgers from September 1973 to October 1975. All weekly paid employees wages and Hamali at godowns charges are booked under the Kumkum factory. However, the Hamali charges and godown etc. are outstanding, but the employer informed that no record of vouchers are prepared in this respect. Similarly, salary of monthly paid employees is shown in the accounts of the factory concerned which could any how were verified from the ledger with the help of employer.

Thus, the inspection report shows that 22-25 weekly employees were working in the respondent firm.

.....11/-

17. Perusal of the impugned order shows that the respondent firm has admitted that some “Hamals” are called for the loading and unloading goods. However, they are not the workers.

18. The Honourable Apex Court in the case of **Rajakamal Transport vs. Employees State Insurance Corporation, Hyderabad** cited *supra* observed that the Rajakamal Transport had engaged “Hamals” for loading and unloading goods undertaken by them for carriage as carriers. The ESI Corporation had called upon it to pay its contribution towards the insurance benefits of the “Hamals”. The Rajakamal Transport disputed the liability and made an application. The Honourable Apex Court, while considering the argument that “Hamals” cannot be considered to be employees in view of the definition of the ESI Act, held that the employees need not necessarily be directly employed by the employer. Those who are employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the

work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment is an employee within the meaning of Section 2(9) of the ESI Act.

The above said view had already been taken by the Honourable Apex Court in the case of Royal Talkies vs. ESI Corporation, reported in (1978)4 SCC 204.

19. Here, in the present case, loading and unloading goods were done at the direction of the establishment and in its control. The respondent firm admitted the "Hamals" were engaged for loading and unloading goods.

20. The Full Bench of the Karnataka High Court in the case of The Regional Director ESI Corporation, Bangalore vs. M/s.Suvarna Saw Mills, Mangalore, decided on 22.2.1979 held that the definition of the word "employee" contained in Section 2(9) of the ESI Act does not make any difference between a causal or temporary or permanent employee. It is wide enough to include even a casual employee employed for a day for wages.

This Court in the case of Parle Bottling Co. Pvt.Ltd. vs. Regional Director, ESIC, Bombay, reported in (1989)II CLR 229 held that the coolies hired by the salesman of the bottling factory to assist the permanent loaders who were paid on vouchers could not be regarded as employees within the meaning of the ESI Act. Further, the coolies hired were not any particular individual, but those who were available on the spot at the relevant time.

The above said decision can be distinguished on the facts from the ratio in the case of Rajakamal Transport vs. Employees State Insurance Corporation, Hyderabad.

The facts show that there were "Hamals" permanently engaged by the firm to carry out the work of loading and unloading goods.

21. Coming to the facts of the present case, the evidence laid by the respondent firm shows that the "Hamals" were engaged for loading and unloading goods. There is no dispute that the activities of loading and unloading goods, which the respondent firm was

manufacturing, were of regular activities undertaken in the regular course of business of the respondent firm. There is no dispute that these activities are conducted under the control and supervision of the respondent firm. It is not the evidence adduced by Bharat Maganlal Shah, who is one of partners of the respondent firm, that the "Hamals" are engaged by any third person or the "Hamals" hired are not any particular individuals.

22. In the circumstances, the ratio laid down by the Honourable Apex Court in the case of **Rajakamal Transport vs. Employees State Insurance Corporation, Hyderabad** cited *supra* would get attracted to the facts of the present case. Moreover, the ESI Act is a social security legislation and was enacted to improve the various risks and contingencies which the employees face while working in establishments or factories. It is thus intended to promote a general welfare of the workers and as such it is to be liberally interpreted. Admittedly, no record is maintained by the respondent firm regarding the wages paid to the "Hamals". However, the evidence adduced by Bharat Maganlal Shah,

who is one of partners of the respondent firm, also shows that the workers of the respondent firm were paid weekly wages during that period. Whereas, officials were paid monthly. His evidence further shows that they have maintained the ledger of the office staff regarding payment of their salary. He further stated that for loading and unloading goods, his firm that is the respondent firm calls the "Hamals" from the market and the payments are made to them according to the bags or packages.

23. Thus, it is crystal clear that the "Hamals" were engaged for loading and loading the goods. Though it is stated that such Hamals' work with different persons, however no document is adduced to that effect. During cross-examination also, he admitted that the "Hamals" are engaged according to the articles to be shifted and, therefore, their names are not recorded in the muster.

24. As regards the demand was made towards the contribution, the inspection report also shows that the number of workers, who were paid weekly, are more than

22-25. Thus, there is an ample evidence on record to show that at the relevant time more than 20 workers were working in the respondent firm and, therefore, the provisions of the ESI Act are applicable to the respondent firm.

25. For the above reasons, the observation of the ESI Court, that less than 20 employees were working, is erroneous and liable to be set aside. The inspection report itself is sufficient to show that the weekly paid workers were working who were more than 22-25. In view of the definition of the ESI Act, even the casual or temporary workers are covered under the definition of the "employee" and, therefore, the respondent firm is liable to pay the contribution under the provisions of the ESI Act.

26. In the light of the above discussion and the cited cases *supra*, the first appeal deserves to be allowed, as per order below:

## ORDER

(1) The First Appeal is **allowed**.

(2) The judgment and order dated 29.8.2008 passed by learned Member, Employees' State Insurance Court, Amravati (Industrial Court) in E.S.I.Case No.3/1990 is set aside.

(3) The respondent firm is held liable to pay the contribution for the period from September 1974 to 31.12.1975.

With this, the First Appeal stands disposed of.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!

BHUSHAN RANA WANKHEDE

Digitally signed by BHUSHAN RANA WANKHEDE
Date: 2023.04.18 19:12:18 +0530