

Employees State Insurance Corporation Vs Swadeshi Silks

Court: Karnataka High Court

Date of Decision: Oct. 25, 2006

Acts Referred: Employees State Insurance Act, 1948 " Section 45 B, 45 G, 75, 76, 82 (2)

Hon'ble Judges: V. Jagannathan, J

Bench: Single Bench

Advocate: Geetha Devi, M.P, for the Appellant; S.N. Murthy and Somashekar, for the Respondent

Final Decision: Allowed

Judgement

V. Jagannathan, J.

This appeal by the ESI Corporation u/s 82(2) of the ESI Act is directed against the order passed by the ESI Court,

Bangalore, dated 24.4.2000 partly allowing the application filed by the respondent herein under Sections 75 and 76 of the ESI Act and absolving

the respondent of his liability to pay the damages for the period from 1.4.1991 to 31.3.1992. Aggrieved by the aforesaid order of the ESI Court,

the Corporation is in appeal. The facts that is necessary for the purpose of this order are to the following effect.

A notice u/s 45-G of the Act dated 31.8.1998 was issued by the appellant to the respondent-M/s. Swadeshi Silks claiming contribution for the

period from 1.4.1987 to 31.3.1982 and it is the case of the respondent that only when the Inspector visited the establishment for the first time on

6.6.1991, the first respondent came to know of its liability to pay the contribution from 1.4.1991 to 31.3.1992 and the contribution for the said

period was accordingly paid. But however, subsequent inspection carried on by the Inspector on 27.2.1995 put the burden on the respondent to

pay the contribution for the period from 1.4.1987 to 31.3.1992 and therefore, aggrieved by the order passed by the appellant herein, the

respondent moved the ESI Court contending that the respondent is not liable to pay the interest and damages for the period covering from

1.4.1987 to 31.3.1992. The ESI Court after considering the case of the parties held in favour of the respondent by holding that the respondent is

not liable to pay the damages for the period covering from 1.4.1987 to 31.3.1992. But it restricted the damages only to 25% for the period

covering from 1.4.1991 to 31.3.1992. It is this order of the ESI Court that has given rise to this appeal.

2. I have heard the submission made by the learned Counsel Smt. Geetha Devi for the appellant and learned Counsel Sri. Somashekar for the

respondent-establishment.

3. Learned Counsel Smt. Geetha Devi submitted that the respondent-establishment came within the purview of the ESI Act so far as contribution

of the appellant is concerned right from the year 1987 and although the Inspector who visited the establishment directed the respondent to pay the

contribution for the period from 1.4.1991 to 31.3.1992 because, the respondent did not produce necessary records at the time of inspection, it

was only a provisional order covering the above said period that was issued and subsequently, as it was revealed that the respondent had not

covered the employees, right from the year 1987, the demand was made by an order u/s 45-B of the ESI Act to pay the contribution for the back

period i.e., from 1.4.1987 to 31.3.1992. Therefore, the ESI Court was in error in absolving the establishment from paying contribution and as

such, the impugned order passed was erroneous in law. So far as the demand being made after the closer of the business is concerned, learned

Counsel placed reliance on a ruling reported in the case of Employees State Insurance Corporation Vs. M/s. Hotel Kalpaka International, to

contend that it is immaterial that notice of demand was issued after the closing of the business, but the fact of issuance of notice is only reminder to

the employer to discharge his statutory obligation to pay the contribution which arose prior to closure.

4. On the other hand, learned Counsel for the respondent. Sri. Somashekar submitted that the respondent-establishment ceased to carry on the

manufacturing process as far back as December 1988 itself and subsequently, the establishment was also wound up in the year 1992 and even

with regard to the period of coverage from 1.4.1991 to 31.3.1992, the respondent-establishment did make the payment on adhoc basis even

though there was no records available at that time. Referring to the ESI Regulation, 1951, it was submitted that it was not expected of the

respondent to maintain the records beyond five years. Therefore, the order requiring the respondent-establishment to pay the coverage for the

earlier period i.e., from 1987 to 1992 cannot be sustained in law and as all the documents were destroyed, the question of coverage from

1.4.1987 did not arise.

5. In support of his submissions, learned Counsel also referred to a decision of the Apex Court in the case of Hindustan Times Ltd., v. Union of

India and Ors. AIR 1998 SC 688 to submit that although proceedings are initiated for recovery of damages long after the closure of the

establishment that cannot by itself be a ground for drawing an inference of waiver, yet, the employer can claim prejudice if there is proof that in

between the period of default on the date of taking the action, he has changed his position to his detriment to such an extent that if the recovery

made long after years, the prejudice to him is of an irretrievable nature. Relying on the aforesaid decision, it was also contended that the respondent

can claim prejudice upon proof of loss of relevant records or non-availability of the personnel etc., and in the instant case, the establishment ceased

to be in operation and even records were not available and therefore, taking note of these circumstances, the ESI Court has rightly passed the

impugned order.

6. Having thus heard the submissions made by the learned Counsel for the parties, the point for consideration is, whether the ESI Court was

testified in absolving the respondent from paying damages for the period from 1987 to 1992?

7. It is seen from the order of the ESI Court that on verification of records by the Inspector, it was noticed that the respondent had employed 16

employees with effect from 1.4.1987 and therefore, the establishment came within the expression "factory" and the coverage for the said period

was also accepted by the respondent and it was paid on 3.4.1987 itself i.e., within 15 days from the date of 45-A order. Subsequently, they have

inspected the establishment on 6.6.1991. The respondent was informed of coverage from 1.4.1991 and further inspection was carried on

27.2.1995 which led to the coverage period dating back to 1.4.1987 and damages were claimed for the back period from April 1987 to March

1992. Although there is delayed communication on the part of the Inspector to the respondent so far as the coverage concerning the period from

April 1987 to March 1992 is concerned, yet, the order passed under 85-B of the ESI Act would go to indicate that the respondent was, in fact

aware of the contribution being payable for the period from 1.4.1987 to 31.3.1992. Nevertheless, the communication was given only in November

1995 and the respondent made a request to the appellant to waive the damages and in the alternative sought the levy of damages for the period

from 1991 onwards.

8. Thus, what is clear from the above material placed before the ESI Court is that the coverage from April 1987 was not in dispute. But the only

aspect of the matter is delayed communication. No doubt, it is contended by the learned Counsel for the respondent that when the demand was

made in the year 1995, the respondent did not possess the necessary records and moreover, the communication was only to pay the contribution

for the period from 1.4.1991 onwards. The further fact that until 19.4.1997, contribution had not paid is also not in dispute.

9. Considering all these aspects of the matter, I am of the opinion that the ESI Court could not have absolved the respondent-establishment from

paying the damages for the period from 1.4.1987 to 31.3.1992. So far as the ruling referred to by the learned Counsel for the respondent is

concerned, it has to be mentioned that in the said decision, i.e., Hindustan Times v. Union of India, the Apex Court has carved out certain

circumstances to be in existence for the employer to claim prejudice. It is only under those circumstances, the employer can take the shelter under

the ground that prejudice is of irretrievable nature. In the instant case, when the respondent-establishment was fully aware of the coverage from

March 1987 onwards and did make the contribution on 3.4.1987 itself, it is not now open to the respondent to contend that it was made known to

it about the coverage from April 1987 onwards only in the year 1995 when the inspection was caused by the corporation through its Inspector.

Therefore, the aforesaid ruling will not help the case of the respondent as the facts before us are quite different as mentioned above.

10. For the aforesaid reasons, I am of the opinion that the order of the ESI Court in absolving the respondent-establishment from paying the

damages for the period from 1.4.1987 to 31.3.1992 is erroneous as well as contrary to the material on record and the stand of the parties as could

be seen from the very submission made by the respondent itself before the ESI Court.

11. In the result, the appeal is allowed and the impugned order of the ESI Court waiving the payment of damages for the period from 1.4.1987 to

31.3.1992 is set aside.