

(2011) 07 MAD CK 0298

Madras High Court

Case No: Revision Petition (P.D.) No. 886 of 2011 and M.P. No. 1 of 2011

Ashok Leyland Ltd.

APPELLANT

Vs

Employees' State Insurance
Corporation

RESPONDENT

Date of Decision: July 25, 2011

Citation: (2011) 8 MLJ 27

Hon'ble Judges: R. Subbiah, J

Bench: Single Bench

Advocate: T.S. Gopalan, for T.S. Gopalan and Company, for the Appellant; S. Vijaya Kumar, for G. Bharadwaj, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

R. Subbiah, J.

This revision petition is filed as against the order dated 01.03.2011 passed in I.A. No. 41 of 2011 in ESIOP. No. 2 of 2008 on the file of Employees' State Insurance Court (Principal Labour Court), Chennai.

2. The Petitioner herein has filed ESIOP. No. 2 of 2008 before the Employees' State Insurance Court (Principal Labour Court), Chennai, u/s 75 of the Employees State Insurance Act (in short "ESI Act") to declare the impugned order dated 28.10.2005 issued by the Respondent in Proceedings No. TN/Ins.VI/51-3602-74, determining arrears of contribution for the period from 1980 to 1987 as illegal and void ab initio and also a permanent injunction restraining the Respondent from claiming contribution, interest and damages in terms of the said impugned order.

3. The brief facts, which are necessary to decide the issue involved in the appeal, are as follows:

(a) The Petitioner is a company incorporated under the Companies Act and they are having their registered office at No. 19, Rajaji Salai, Chennai-1. The Petitioner company is engaged in manufacturing and selling commercial vehicles and engines. In the year 1952, the Petitioner put up its factory at Ennore and it has been covered under the ESI Act with Code No. TN/INS/VI 51-3602-74. In the year 1980-81, it started construction of its factory at Alwar in Rajasthan and it commenced manufacturing activity only in 1982 and it has also been covered under the ESI Act since inception with Code No. 15/7461/74. Apart from that, in the year 1980-81, the Petitioner commenced construction of its proposed factory at Bhandara in the State of Maharashtra and the factory building was completed and manufacturing activity was commenced in the year 1982; but the Bhandara factory has not been covered under the provisions of ESI Act. That apart, in the year 1980, another unit at Hosur was also constructed and the ESI Act has been extended to Hosur unit in June 1984. It was independently covered under the ESI Act with Code No. 51-4500. The eligible employees of the respective units (Alwar and Hosur) were insured with respective Regional Offices of the ESI Corporation and contributions were remitted to the respective Regional Offices of the Respondent Corporation. In between 16.03.1988 and 28.07.1988, the Inspector of the Respondent Corporation visited Petitioner's Ennore factory and on the basis of the figures reflected in the balance sheet of the Petitioner, the Respondent had passed the impugned order under Section 45-A of the ESI Act dated 28.10.2005.

(b) Challenging the said order, the Petitioner filed E.S.I.O.P. No. 2 of 2008 before the ESI Court stating that the demand is primarily on the amounts reflected under the heads of accounts, namely, repairs to building, repairs to plant and machinery and building additions as wages and has sought contribution. The total amount spent under three heads for the period 1980 to 1987 was Rs. 51.89 crores. While passing the impugned order, the Respondent failed to appreciate that the amount shown under the said three heads in the balance sheet also included the amounts pertaining to the other three factories at Alwar, Bhandara and Hosur and the amounts were not in respect of the Ennore factory alone. A sum of Rs. 27.54 crores of the total sum pertaining to the other three factories of the Petitioner has to be excluded from the total amount of Rs. 51.89 crores.

(c) During trial, the Petitioner had examined its Statutory Auditor and two of its officials belonging to its accounts department. The Petitioner's witnesses had adduced evidence to the effect that the balance sheet and the books of account, based on which the contributions were claimed, reflected the amounts pertaining to all the factories of the Petitioner, namely, Ennore, Hosur, Alwar and Bhandara. Therefore, the amounts pertaining to the other factories have to be excluded.

(d) The Petitioner has filed an application in I.A.41 of 2011 in the said original petition stating that so far as Rs. 20.51 crores pertaining to Ennore factory

is concerned, contribution would not be payable and that a sum of Rs. 3.84 crores had been included due to an error in extraction from ledger account. Therefore, in view of the evidence adduced on the side of the Petitioner, the Court has to frame the following preliminary issues and pass orders as to

(1) Whether the Respondent has jurisdiction to claim contribution in respect of the amounts pertaining to the other three factories of the Petitioner situated at Alwar, Hosur and Bhandara while the proceedings initiated u/s 45A against the Ennore factory?

(2) Whether the sum of Rs. 27.54 crores, out of the total amount of Rs. 51.89 crores reckoned as wages by the Respondent, has to be excluded as it pertains to the other three factories of the Petitioner?

(e) The said interim application for deciding the preliminary issues was vehemently opposed by the Respondent by filing a counter stating that the framing of preliminary issue could have been raised by the Petitioner either at the time of filing the main original petition or at the time when the issues were framed. But the Petitioner, having kept silent for long, after completion of recording evidence and after filing the written arguments, filed the present application to decide the jurisdictional issue as the preliminary issue, only to drag on the proceedings. Thus, they prayed for the dismissal of the application.

(f) The trial court, after analysing the entire evidence, dismissed the application filed by the Petitioner. Aggrieved over the same, the present revision petition has been filed.

4. Learned Counsel for the revision Petitioner submitted that the Respondent has made inspection between the period 16.03.1998 and 28.07.1988 only in the Ennore factory. But all the accounts pertaining to the other factories were maintained in one general ledger. In fact, the Bhandara unit was not covered under the ESI Act and that items relating to Bhandara unit have to be excluded. Similarly, ESI Act was extended to Hosur area only from 1984 and hence, Hosur unit has also to be excluded as it was an establishment having a different ESI Code No. Similarly Alwar unit has also to be excluded as the said unit is also having a separate ESI code number. But, without considering the objections raised by the Petitioner with regard to the other units, for which the Respondent has no jurisdiction, the order u/s 45-A of ESI Act has been passed. Therefore, the issue with regard to the jurisdiction has to be decided preliminarily. The Petitioner could not raise this issue at the earlier point of time without evidence since the court below could not have been able to decide the issue. Now, the evidence has been adduced by both parties. Therefore, the issue with regard to the jurisdiction has to be decided as a preliminary issue, otherwise, the Petitioner would put to much hardship. In fact, the Petitioner, before passing order u/s 45-A by the Respondent, made a request for deciding the preliminary issue in the first instance. But the Respondent refused to do so. Hence,

the Petitioner has also filed a writ petition in W.P. No. 25374 of 2005 before this Court and this Court, by its order dated 09.08.2005, directed the Respondent to consider the representation of the Petitioner dated 21.07.2005 praying to decide the jurisdiction issue as a preliminary issue. But, the Respondent, having not chosen to give any ruling with regard to the preliminary issue in the first instance, has passed the impugned order. Thus, the learned Counsel for the Petitioner submitted that since the Petitioner has been raising the jurisdictional issue as a preliminary issue right from the beginning, the court below ought not to have dismissed the application filed by the Petitioner.

5. On the contrary, the learned Counsel for the Respondent submitted that the issue is pending for a long time. The Respondent issued a show cause notice in form C.18. The revision itself is not maintainable under section 82(2) of ESI Act and only an appeal shall lie before this Court challenging the order passed by the ESI Court, if it involved any substantial question of law. Moreover, the first notice was issued on 16.08.1990. Now, almost 20 years have elapsed. The present application has been filed after completion of the evidence and written arguments were filed, only with an intention to prolong the issue further. In this regard, the learned Counsel further submitted that the Respondent has required only records from the factories to decide the issue raised by the Petitioner. But the Petitioner has not produced the same. Hence, at this stage, the question of deciding the preliminary issue does not arise.

6. By way of reply, the learned Counsel for the Petitioner submitted that the production of old records pertaining to the factories in voluminous is not possible. Therefore, the jurisdictional issue has to be decided as a preliminary issue. In support of his submissions, the learned Counsel has relied upon the decisions reported in [Bharat Bhawan Trust Vs. Bharat Bhawan Artists Association and Another](#), and T.V. Swamy v. Management of Best and Crompton Madras and Anrs. 2010 LLR 1045.

7. Heard the learned Counsel for the parties.

8. It is the case of the revision Petitioner that the Respondent has made inspection only in the Ennore factory and they are maintaining a General Ledger pertaining to all the four factories, run into thousands of pages for each month. From the total amount of Rs. 51.89 crores, the amounts pertaining to other factories have to be excluded. The Respondent has no jurisdiction to claim contribution in respect of the amounts pertaining to other factories. It is the further case of the Petitioner that the two factories one at Alwar and another at Hosur are having different ESI Code numbers and the factory at Bhandara has not been covered by the ESI Code. Per contra, it is the contention of the Respondent that the Respondent Corporation required only the records from the other factories, for which, it is the reply of the Petitioner that it is not possible to produce old records relating to the other factories and, therefore, the jurisdiction issue has to be decided as a preliminary issue.

9. The learned Counsel has also placed reliance on the judgments reported in [Bharat Bhawan Trust Vs. Bharat Bhawan Artists Association and Another](#), in support of his contention that the jurisdictional issue can be decided as a preliminary issue. Absolutely, there is no controversy in accepting the proposition made in the said decisions with regard to the determination of the jurisdictional question as a preliminary issue. But, in the instant case, the Petitioner has not raised the plea that the jurisdictional question should be decided as a preliminary issue when the issues were framed by the court below. Now, after completion of the evidence and the written submissions were filed, the present application has been filed. The court below has dismissed the application filed by the Petitioner holding that the preliminary objection can be decided in the main petition. In this regard, a reference could be placed in the judgment relied on by the Respondent reported in *Nagarjuna Oil Corporation Ltd., Cuddalore v. R. Revathi* 2011 (2) CTC 763, wherein it has been held as follows:

According to me, that question can be decided by the Court below by permitting the party to lead the evidence. The reason is that the Court fee is a mixed question of fact and law and it cannot be decided as a preliminary issue. Nevertheless, u/s 12(2) of the Tamil Nadu Court Fees and Suits Valuation Act, any Defendant may, by his written statement filed before the first hearing of the suit or before evidence is recorded on the merits of the claim but, subject to the next succeeding Sub-section, not later, plead that the subject matter of the suit has not been properly valued or that the fee paid is not sufficient. When such questions are raised, the same shall be decided before the evidence is recorded. In this case, it is admitted that the revision Petitioner has not raised this issue in the written statement nor filed application before recording the evidence. Admittedly, PW1 has filed proof and when the case was posted for cross-examination, this Application was filed by the revision Petitioner. Therefore, the petition filed by the revision Petitioner cannot be brought under the scope of Section 12(2) of the Tamil Nadu Court Fees and Suits Valuation Act...

The dictum laid down in the said decision is squarely applicable to the facts of the case on hand.

10. It is to be noted that when an application has been filed, after the evidence was recorded, that the jurisdictional question has to be decided as a preliminary issue, the Court should not resort to try the issue as a preliminary issue and it has to be tried along with other issues since the jurisdictional issue is a mixed question of fact and law. In this case, already evidence was recorded and written arguments were filed. It is not in dispute that the Petitioner has not raised the question of jurisdictional issue as a preliminary issue when the issues were framed by the Court. Under such circumstances, I am of the view, that at this stage, the application filed by the Petitioner cannot be entertained. I do not find any infirmity in the order passed by the court below; however, the Court is directed to deal with the issue

raised by thePetitioner with regard to the jurisdiction along with otherissues in the main original petition while deciding themain original petition.

With the above observation, this revision petition is dismissed. No. costs. Connected M.P.is closed.