SUPREME COURT OF INDIA

Bharat Heavy Electricals Ltd.

Vs.

ESI Corporation

C.A.No.1271 of 2008

(S.B. Sinha and V.S. SirpurkarJJ.)

14.02.2008

JUDGMENT

S.B. Sinha, J.

1. Leave granted.

2. Background facts:

> "Appellant herein is a Public Sector Undertaking. It used to engage contractors for various purposes. It received a notice on or about 3.9.1992 purported to have been issued under Section 45A of the Employees State Insurance Act, 1948 (for short the Act) on the premise that they had not deposited the Employees State Insurance contribution for the period 19.7.1981 to 30.9.1991."

3. In its show cause, in response to the notice issued by the respondents, the appellant stated that the workmen concerned had been engaged by the contractors who would be in possession of the relevant records to show as to whether or not any contribution was payable or whether the Act was applicable in respect of the concerned workmen. A list of contractors along with their addresses who were involved during the period in question was annexed to the said show-cause. A prayer was made before the Authority to implead the said contractors as parties in the said proceedings under Section 45A of the Act as immediate employers.

4. By a letter dated 8.3.1993 the said prayer was rejected by the competent authority of the respondent, stating:

> "With reference to the above, I have to invite your kind attention on the above subject and inform you that engaging the contractors for BHEL works is an internal affair of the factory and our Corporation is not preventing you in any manner in bringing along

with you those contractors to explain the nature of expenditure incurred by you through the contractors. You are not denied any opportunity to represent your case properly. You may recover the ESI contribution along with employers share from your contractors (i.e. immediate employer) under Section 40 and 41 of the ESI Act. As per Section 41(1) of the ESI Act, the principal employer can recover the contributions from the immediate employer even as deduction from any amount payable by them under any contract or even as a debt payable by the contractors. So, it is not necessary for the Employees State Insurance Corporation to implead the contractors to enable you (principal employer) to invoke your right of recovery. I am therefore, to intimate you that your request as communicated in the affidavit cannot be acceded to."

5. Proceedings:

"A Writ Petition was preferred there against before the Madras High Court wherein a decision of the said court in Madras Gymkhana (represented by its Honorary Secretary), Madras v. Employees State Insurance Corporation (represented by its Regional Director), Madras [1990 (2) Labor Law Notes 777] was relied upon. By an order dated 11.4.2000, a Learned Single Judge, doubting the correctness of the said decision, referred the matter to a Division Bench opining:

> "In view of the judgment of the Honble Supreme Court of India referred to above, namely, AIR 1993 SC pg.2655 and the other judgment namely, JT 1989 (4) SC 380, I am of the respectful opinion that the judgment of this Court reported in 1990-2 L.L.N pg.777 does not appear to have decided the issue correctly and, therefore, it definitely calls for a reconsideration by a larger Bench. The Registry is, therefore, directed to place this order of reference, my judgment containing reasons and the material papers before My Lord the Honble Chief Justice for referring the issue involved in this case for consideration by a larger Bench."

6. By reason of the impugned judgment, a Division Bench of the Madras High Court, while overruling the said decision in Madras Gymkhana (supra) Held:

> "The scheme of the ESI Act does not envisage separate and independent determination of contribution payable by the principal employer and the immediate employer in respect of employees directly employed by the principal employer and the contract employees respectively. When once the authority is satisfied that persons were employed by or through an immediate on the premises of the factory or establishment or under the supervision of the principal employer and if for any reason the principal employer fails to submit, furnish or maintain the records and registers in accordance with the provisions of Sec.44, the Corporation is within their powers to determine the contribution payable in respect of contract employees against the

principal employer without looking for the immediate employer. As already stated, in an enquiry under Section 45-A of the ESI Act all that is required is the authority must give a reasonable opportunity of being heard to the employer concerned. That has been complied with by the respondent in the present case by issuing the show because notice dated 3.9.1991, wherein the Corporation has also afforded a personal hearing to the petitioner. The decisions relied on by the petitioner, viz. Food Corporation of India, Ashok Leyland Limited and Chennai Petroleum Corporation Ltd., cited supra, are of no assistance to them."

7. Contentions:

"Mr. Milon K. Banerjee, learned Attorney General for India appearing for the appellant, submitted that the High Court committed a serious error in passing the impugned judgment in so far as it failed to construe the provisions of the Act in their proper perspective. Learned Attorney General has placed strong reliance upon a decision of *P. Sathasivam, J., (as His Lordship then was) in Ashok Leyland Limited v. Employees State Insurance Corporation*[1]."

8. Mr. Francis, learned counsel appearing on behalf of the respondent would, however, support the impugned judgment.

9. The Act:

"The Act was enacted to provide for certain benefits to the employees in cases of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto. The term employee has been given a wide definition. In terms of sub-section (9) of Section 2 of the Act, it includes a person employed directly by the principal employer or by or through an immediate employer. Immediate employer has been defined in Section 2(13) to mean:

"Immediate employer, in relation to employees employed by or through him, means a person who has undertaken the execution, on the premises of a factory or an establishment to which this Act applies or under the supervision of the principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment, and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer and includes a contractor;"

10. Section 2(17) defines principal employer in the following terms:

"(i) principal employer mens in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, and where a person has been named as the manager of the factory under the Factories Act, 1948 (63 of 1948), the person so named

(ii) In any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the head of the Department;

(iii) In any other establishment, any person responsible for the supervision and control

of the establishment;"

11. Chapter IV of the Act provides for mandatory insurance of all the employees in the manner provided for therein. Section 39 provides for payment of contribution. Section 40 provides for the principal employer to pay contribution in the first instance, whereas an enabling provision has been enacted for recovery of the contribution from the employee directly if he is employed by the principal employer directly. Section 41 empowers the principal employer to recover the amount of the contribution so paid from the immediate employer either by deduction from any amount payable to him by the principal employer under any contract or as a debt payable by the immediate employer. Sub-section (1A) of Section 41 mandates that the immediate employer shall maintain a register of employees employed by or through him as provided for in the regulations and submit the same to the principal employer before the settlement of any amount payable under sub-section (1). We may, however, notice that the said provision was introduced by Act No.29 of 1989 w.e.f 1.2.1991. Section 45A lays down the manner in which the contributions payable in certain cases shall be determined, sub-section (1) whereof reads, thus:

12. (1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of Section 44 or any Inspector or other official of the Corporation referred to in sub-section (2) of Section 45 is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under Section 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment. Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a Reasonable opportunity of being heard.

13. Application of the Act:

"The period in question is 19.7.1981 to 30.9.1991. No return of contribution is also said to have been filed for the said period. Clause (4) of the show-cause notice dated 3.9.1992 reads as under:

"And whereas it is proposed to determine and Recover the amount of contribution payable in
Respect of the employees of your factory establishment under Section 45A of the Act, as under:

"1. Nature of Dues Period Amount of contribution payable Basis for calculation FromTo123a3b45 Contribution due on the wages paid through immediate employer (contractors)July 1981 Sept. 1991 Rs.3,32,45,042.95 As shown in the appendices And whereas, it is proposed to afford M/s. an opportunity as required under Section 45A (1)(b) to show cause against the said determination and recovery. Please show cause within 15 days here of as to why assessment should not be made as proposed above. In case you have any objections you are hereby given an opportunity to explain the same and or to file a statement giving full particulars of the contributions actually due as per your records for the above said period within the time specified above. In case you desire to represent your case personally you may appear before the undersigned in person or through an authorized representative on 24.09.1992 at 10.00 am with necessary document to explain your case."

14. Appellant herein affirmed an affidavit in support of its application in implead the third parties/contractor, stating:

"For the period in question, third Parties/contractors are involved and only they would be in possession of records relevant to determine whether or not contributions at all are Payable or as to whether at all the Employees State Insurance Act, 1948 is applicable in the first Place. This Management viz., Bharat Heavy Electricals Ltd., do not have details with regards to the work of wages, if any, paid by the third parties/contractors. The relevant information, materials and such like would be available only with said third parties/contractors whose names and addresses in so far as they are available at present are enclosed as annexure to this petition. The names and addresses of the rest of the third parties/contractors who were involved for the period in question would be furnished as and when the same are available."

15. A prayer was made to implead the contractors mentioned in the Annexure to the said affidavit as parties. Precedent:

16. In *Food Corporation of India v. Provident Fund Commissioner & Ors*[2] this Court while considering the provisions of Section 7A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 held:

"It will be seen from the above provisions that the Commissioner is authorized to enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen. The Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. That is the legal duty of the Commissioner. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person."

17. The Division Bench of the High Court distinguished the said decision holding that the provisions of Section 7A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 are not in pair material with the provisions of the Act stating:

"An inquiry under sub-section (1) of Section 7-A can be initiated to decide the dispute regarding the applicability of the Act to an establishment and to determine the amount due from any employer under any provisions of the Act, the Scheme or the Pension Scheme or the Insurance Scheme, as the case may be. For the purposes of such inquiry, the authorities under the Act are vested with the same powers as are vested in a civil court for trying a suit though such powers are restricted to certain specified matters, viz. to enforce the attendance of any person or examining him on oath, requiring the discovery and production of documents, receiving evidence on affidavit, issuing commission for the examination of witnesses. A fiction is created under Section 7-A that an inquiry there under is deemed to be a judicial proceeding. The observance of principles of natural justice is also mandated vide sub-section (3) which says that no order under sub-section (1) shall be made unless the employer concerned is given a reasonable opportunity of representing his case. Thus, it is obvious that such specific powers are given to the authorities concerned to decide not abstract question of law, but to determine actual concrete differences in payment of contribution and other dues by identifying the workmen and the Authorities should exercise all their powers to collect all evidence and collate all material before coming to proper conclusion and as such an inquiry under Section 7-A is more or the less a trial of a suit before a civil court and judicial in nature. The powers so conferred on the authorities concerned are being statutory powers, a legal duty is cast on such authorities to exercise the same when situation arises and failure to exercise the jurisdiction, especially when a party to the proceedings requests for such exercise, would lead to nullification of the order passed in the inquiry."

18. Analysis:

"We, with respect to the learned Judges, fail to notice any significant difference in the purport and object of both the provisions. The purport and object of both the statutes,

for all intent and purport, in our opinion, is the same. In the proceedings initiated under Section 45A of the Act, an immediate employer or principal employer may also show that they are not liable to deposit any contribution on behalf of the employees as the establishment in question did not come within the purview thereof. The purpose of the proceedings, both under the Act as also the Employees Provident Fund Act, is to determine the amount due from any employer in respect of the employees under the statutory schemes. Both the Acts envisage compliance of principles of natural justice. The proviso appended to Section 45A of the Act provides for a statutory mandate of giving a reasonable opportunity of being heard."

19. The quantum of amount due has to be determined in respect of all contract workers engaged by the contractors. The principal employer would be entitled to recover the contributions from the contractor; they being the immediate employers. Whereas under the Provident Fund Act, the principal employer is statutorily liable in terms of the provisions of the Act to comply with the provisions therein; in terms of the Act, the principal employer is Entitled to recover the amount of contribution payable by the immediate employer for them. Section 45A of the Act enables the appropriate authority to recover such dues both from the principal as also the immediate employer. It provides for an opportunity of hearing to both of them. Apart from Section 41(1A), Regulation 32 of the Employees States Insurance (General) Regulations, 1950 mandates immediate employers to maintain registers in the prescribed form(s). An order passed under Section 45A of the Act has a serious civil and/or financial consequence as the amount so determined is liable to be recovered as arrears of land revenue. Section 44 of the Act, not only mandates the principal employer, but also the Immediate employer to file its reports and maintain registers. Under Sub-section (2) of Section 44, when such reports are not submitted either by the principal employer or by the immediate employers, the Corporation may require the person in charge of the factory or establishment to furnish such particulars as it may consider necessary for the purpose of enabling the Corporation to decide whether the factory or establishment is a factory or establishment to which this Act applies. Sub-section (3) of Section 44 of the Act enjoins upon the principal as also the immediate employers to maintain registers or records as may be required by regulations. Section 45 also empowers the Inspector of Corporation to require an immediate or principal employer to furnish to him such information as he may consider necessary in regard to the compliance of the provisions of the Act by them. The Act, therefore, recognizes the existence of an immediate employer.

20. We may also notice that in terms of the provisions of the Contract Labor (Regulation and Abolition) Act, 1970 and the Rules framed there under, a contractor is required to maintain a register of the workmen employed by him. The contractor is also required to issue an employment card to the said workers. Muster rolls, wages registers and other records in respect of each worker engaged by the contractor are also required to be maintained. Reliance has been placed by the Division Bench as also by *Mr. Francis on Employees State Insurance Corporation v. Harrison Malayalam Pvt. Ltd*[3]. Unfortunately, therein attention of this Court

was not drawn to the case of Food Corporation of India (supra). Even otherwise, they said decision has no application to the fact of the present case.
The question therein which arose for consideration was as to whether the
Employees of the contractor who were casual employees were identifiable or not. It is in that context, this Court opined:

> "Under the Act, the scheme is more akin to group Insurance. The contribution paid entitles the Workman insured to the benefit under the Act. However, he does not get any part of the Contribution back if during the benefit period; he does not qualify for any of the benefits. The contribution made by him and by his employer is credited to the insurance fund created under the Act and it becomes available for others or for him, during other benefit periods, if he continues in employment. What is more, there is no relation between contribution made and the benefit availed of. The contribution is uniform for all workmen and is a percentage of the wages earned by them. It has no relation to the risks against which the workman stands statutorily insured. It is for this reason that the Act envisages automatic obligation to pay the contribution once the factory or the establishment is covered by the Act, and the obligation to pay the contribution commences from the date of the application of the Act to such factory or establishment. The obligation ceases only when the Act ceases to apply to the factory/establishment. The obligation to make contribution does not depend upon whether the particular employee or employees cease to be employee/employees after the contribution period and the benefit period expire."

21. In that case, it was not disputed that the Act applied to casual workmen. Here, however, the applicability of the Act itself is in question. In proceedings under Section 45A, not only the applicability of the Act but also the quantum thereof which may be held to be payable may be the subject matter of determination.

22. Reliance has also been placed on a decision of this *Court in Employees State Insurance Corporation v. Harrisons Malayalam Ltd*[4]*. (2nd case),* wherein this Court referring to the first case opined that the liability of the employer to contribute arose from the very first day of employment. There is no dispute with regard to the aforementioned proposition of law but the dispute being both in regard to the applicability as also the quantum, in our opinion, the respondent authority had the requisite jurisdiction to implead the third party or summon them before it to produce all relevant documents.

23. In Ashok Leyland, P. Sathasivam, J following the Food Corporation (supra) and Madras Gymkhana (supra) held:

> "The respondent is also directed to implead the contractors/sub-contractors if it (respondent) feels that they are necessary and proper parties on the basis of the information furnished by the petitioner, for adjudication of the matter in controversy and to proceed further."

24. Conclusion:

> "Determination of the exact liability on the part of the contractors is necessary keeping in view the fact that they or some of them may not be under the control of the principal employer having regard to the fact that the contract has come to an end. It will bear repetition to state that the principal employers have a statutory right to recover the dues from the contractors/immediate employers."

25. It appears that the determining authority did not give an opportunity of hearing to the petitioner in regard to the names and other particulars of the contractors. The impugned judgment, therefore, cannot be sustained. It is set aside accordingly. The appeal is allowed and the matter is remitted to the ESI Corporation/determination authority for considering the matter afresh. The authority shall either implead the contractors as parties and/or summon Them for producing necessary records for the said purpose. In the facts and circumstances of the case, there shall be no order as to costs.

[1]*(2000) 2 LLJ 0593*
[2]*(1990) 1 SCC 068*
[3]*(1993) 4 SCC 0361*
[4]*(1998) 9 SCC 074*