

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 236 OF 2009

W I T H

CIVIL APPLICATION NO. 4687 OF 2001 (FOR STAY)

IN

FIRST APPEAL NO. 236 OF 2009

The Regional Director,]
Employees State Insurance Corporation,]
E.S.I.C. Bhava, Lower Parel,] Appellant
Bombay-400 013] (Ori. opponent)

VERSUS

M/s. Kishinchand Chellaram,]
629-A, Gazdar House,] Respondent
Jagannath Shankarseth road,] (Ori. applicants)
Bombay-400 002]

Mr. H.V. Mehta i/by M/s. M.V. Jaykar & Co. for appellant.
Mr. S.C. Naidu a/w. Mr. Yogesh Naidu, Mr. S.J. Sarfare, Mr. N.P. Dalvi,
i/by M/s. C.R. Naidu & Co. for respondent.

Coram : Smt. R.P. SondurBaldota, J.**Judgment Reserved on :- 7th May 2010****Judgment Pronounced on :- 15th June, 2010.**

J U D G M E N T (Per Smt. Justice R.P SondurBaldota) :

1. This appeal is preferred against the order dated 31st March 1995 of the Employees State Insurance Court, allowing the application filed by the respondent under Section 75 of Employees State Insurance Act, 1948 (hereinafter referred to as "The E.S.I. Act").
2. The brief facts of the case are that the respondent is a partnership firm, having its' registered office at Mumbai with a shop at Madras. The shop stands closed since September 1986. The shop was covered under the provisions of E.S.I. Act under Code No.51-18452-102 as the establishment pursuant to the Notification issued by the Government of Tamilnadu dated 21st April 1976 u/s 1(5) of the E.S.I. Act. The Government of Maharashtra also issued Notification under Section 1(5) of E.S.I. Act dated 12th November 1978 extending the provisions of the E.S.I. Act to other establishments. According to the respondent, it had never employed more than 16 persons at the registered office from November 1978 onwards. These employees had been carrying on only administrative work and had no connection with the activity of the shop at Madras. However, after getting submitted from the respondent, O-1 Form, the appellant by its letter dated 15th June 1979 informed it that its administrative staff at Mumbai falls within the purview of Section 2(9) of E.S.I. (Amendment Act, 1966) w.e.f. 12th November 1978 and

allotted the same Code Number as for the shop at Madras i.e. Code No. 51-18452-102. As per the letter, the code number was allotted on the basis of coverage of the shop at Madras. Later on 16th February 1988, the appellant-corporation issued notice in Form C-18 determining the contribution on ad-hoc basis amounting to Rs.44,511/- for the period 12th November 1979 to 31st December 1987. The respondent contested the notice by sending various letters. However, the appellant without considering the objections, passed order under Section 45(A) of the E.S.I. Act on 18th October 1988 determining the contribution of Rs.33,166.81 for the period 12th November 1978 to 31st December 1987 and interest thereon of Rs.10,530.60 upto 31st September 1978.

3. The respondent then filed application under Section 75 of E.S.I. Act before E.S.I. Court at Mumbai to challenge the order of coverage of the establishment at Mumbai. The grounds of challenge raised in the application were as follows :

(i) The Mumbai Office was not coverable under Section 2(9) of the E.S.I. Act, as the persons working in Mumbai were not doing work of purchase of raw material as well as distribution or sale of products of the establishment at Madras.

(ii). The shop at Madras not being covered under Section 2(12) of the E.S.I. Act, but being covered under Section 1(5) of the Act, coverage

of respondents' registered office at Mumbai under Section 2(9) was contrary to the provisions of E.S.I. Act.

(iii). The Mumbai office was not independently coverable under the Notification issued under Section 1(5) of E.S.I. Act by the Government of Maharashtra as the respondent never employed 20 or more persons in the establishment at Mumbai during the period 12th November 1978 to 31st December 1987.

(iv). Though the appellant claimed contribution in respect of 13 employees throughout the period from 12th November 1978 to 31st December 1987, all the 13 persons were not drawing wages less than the ceiling prescribed under the E.S.I. Act.

4. The appellant justified its' action contending that the Madras shop being covered under Section 1(5) of the E.S.I. Act, the employees at Mumbai office doing the work relating to administration and accounting of the shop at Madras, would be covered by the definition "employees" under Section 2(9)(iii) of the E.S.I. Act. As such, the respondent was liable to make contribution in respect of the Mumbai office employees. According to the respondent, even otherwise, the respondent was covered by Notification issued by the Government of Maharashtra under Section 1(5) of the E.S.I. Act w.e.f. 12th November, 1978.

5. The E.S.I. Court on considering the evidence led before it, held that the respondent had established that it did not employ more than 16 employees at Mumbai office since 12th November, 1978 and that the Shop at Madras and the office at Mumbai are independent establishments. It held that the sale, purchase and payment in the activity of the shop is done at Madras, whereas, the registered office at Mumbai is carrying out only administration/accounting work. Therefore, the work done at Mumbai was neither incidental, nor, preliminary work connected to the work at Madras. These findings of fact drawn on the basis of the record cannot be disturbed in the present appeal which is in the nature of the second appeal.

6. Mr. Naidu, the learned counsel for the respondent has in fact submitted that the present appeal is not maintainable as there is no substantial question of law arising for consideration of the court. Relying upon the decision of the Division Bench of this Court in the case of Dainik Deshdoot & Ors. V/s. The Employees' State Insurance Corporation & Ors. reported in 1995 I CLR page 446, Mr. Naidu submits that, for the present appeal to be maintainable, it is necessary for the appellant to show that it involves a question of law of general public importance or the question that directly or substantially affects the rights of the parties, which question is still open, in the sense that it is not

finally decided by any of the higher courts. This is confirmed on perusal of the impugned order and the memo of appeal, shows that all that the appellant has urged is that the establishment at Mumbai and the shop at Madras should be treated as one unit so as to extend the application of the E.S.I. Act to it. Mr. Mehta, the learned Counsel for the appellant, however submits that the appeal gives rise to the following question of law which according to him is substantial question of law for the consideration of the court.

“Whether the issuance of Notification by Tamilnadu Government under Section 1(5) of the E.S.I. Act, covering the respondent’s Chennai Establishment, w.e.f. 16.1.1977 as a “Shop” will cover the Mumbai office of the respondent upon the issuance of Notification by State of Maharashtra under Section 1(5) of the Act, which came into force w.e.f. 12th November, 1978 by clubbing the employees of both the units”

Perusal of the impugned judgment shows that the question of law now sought to be raised by the appellant was not raised before the E.S.I. court for its’ consideration. As already seen above, the case of the appellant was that the Notification issued by the State of Tamilnadu gets extended to the Mumbai office, because the work carried on by them is connected with the administration of the shop at Chennai. The second contention of the appellant, which would be in the nature of an alternative

submission was that the two establishments infact constitute one establishment and as such would be covered by the Notification issued by the Government of Maharashtra. There was no contention raised for the combined effect of the two Notifications. Therefore, the question of law now sought to be raised by the appellant does not arise from the proceedings. Since, there is no question of law arising for consideration of the court, the appeal is liable to be dismissed for this reason alone.

7. Considering the fact that both the counsel have advanced arguments on merits of the case also, I consider it appropriate to deal with the same so as to complete the order. Mr. Mehta heavily relies upon the decision of the Apex Court in the case of Transport Corporation of India V/S. Employees State Insurance Corporation and Another reported in A.I.R. 2000 S.C. page 238 in which the Apex Court has held that :

“ . A conjoint reading of sub-sections (9), 13 and 17 of S.2, therefore, clearly shows that if the head office or the registered office of the appellant is controlling its Bombay branch, the employee working under the supervision of the principal employer or his agent. Consequently, once such `principal employer' like the appellant, having head office at Secunderabad in the State of Andhra Pradesh is covered by the sweep of the Act, automatically employees working in its branches, may be anywhere in India, including the branch at Bombay would get covered by the sweep of the Act. That would be the direct consequence of the applicability of the Act by the notification of the `appropriate

Government' namely, the Andhra Pradesh Government under S.1(5) of the Act."

The decision cited cannot help the appellant considering the facts of the case on hand. What is sought to be argued in this case is converse to the proposition laid down by the Apex Court, as the notification of Tamilnadu Government was made applicable to the subsidiary office and not the main office. In the circumstance, there is no question of extending the application of Notification issued by the Tamilnadu Government to the Mumbai office, which is the main office. Had the main office of the respondent been at Madras and his shop at Mumbai, both establishments could be covered by the Notification of the Tamilnadu Government in view of the above decision of the Apex Court relied upon by the appellant.

8. The next question to be considered is whether the Mumbai office could be independently covered by the E.S.I. Act on issuance of Notification under Section 1(5) by the Government of Maharashtra. Since undisputedly the number of employees working in Mumbai office is not sufficient for the application of the Act, there can be no question of the respondent being covered by the Act. The appeal is therefore dismissed. With the dismissal of the appeal, Civil Application No. 4687 of 2001 taken out for stay does not survive. The same is accordingly disposed off.

(Smt. R.P. SondurBaldota, J)

Bombay High Court

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