

HIGH COURT OF DELHI**Bench: Justice Dharmesh Sharma****Date of Decision: 4th January 2024**

Case No.:

FAO 119/2019

CM APPL. 13157/2019, CM APPL. 13155/2019, CM APPL. 13158/2019, CM
APPL. 9959/2020**APPELLANT:****M/S GUJRAL TOURS & TRAVELS PVT LTDAppellant****VERSUS****RESPONDENT:****EMPLOYEES STATE INSURANCE CORPORATIONRespondent****Legislation and Rules:**

The Employees' State Insurance Act, 1948 (ESI Act)

Indian Evidence Act, 1872 - Sections 34, 65B(4)

Subject:

Appeal against the order dismissing the challenge to the applicability of the Employees' State Insurance Act to the appellant company, concerning contributions and compliance with statutory obligations under the ESI Act.

Headnotes:

Applicability of ESI Act – Coverage of Establishments – Inspection conducted by ESIC revealed 29 employees in the appellant's establishment, thereby falling under the ESI Act provisions. Appellant failed to produce necessary attendance and wage records. The court emphasized that establishments employing 20 or more coverable employees were liable under the ESI Act even without using power [Paras 9.2-9.5, 14-17].

Burden of Proof – Evidence Admissibility – Appellant's failure to provide a certificate under Section 65B(4) of the Indian Evidence Act rendered

computer-generated wage records inadmissible. Court underlined the importance of properly maintained and presented evidence to substantiate claims [Paras 9.5, 18-19].

Substantial Question of Law – Appeal Dismissal – Appeal dismissed for lack of substantial question of law. Findings of the Trial Court were upheld as they did not suffer from any illegality, perversity, or incorrect application of the law [Paras 10, 20].

Decision: Appeal dismissed. Interim order vacated. ESI dues with accrued interest to be released to the respondent.

Referred Cases:

- Shambhu Nath Mehra v. The State of Ajmer, AIR 1956 SC 404
- Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681
- State of W.B. v. Mir Mohammad Omar and Ors., (2000) 8 SCC 382
- Zahira Habibulla H. Sheikh & Anr. vs. State of Gujarat & Ors., (2004) 4 SCC 158
- Vishal Singh v. State of Rajasthan, (2009) Cri. LJ 2243
- Kikar Singh v. State of Rajasthan, AIR 1993 SC 2426

Representing Advocates:

For Appellant: Mr. Harsh Singh

For Respondent: Mr. V.K. Singh and Ms. Prachi Singh

J U D G M E N T

FACTUAL BACKGROUND

1. This judgment shall decide an appeal under section 82(2) of The Employees' State Insurance Act, 1948¹ filed by the appellant company assailing judgment/order dated 12.12.2018 passed by the then learned SCJ-CUM-RC

¹ ESI Act

(West), Tis Hazari Courts, Delhi, designated as Employees" Insurance Court, in ESIC Petition No. 18/16 titles as „M/S Gujral Tour and Travels Pvt. Ltd. vs. Employees State Insurance Corporation², whereby the Learned Trial Court dismissed the petition filed by the appellant company challenging the applicability of the EST Act to it.

FACTUAL BACKGROUND:

2. The appellant is a Private Limited Company duly incorporated under the Companies Act having its office at GL-13, Shiv Nagar, Jail Road, New Delhi – 110058 and is being represented by Shri A S Gujral who is the Managing Director of the appellant company. The appellant company is engaged in business as Travel Agents, Tours Operators, Clearing and Forwarding Agents, Tourists Transport Operators, Ship Broker Customs Agents, Consultants for General Sales for any Airlines, Steamship Companies, Railways, Transport Companies etc.
3. On the other hand, the respondent ESIC³ is an organization fully financed from the contributions received from the poor workers/ insured persons and their employers. The respondent constituted under the ESI Act is enjoined upon to provide for certain benefits to the employees in case of sickness, maternity and employment injury and to make provisions for certain other matters in relation thereto.
4. Briefly stated, an inspection of the Establishment of the appellant company was conducted by the Social Security Officer⁴ of the respondent on 05.02.2009, and thereafter on 19.02.2009. Consequently, vide communication dated 23.02.2009, it was conveyed to the appellants herein that they fell under the purview of ESI Act provisionally w.e.f., 01.01.2009 and the establishment was allotted the code 11-40-106673-1006.
5. Thereafter, vide order dated 20.12.2011 passed under Section 45-A of ESI Act, the appellants herein were directed to contribute Rs. 85,800/- for the period from April 2009 to March, 2020 under the Act. It was further stated that this amount would be recovered under Section 45-C to 45-I under ESI Act if the same was not contributed. Additionally, interest amounting to the tune of Rs. 11,148/- was ascertained to be paid for the period of March 2011 to November 2011.

² ESIC

³ Employee"s State Insurance Corporation

⁴ SSO

6. Aggrieved by the above order, the appellant herein filed a petition under Section 75-76 of the ESI Act challenging the demand and recovery of Rs. 85,800/- vide order⁵ dated 20.12.2011 and demand and recovery of Rs. 11,148.00 vide C-18 no. D/Ins.I/CDO/ I1001066730001006/574/140 dated 02.02.2012. The learned Trial Court framed the following issues for consideration: -

“1. Whether the petitioner is entitled for quashing of the impugned demand of Rs. 85,800/- (as raised by the respondent against the petitioner) and also the order dt 20.12.2011 passed by the respondent?

OPP

2. Whether the petitioner has not come to the court with clean hands as mentioned in preliminary objection no. 1 of WS of the respondent and if so, its effect ? OPR

3. Relief ”

IMPUGNED ORDER:

7. Suffice to state that at this stage that the learned Trial Court on appreciation of evidence led by the parties found that on the date of inspection, a report was prepared on the spot by the SSO Ex.RW1/1, and admittedly 29 employees were found working in the Establishment and the plea of the petitioner/appellant company that the said document Ex.RW 1 corresponding to Ex.PW 1/3 of their own showed that the wages/salary described therein were net payment whereas gross payment should have been considered was not accepted for want of Inspection Book in terms of Regulation 102 A of ESI General Regulations, 1950 and for its failure to prove Ex.PW-1/3 which was a computer generated print out of the Register of payment of wages and salaries ,which was held to be falling foul to Section 34 of the Indian Evidence Act. Accordingly, Issue No. 1 was decided in favour of the respondent ESIC and against the petitioner/appellant company. Further, it was held that Issue no. 2 was wrongly framed and not required to be answered. Accordingly, the petition was dismissed and the said order is, therefore, assailed in the present appeal.
8. The main grievance of the petitioner company is that the learned Trial Court failed to appreciate that the RW-1 during the cross examination admitted that

in the year 2009 the employees drawing gross salary of Rs. 10,000/- or more were not covered under ESIC as per the Act; and that RW - 2 had not gone through the record submitted by the petitioner and had passed the order on the basis of the survey report submitted by the inspector in the office of the respondent; and that the order has been passed without appreciating the evidence produced on behalf of the appellants. Further, that the trial court has passed the order on the basis of conjecture and has ignored the factual matrix of the case.

⁵ No. D/CDO/Ins.I/11001066730001006/4017

ANALYSIS AND DECISION

9. Having given my thoughtful consideration to the submissions made by learned counsels for the rival parties at the Bar and on perusal of the record including the digitized LCR⁵, I find that the instant appeal is devoid of any merits.
10. First things first, the statutory appeal is provided under Section 82 (2) to the High Court from an order of an Employee/s Insurance Court if *it involves a substantial question of law*. In order to understand whether any substantial question of law is made out in the present appeal, it would be relevant to reproduce the reasons given by the learned Trial Court in deciding issue no. 1 against the appellant company, which reads as under :-

“9.1 ISSUE NO.I:- Whether the petitioner is entitled for quashing of the impugned demand of Rs. 85,800/- (as raised by the respondent against the petitioner) and also the order dt 20.12.2011 passed by the respondent ? OPP

The onus to prove this issue is upon the plaintiff.

9.2. It is not disputed by the parties that at the relevant time any establishment working without using power, employing 20 or more coverable employees was liable to be covered under the ESI Act. It is also not disputed that at the relevant time any employee drawing gross salary Rs. 10,000/- or less was coverable under ESI Act.

⁵ Lower Court Record

9.3 It is the contention of the respondent that the coverage order was passed in view of list Ex. RW 1/1 provided by the Manager of the petitioner and also other relevant materials. On the other hand it is contended by the respondent that true record of the salaries of the employees of the petitioner is reflected in Ex. PW 1/3. This record shows gross as well as net salaries of the employees. The salaries shown in the list Ex. RVV 1/1 are net salaries of the employees. During cross examination, RW-1 emphasized that the list Ex. RW 1/1 was prepared and signed by the Manager of the petitioner company.

9.4 The petitioner has not produced its attendance register. The petitioner has also not produced inspection book in terms of Regulation 102 A of ESI (General) Regulations 1950. It is the case of the respondent that records were not produced at the time of inspection. In para no.2 of the affidavit Ex. RW-1/A of RW-1, it is stated that the attendance register and wages register were not produced. Instead, handwritten list of 29 employees was handed over to RW-1.

9.5 Ex. PW-1/3 is computer generated printout of register of payment of wages and salaries. This printout cannot be considered as book of account in terms of Section 34 of Indian Evidence Act. During cross examination of RW-1, she repeatedly reiterated that Ex. RW-1/1 was prepared and signed by Sh. O.P. Bhatia, Manager of the petitioner. The petitioner has not specifically challenged the signatures appearing on the list Ex. RW-1/1. If it is argued that list Ex. RW-1/1/ was prepared by the Inspecting Officer RW-1 on her own, it is pertinent to observe that without going through the records of the petitioner, the Inspecting Officer could not have known the names of the employees of the petitioner. The said names in the list Ex. RW-1/1/ correspond to the account Ex. PW 1/3. This leads to the conclusion that list Ex. RW-1/1/ was either prepared by some employee(s) of the petitioner or prepared upon the instructions some employee Cs) of the petitioner. If the petitioner claims that list Ex. RW 1/1 was prepared out of the account Ex. PW 1/3, it is not clear what prevented the petitioner from directly handing over the account Ex. PW1/3 to the Inspecting Officer. The list Ex. RW-1/1 bears the stamp of the petitioner. It is not possible for the respondent's officer(s) to procure the stamp of the petitioner's business unless the same is provided by some employee(s) of the petitioner. Ex. PW 1/3 is only for the months of January and February 2009. This is

an isolated document. The petitioner has not filed the bank account details of its employees to show that the amount reflected in Ex. PW 1/3 was being regularly credited to the account of the employees. It is nowhere contended by the petitioner that the employees were paid in cash.

9.6 In view of above, there is no reason to disbelieve contents of the list Ex. RW 1/1.

9.7 Issue no. 1 is decided in favour of the respondent and against the petitioner.

11. In the instant appeal, the appellant company assails the aforesaid finding of facts by the learned Trial Court. It is well settled in law that if the findings of facts are illegal, perverse or unconscionable, there would arise a „question of law“.

12. It is pertinent to mention that Section 2 (12) of the ESI Act as it existed in the year 2009 before it was amended, by Act 18 of 2010, defines the term "factory" to mean any premises including the precincts thereof-

“(a) whereon ten or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on, or

(b) whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power or is ordinarily so carried on, but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952) or a railway running shed;”

13. A bare perusal of the aforesaid provisions would show that during the relevant time any Establishment which was working without power employing 20 or more coverable employees was liable to be covered under the ESI Act. There is further no dispute that during the relevant time any employee drawing gross salary of Rs.10,000/- or less was only coverable under the ESI Act.

14. Now, it is pertinent to appreciate that during the course of trial, the respondent examined RW-1, Ms. Reena Hira, SSO who deposed that she

inspected the premises on 05.02.2009 and she met the Manager O. P. Bhatia who produced a hand written slip Ex. RW1/1 bearing signatures of the Manager as also seal of the company that went to show that at the relevant time there were 29 employees working with the appellant company. The genuineness of Ex. RW1/1 has not been questioned in any manner by the appellant company.

15. It is also borne out from the record that the appellant company later produced a computer generated print out of the Register of payment of wages and salaries. PW-1 Ramesh Kalra, who was examined on behalf of the appellant company in his cross-examination showed ignorance to any inspection done on 05.02.2009 and 19.02.2009 but he did acknowledge that as on those days there were 14 employees who were drawing wages of Rs.10,000/- or less than Rs.10,000/-.

16. Much mileage was sought to be taken from the deposition of RW-1 in her cross examination, wherein she deposed as under:-

“It is true that on the date of inspection /survey 29 employees were working with the petitioner as per the record submitted by the petitioner. In the year 2009, the employees drawing gross salary of Rs.10,000/-or more were not covered under the ESI as per the Act. In the year 2009, the ESIC was applicable upon the company, if a company was employing at least 20 or more than 20 employees drawing up to Rs. 10,000/- or less than Rs.10,000/- per month.

17. It is borne out from the evidence brought and proven on the record by the parties that the details of the employees and their respective salaries reflected in Ex. RW1/1 otherwise tallied with the computer generated statement Ex. PW 1/3 relied upon by the appellant / company. Be that as it may, there is no flaw in the observations by the learned Trial Court that the appellant company failed to establish that the details of the wages in Ex. RW1/1 or for that matter Ex. PW 1/3 were based on the net salary being to the employees and not gross salary.

18. Needless to state that the burden of proving such aspect was upon the appellant company. The computer generated copy Ex. PW 1/3 was not supported by a Certificate in terms of Section 65 B (4) of the Indian Evidence Act⁷ and the learned Trial Court rightly concluded that it was also inadmissible for being a „self serving document“ in terms of Section 34 of the Indian

Evidence Act.⁸ No account books or relevant extracts therefrom were proven on the record to substantiate Ex. PW 1/3.

19. Further, the Attendance Register as well as Inspection Book in terms of Regulation 102A of the ESI General Regulation 1950⁹ was not produced either. Incidentally, there was no challenge in the cross-

⁷ 65B. Admissibility of electronic records.-

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say –

- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
- (c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be sign by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate, and for the purposes of this sub-section if shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

⁸ 34.[Entries in the books of account, including those maintained in an electronic form], regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

⁹ (i) Every principal employer shall main-tain a bound inspection book and shall be responsible for its production, on demand by an Inspector or any other officer of the Corporation duly authorised to exercise the powers of an Inspector irrespective of the fact whether the principal employer is present in the factory or establishment or not during the Inspection.

(ii) A note of all irregularities and illegalities discovered at the time of inspection indicating therein the action, if any, proposed to be taken against the principal employer together with the orders for their remedy or removal passed by an Inspector or any other officer of the Corporation duly authorised

to exercise the powers of an Inspector, shall be sent to the principal employer who shall enter the note and orders in the inspection book.

(iii) Every principal employer shall preserve the inspection book maintained under this regulation, after it is filled, for a period of 5 years from the date of the last entry therein.]

examination of RW-1 to her version that the Attendance Register and Registry was not produced, and at the cost of repetition, merely a hand written list of 29 employees was handed over to the RW-1.

FINAL ORDER:

20. The sum and substance of the aforesaid discussion is that that the finding on facts recorded by the learned Trial Court does not call for any interference. It does not suffer from any kind of patent illegality, perversity or incorrect approach to the law. Accordingly, the present appeal is dismissed.
21. The interim order dated 01.04.2019 passed by this Court whereby the operation of the impugned order dated 12.12.2018 was stayed subject to the amount of the ESI dues levied getting deposited with the Registrar General of this Court is hereby vacated and the respondent ESIC shall be released such amount with accrued interest forthwith.
22. The pending applications also stand disposed of.

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