

AFR
Reserved

Court No. - 19

Case :- WRIT - C No. - 1000927 of 2005

Petitioner :- U.P. Cooperative Federation Ltd. through M.D. & Anr

Respondent :- The Employees State Insurance Corporation & 3 Others

Counsel for Petitioner :- Shireesh Kumar

Counsel for Respondent :- Shishir Pradhan

Hon'ble Pankaj Bhatia,J.

Heard Sri Shireesh Kumar, Advocate assisted by Sri Mustafa Khan, the counsel for the petitioner and Sri Shishir Pradhan, the counsel for the respondents.

The present petition has been filed quashing the orders dated 24.06.2004, 30.07.2004 and the recovery certificate dated 14.02.2002 (Annexure nos. 5, 6 and 7 to the writ petition) whereby the demands have been quantified against the petitioners and they have been directed to pay the said amount in exercise of the powers conferred under the Employees State Insurance Act, 1948 ('ESI Act' for short).

The facts, in brief, are that the petitioner is an apex cooperative society created under section 2(a-4) Clause 3 of the U.P. Cooperative Societies Act, 1965. It is stated that the society is registered under the Societies Registration Act and more than 90% paid up share capital is owned by the State Government. It is also on record that the rules, regulations and guidelines issued by the State Government are normally applicable to the employees of the petitioner's society and they also enjoy certain benefits which are admissible to the employees of the State Government. It is also on record that the petitioner's society runs and execute various schemes of the State Government such as purchase of wheat, paddy, sugar, fertilizer, coal etc. as and when the same were

executed to the petitioner's society. It is stated that the petitioner is also running P.C.F. Press and the persons employed in the accounts section are enjoying the benefits of the State Government from time to time which according to the petitioner are far superior to the benefits flowing to the persons came under the 'ESI' Act. It is stated that the respondent no.1 issued a notice dated 18.11.2003 calling upon the petitioner to show cause as to why the petitioner's society should not be made liable for payment of the contribution to the ESI Fund, to which the petitioners raised their objections. However, an order came to be passed on 24.06.2004 wherein a demand of Rs.33,846/- was raised against the petitioners allegedly towards the employer's contribution for the employees working in the account section of PCF press for the period January 1981 to September 1986 and from January 1988 to May 1989 (Annexure 5).

It is stated that once again on 30.07.2004 a demand of Rs.1,39,262/- towards the employer's contribution was raised in respect of the employees working in the accounts section of the PCF Press. The petitioners once again stated that they had submitted their reply to the show cause notice dated 18.11.2003, however, the grounds taken in the show cause notice were not considered while raising the demand dated 24.06.2004. It is on record that subsequent thereto, a recovery certificate seeking to recover a sum of Rs.1,81,409/- was issued against the petitioners and the opposite party no.4 was directed to debit the said amount from the accounts of the petitioners. The said orders are under challenge before this Court.

The counsel for the petitioners argues that the petitioners would not be covered under the 'ESI Act' as the petitioner is

not notified under section 1(5) of the 'ESI' Act. He further argues that the petitioners cannot be termed as a 'factory' as defined under section 2(12) of the 'ESI Act' so as to include the petitioners under the ambit and scope of the 'ESI Act' by virtue of section 1(4) of the 'ESI Act'. He further argues that in any event the petitioners are giving the benefits to their employees which are far superior to the ones that are given to the employees by virtue of applicability of 'ESI Act'. In the light of the said arguments, the counsel for the petitioners argues that the orders impugned in the present writ petition are liable to be quashed. The petitioners has placed reliance on the judgment of the Supreme Court in the case of **M/s Srinivasa Rice Mill vs. Employees State Insurance Corporation; 2007 (1) SCC 705** as well as the judgment in the case of **Bangalore Turf Club Ltd. vs. Regional Director, ESI Corporation; 2009 (15) SCC 33**.

The counsel for the respondent Sri Shishir Pradhan, on the other hand, tries to justify the order by arguing that although no notification under section 1(5) of the Act has been issued. However, the petitioners' establishment would be covered under section 1(4) of the Act and by virtue of the said section 1(4) of the Act, all factories stand included within the ambit of the Act and thus no fault can be found with the orders passed against the petitioners and impugned in the present writ petition. He placed reliance on the judgment of the M.P. High Court in the case of **Sindi Sehiti M.P. Transport Cooperative Society Ltd. Bhopal vs. Regional Director, ESI Corporation and others; 1997 M.P.L.S.R. 335**.

In the light of the arguments raised, the point for determination that arises is whether the petitioners' establishment would be covered within the ambit of 'ESI Act'

by virtue of the mandate of Section 1(4) of the ESI Act as the parties are not at issue that no notification has been issued under section 1(5) of the Act.

It is relevant to quote section 1(4) as well as section 2(12) of the 'ESI Act' which read as under :

Section 1(4) : - *It shall apply, in the first instance, to all the factories including factories belonging to the government other than seasonal factories.*

Provided that nothing contained in this sub-section shall apply to a factory or establishment belonging to or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.

Section 2(12) :- *'factory' means any premises including the precincts thereof whereon ten or more persons are employed or were employed on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on 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;*

'ESI' Act was enacted to provide certain benefits to the employees in case of sickness, maternity and employment injury and for certain other matters in relation thereto. The intent and purpose of the Act was to provide benefits to the sections of the society who work within the factories and any other establishments [if notified under section 1(5) of the Act]. Clearly the intent of the Act is to provide socio economic benefits to a class of the society covered under the Act

A plain reading of section 1(4) of the Act clearly provides that the Act at the first instance was made applicable to all factories including the factories belonging to the government but excluding the seasonal factories. Proviso of sub-section 4 excludes factory or establishment belonging to or under the

control of the government whose employees are otherwise in respect of benefits substantially similar or superior to the benefits provided under this Act.

A plain reading of the said sub-section leaves no room for doubt that it is applicable to the factories at the first instance. The term 'factory' has been defined under section 2(12) to mean any premises where ten or more persons are employed and in any part of which, a manufacturing process is being carried on. The word 'manufacturing process' itself finds definition under section 2(14-AA) and incorporates the meaning assigned to the term 'manufacturing process' under the Factories Act.

It is important to note that the definition of the word 'manufacturing process' as defined under section 2(14-AA) was inserted under the ESI Act w.e.f. October 20, 1989 by virtue of ESI (Amendment) Act No.29 of 1989. Prior to the said amendment the meaning of 'manufacturing process' as specified under the Factories Act was not applicable to the 'ESI Act' and thus to that extent the amendment incorporated w.e.f. 20.10.1989 would apply prospectively and would not apply prior to the said amendment coming into force.

In the present case, the demand was raised for an amount of Rs.33,846/- for the employer's contribution for the employees working in the account section of PCF Press for the period January 1981 to September 1986 and from January 1988 to May 1989. Thus, the demand pertain to the period prior to 20.10.1989 when the definition of 'manufacturing process' under section 2(14-AA) was inserted under the ESI Act. In view of the amended Act No.29 of 1989 being prospective in nature, the definition of word 'manufacturing process' would

not be the same as expansively assigned under the 'Factories Act' and would be governed by the normal definition of 'manufacturing process'. Word 'manufacturing process' has been expansively defined under the Factories Act even to include Printing Press activity as a manufacturing process where as in common parlance Printing Press cannot be termed as a 'manufacturing process'. In view of the same, the applicability of the provisions of 'ESI Act' on the petitioner would clearly not be covered by Section 1(4) of the 'ESI Act' for the period prior to 21.10.1989 and thus, the demand cannot be justified.

The judgment of the Supreme Court in the case of **Bangalore Turf Club Ltd. (supra)** would not be applicable to the facts of the present case as in the said case the Supreme Court considered the scope of notification of establishments under section 1(5) of the 'ESI Act'.

The second judgment in the case of **M/s Srinivasa Rice Mill (supra)** relied upon by the petitioner laid down in para 18 and 31 as under :

Para-18. Before an Act is made applicable, in the event, a dispute is raised, the authorities exercising statutory power must determine the jurisdictional fact. Applicability of the Act would be a jurisdictional question. The Employer is entitled to raise such a question before the appropriate authority. Such a question can also be raised for the first time before a court exercising the power of judicial review although ordinarily the same should be raised before the concerned authority as a preliminary issue.

Para 31. We, therefore, are of the opinion that having regard to the facts and circumstances of this case the interest of justice would be subserved if Appellants are given an opportunity of hearing. Keeping in view the fact that Appellants now know the allegations made against them, no fresh notice need be served. Appellants may file their returns and also all other books of

accounts before the authorities under the Act within six weeks from date. The authorities shall give an opportunity of hearing to them and determine the question as to whether a jurisdictional fact existed for application of the provisions of the Act in cases of the respective employers. In the event, it is found, upon perusal of all the documents whereupon the employers may rely upon and on the basis of such information as may be sought for or directed to be furnished by the authority to the employer and upon hearing them that the provisions of the Act apply, the authorities may proceed as against them as is permissible in law.

In the present case, no such exercise was ever carried out prior to imposing the recovery against the petitioner.

The third judgment in the case of **Sindi Sehiti M.P. Transport Cooperative Society Ltd. Bhopal (supra)** as cited by the counsel for the respondents would also not applied to the facts of the case inasmuch as there is no issue in between the parties that the petitioners' organization has not been notified under section 1(5) of the 'ESI Act'.

As the demand in the present case pertain to the period January 1981 to May 1989 and I have already held that the definition of manufacturing process as adopted w.e.f. 20.10.1989 would not be applicable for the period for which the demand has been raised, clearly the demand is unsustainable, as such the orders dated 24.06.2004, 30.07.2004 and 14.02.2002 contained as Annexures 5, 6 and 7 to the writ petition are set aside.

The writ petition stands allowed.

The amount deposited before this court shall be refunded to the petitioners on their moving an appropriate application.

Order Date :- 20.4.2022

VNP/-

[Pankaj Bhatia, J.]