

IN THE EMPLOYEES STATE INSURANCE COURT,
MAHARASHTRA AT PUNE

APPLICATION (ESI) NO. 04 OF 2016

Samarth Gauges & Tools Applicant

... V/s ...

Employees State Insurance Corporation Opponent

-: ORDER BELOW EXH. C-2 :-
(Dated 05.05.2022)

In the instant application, the applicant has prayed to stay the recovery certificate and prohibitory order passed by the opponent corporation till final disposal of the main application.

2. Mr. Joshi, the Ld. Counsel for the Applicant submitted that the applicant has an establishment at the address located in the cause title. It is engaged in the manufacture of tools and gauges. It obtained a ESI Code and is duly complying with all the provisions of the ESI Act 1948. The Applicant is carrying out the work of assembly of gauges and tools. It has numerous other small suppliers and outside contractors. The Applicant gets work done from these outside labour contractors by providing them with material. These outside labour contractors work on the said material, do the concerned job and send the same back to the Applicant. The Applicant has absolutely no control over the work which is done by these outside contractors. Once the material is supplied to them the outside labour contractors carry out work in their own establishment with their own workers by using their skill, knowledge and technology, if any. After completing the job, as per the specifications

they send the material back to the Applicant in the form of finished or semi-finished jobs. The Applicant pays these outsider vendors as per the work done by them and the said amount is recorded in the books of accounts of the applicant as outside labour charges. The concerned vendors are not exclusive suppliers of the applicant. These are small establishments which carry out work for different establishments. The work is carried out by these outside vendors with the help of their own workmen. The work of these workmen is supervised by the concerned outside vendors. It is the outside vendors who pay wages and decide upon the terms and conditions of service of these workmen. The said workmen cannot be treated as the employees of the applicant and no ESI contribution can be claimed on the amount paid to these contractors as outside labour charges. The Opponent Corporation only with a view to harass the applicant has been conducting inspections from time to time and treating the said outside charges as omitted wages. Based on the said inspections, Opponent Corporation issued recovery certificates directly in some cases without passing any order under Section 45A of the ESI Act. The Recovery Officer has passed totally illegal and false order on 18.1.2016 claiming recovery of Rs. 4,79,219/- based recovery certificates dated 18.12.2008, 1.10.2009, 12.1.2010, 28.9.2010, 9.3.2012, 23.4.2013, 24.7.2013, 30.8.2013, 10.10.2013, 11.2.2014, 17.11.2014, 12.2.2015 and 2.11.2015. In furtherance of the said certificates, the Opponent issued prohibitory orders to the Andhra Bank and KJSB Bank. The Bank Accounts of the Applicant in these banks were attached by the Opponent Corporation. Hence, he prayed that the recovery certificate and prohibitory order issued by the opponent corporation shall be stayed till final disposal of the main application.

3. To support his contention, he placed reliance on the decision of Hon'ble Apex Court in the case of **C.E.S.C. Limited and Ors Vs. Subhash Chandra Bose and Ors MANU/SC/0466/1992**, wherein it has been observed in para 14 as under :-

“14.In the textual sense 'supervision' of the principal employer or his agent is on 'work' at the places envisaged and the word 'work' can neither be construed so broadly to be the final act of acceptance or rejection of work, nor so narrowly so as to be supervision at all times and at each and every step of the work. A harmonious construction alone would help carry out the purpose of the Act, which would mean moderating the two extremes. When the employee is put to work under the eye and gaze of the principal employer, or his agent, where he can be watched secretly, accidentally, or occasionally, while the work is in progress, so as to scrutinise the quality thereof and to detect faults therein, as also put to timely remedial measures by directions given, finally leading to the satisfactory completion and acceptance of the work, that would in our view be supervision for the purposes of Section 2(9) of the Act.

It is the consistency of vigil, the proverbial a stitch in time saves nine'. The standards of vigil would of course depend on the facts of each case. Now this function, the principal employer, no doubt can delegate to his agent who in the eye of law is his second self, i.e., a substitute of the principal employer. The immediate employer, instantly, the electrical contractors, can by statutory compulsion never be the agent of the principal employer. If such a relationship is permitted to be established it would not only obliterate the distinction between the two, but would violate the provisions of the Act as well as the contractual principle that a contractor and a contracted cannot be the same person. The E.S.I.C. claims establishment of such agency on the terms of the contract, a relationship expressed or implied. But, as is evident, the creation or deduction of such a relationship throws one towards the statutory scheme of keeping distinct the concept of the principle and immediate employer, because of diverse and distinct roles.”

4. Per contra, Ld. Counsel Smt. Chopra for the Opponent submitted that the Applicant's unit is covered under the ESI Act w.e.f. 01.01.2007 and carried out the work of manufacturing tools and gauges. The Social Security Officer of the Opponent Corporation visited the unit

for inspection on 30.07.2013, 23.09.2013, and 28.09.2013 and pointed out omitted wages. Accordingly, the contribution was claimed by issuing C-18 ad-hoc followed by 45-A orders dated 25.08.2014 and 18.5.2015 for Rs. 1,09,517/- for the period from 04/09 to 03/10, 1,46,134/- for 04/10 to 03/11 and Rs. 8,988/- for 04/10 to 03/11 (in respect of S.S. Industries) respectively. The Applicant deposited amount of Rs. 27,380/-. He failed to pay rest of the amount. The Applicant did not produce the record in respect of various contractors at the time of inspection on 30.07.2013, 23.09.2013 and 28.09.2013 and then on various personal hearings dated 25.06.2014, 11.07.2014, 28.07.2014 13.10.2014 wherein opportunities were given to the applicant to produce documentary evidence. However, no documentary evidence was produced by the Applicant on these dates. Hence, there was no other alternative than to determine the contribution due u/s 45-A at 6.5% of the total amount. The applicant made an appeal u/s 45-AA for which personal hearing was offered to the applicant on 24.11.2014 but the applicant failed to attend the same. Hence, order under Section 45-AA was passed on 14.01.2015 by the Appellant Authority. The Applicant is liable to pay the amount of Rs. 4,79,2019/-. Applicant has not made out prima facie case. Hence, she prayed to reject the application.

6. Applicant is coming with the specific case that the work has been taken from the contractors who worked outside the premises of the applicant. Applicant was not having control over the work of the employees working under the contractor. The contention of the applicant is supported by the affidavit. Whether the applicant supervises the work of the employees of the contractor ? It is a crucial issue involved in the present matter. The Applicant has raised a fair dispute for trial. This Court has also waived the condition of deposit of 50% amount as contemplated u/s 75 (2B) of the ESI Act as per order dated

13.12.2019 passed below Exh. C-4. Opponent corporation has not challenged the said order. The opponent corporation has withdrawn the amount of Rs. 1,79,188/- from the bank account of the applicant. Moreover, ld. counsel for the applicant gave no objection for operating the bank account. It is evident from the order dated 25.4.2022 passed below Exh. C-34.

7. In these circumstances, if the opponent corporation is not restrained from recovering the amount, the purpose of the applicant will be frustrated. There will be hardship to the opponent. Balance of convenience tilts in favour of the applicant. Hence, application deserves to be allowed.

8. In the result, I pass following order :

ORDER

1. Application is allowed.
2. Recovery certificate and prohibitory order issued by the opponent corporation are hereby stayed till final disposal of the main application.

Date :- 05.05.2022

Place :- Pune
nsp

(S. R. Tamboli)
Judge,
Employees Insurance Court, Pune.