

**IN THE COURT OF THE DISTRICT JUDGE-CUM-  
ESI COURT, KHURDA AT BHUBANESWAR.**

Present:

**Dr. D.P. Choudhury,**  
District Judge, Khurda  
at Bhubaneswar.

*Dated, Bhubaneswar the 25<sup>th</sup> July'14.*

**E.S.I. Misc. Case No. 142 of 2005.**

M/s. Hotel Grand, Sea Beach, Puri, through its Proprietor Shri Achyutananda Mohanty, S/o. Late Sanatan Mohanty, Swargadwar, Puri Town, P.S. - Puri Town, P.O./Dist. - Puri, Orissa.

... **Petitioner.**

***- V e r s u s -***

1. E.S.I. Corporation, Represented through its Recovery Officer, Regional Office, Panchdeep Bhawan, Janpath, Unit-IX, Bhubaneswar-7.
2. Branch Manager, Indian Overseas Bank, Laxmi Market Complex, Grand Road, Puri.
3. Sonali Panja, W/o. Ashim Kumar Panja, 13-Z, Ariff Road, Calcutta-67.
4. Karabi Panja, 13-Z, Ariff Road, Calcutta-67.
5. Sukadev Mukherjee, S/o. Late Bimal Kumar Mukherjee, 13, Subodh Garden, Kapilashram, Calcutta-700 070.
6. Dipankar Majumdar, S/o. Late J.L.Majumdar, 79/3/2A, Raja Naba Krishna Street, Suit No.13, Calcutta-700 005.

... **Opp. Parties.**

**Counsel :**

For Petitioner	--	Shri A. Mohanty & Associates.
For O.P.No.1	--	Shri S.N. Patnaik & Associates.
For O.P.No.2	--	Shri A. Panda.
For rest of O.Ps.	--	None.

Date of argument : 10.07.2014.

Date of judgment : 25.07.2014.

## **J U D G M E N T**

This is a petition under section 75 of the Employees' State Insurance Act, 1948 (hereinafter called "the Act").

2. The factual matrix leading to the case of the petitioner is that the petitioner being the absolute owner of the premises "HOTEL GRAND" situated at Swargadwara, Puri Town, leased out the same to opposite party Nos.3 to 6 on payment of rent with effect from May, 1997. It is averred, inter alia, that for the first time on 26.08.1998, the Insurance Inspector visited the said hotel premises; but due to its renovation work and the staff working there being out of station, no document could be produced before the inspecting authority. It is alleged that opposite party No.1 arbitrarily involved the petitioner and imposed demand and penalty treating his establishment under section 15 of the Act, although it is not covered under the Act. According to the petitioner, when the hotel has been leased out, he is not liable to pay the demand and penalty for the period 02.10.1997 to 30.09.1998 under the Act as per the inspection report. But, in spite of protest, opposite party No.1 went on raising the demand of Rs.44,616/- for the aforesaid period, as the petitioner engaged employees more than the statutory limit. It is averred that the provisions of the Act are not applicable to the petitioner, but it may be applicable to opposite party Nos.3 to 6. Since opposite party No.1, without any prior intimation, issued notice of attachment / prohibitory order in respect of Savings Bank Account maintained by the petitioner, the petitioner filed

the case to quash the order dated 04.11.2004 of the ESI Authority and to direct opposite party No.2 (Bank) not to disburse or release the disputed amount to opposite party No.1, pending finalisation of this case. Hence the petition.

3. Opposite party No.1 filed written statement, stating that the case of the petitioner is not maintainable in the eye of law, there is no cause of action to file the same and the claim of the petitioner is barred by limitation. It is further averred, inter alia, in the written statement that opposite party No.1 visited the premises of the petitioner on 04.11.1997 for the purpose of survey and, during inspection, he verified Attendance Register from 5/97 to 11/97 and Wage Register from 5/97 to 10/97 in respect of lodging section, but no records were produced in respect of the restaurant for inspection. Since the petitioner could not show any paper, again and again demand was raised and, finally, contribution amount of Rs.44,616/- was raised for the period from 02.10.1997 to 30.09.1998. The petitioner was also afforded chance of personal hearing. Thereafter, the Inspector again visited the premises of the petitioner and, finally, personal hearing was made and notice for demand of contribution was issued. Since the action has been taken correctly by the Employees' State Insurance Corporation ("the Corporation", for short) for realisation of contribution amount and interest thereon, the petition filed by the petitioner is liable for dismissal with cost.

4. Opposite party No.2, the Bank, filed separate

written statement, stating that there is no cause of action to file this case against opposite party No.2. It is their case that opposite party No.2 has no knowledge about existence of any case between opposite party No.1 and petitioner. But, they have received a notice from opposite party No.1 to attach the S.B. Account of the petitioner and to remit the demanded amount to opposite party No.1. After getting such notice, opposite party No.2 informed the petitioner that the property is going to be attached in view of the letter of opposite party No.1. Finally, opposite party No.2 prayed to dispose of the case accordingly.

5. The case is dismissed for default against opposite party Nos.3 & 4; opposite party No.5 is set ex parte; and the case against opposite party No.6 is abated.

6. On the aforesaid pleadings of the parties, the following issues have been framed :

### **I S S U E S**

1. Whether the petition under section 75 of the E.S.I. Act, 1948 is maintainable in law ?
2. Whether there is cause of action to file such dispute under the E.S.I. Act ?
3. Whether the case of the petitioner is barred by limitation ?
4. Whether the demand of Rs.44,616/- made by opposite party No.1 from the petitioner for the period 02.10.1997 to 30.09.1998 is legal, valid and proper ?
5. Whether the petitioner-establishment has been leased out to opposite party Nos.3 to 6 by the petitioner at the time of inspection ?
6. To what relief, the petitioner is entitled ?

## **FINDINGS**

### **ISSUE No.5 :**

7. This issue being important to decide the other issues is taken up first for discussion and effective adjudication. It is the case of the petitioner that he being the owner of the hotel in question leased out the same to opposite party Nos.3 to 6 with effect from May, 1997 to 30.09.1998 covering the date of inspection by the Corporation. Opposite party No.1 has averred in his written statement that on 04.11.1997, the Insurance Inspector visited the establishment of the petitioner and, during that inspection, he verified the Attendance Register from 5/97 to 11/97 and Wages Register from 5/97 to 10/97; but no record was produced for inspection. At para-10 of the written statement, it has been stated that on 26.08.1998 for the second time when inspection was made, no responsible person was found. On 27.08.1999, it was only reported that the hotel and restaurant have been leased out to opposite party Nos.3 and 6; but the petitioner could not produce any document to that effect. In such situation, onus lies on the petitioner to prove that during the relevant time, the hotel and restaurant in question were leased out by him to opposite party Nos.3 to 6 because even if neither of the parties has adduced evidence, it is the petitioner's case to fail and melt into insignificance. The petitioner, in order to discharge onus, has examined himself by appointing Pleader Commissioner and also adduced documentary evidence. It is revealed from examination-in-chief of P.W.1 that he had leased

out the hotel, including restaurant with kitchen and one room on the ground floor, only for ten years from 02.10.1997 to Sanyal Hotel by virtue of lease agreement executed on 01.10.1997 and representing the lessor the agreement was signed by Sumeet Sanyal and Amit Sanyal on 01.10.1997. It is further revealed that when the lessee did some renovation work by engaging local casual labourers and it was being undertaken, on 26/27.02.1998, the Recovery Officer of the Corporation inspected the premises and found that it was sub-let to one Sonali Panja (opposite party No.3) and Dipankar Majumdar (opposite party No.6), who are of Kolkata. He has further added that on the date of inspection, the Inspector was satisfied of the fact that the property was leased out, the lessees were out of station and the hotel was not functioning. At the same time, he has stated that this fact has not been reflected in the inspection note. This evidence brings doubt in the mind of the Court as to if there was official inspection and the hotel in question was leased out. In examination-in-chief, he has further stated that the agreement dated nil has been executed between himself and Sonali Panja (opposite party No.3), Karabi Panja (opposite party No.4), Sukadev Mukherjee (opposite party No.5) & Dipankar Majumdar (opposite party No.6) vide Ext.1. He has further stated that the agreement dated nil was executed between himself and Sonali Panja and three others vide Ext.2. The lease agreement dated 02.10.1997 was executed between himself and Sanyal vide Ext.3. There was vivid cross-examination to this witness, who admitted in para-13 that he is

the owner of Hotel Grand, Sea Beach, Puri. There is a suggestion at para-15 that Exts.1, 2 & 3 were prepared after preliminary inspection report on 04.11.1997 and for that purpose the signatures do not carry any date. I went through all the papers relating to lease agreement. Ext.1 shows that there was agreement for leasing out Hotel Grand by the petitioner to opposite party Nos.3 to 6 for a period of one year i.e. from 05.05.1997 to 04.05.1998. But, the document does not bear the signatures of either the petitioner or the opposite parties, the reasons best known to the petitioner. The recital of the document only shows that from 05.05.1997 for a period of one year, the conditions would be in force. But, surprisingly, neither P.W.1 nor opposite party Nos.3 to 6 have put date below their signatures. An adverse inference can be drawn as to the filing of this fictitious document, as the same does not bear any date when it was executed between the lessor and the lessees. Moreover, the signatures in the document have not been proved by the petitioner. Similarly, another agreement for lease vide Ext.2 shows that on 5<sup>th</sup> May, 1996 for a period of one year it was executed. But, strangely, there is no date under the signatures of the lessees. Although the petitioner has signed the document by putting date 02.05.1996, it is not known why the lessees have not signed with date. Likewise, Ext.3 shows that the hotel and restaurant of the petitioner was let out on lease for ten years from 02.10.1997. Since the lease deeds bear no date of execution by the lessees and their signatures have not been proved, the

credibility of P.W.1 and the documents exhibited on his behalf are doubtful. Of course, P.W.1 has proved the document vide Ext.4, which shows that a notice dated 10.12.1998 was issued by the Corporation to S. Mukherjee, Owner, M/s. Hotel Grand, Sea Beach, Puri. If this document has been issued to S. Mukherjee (opposite party No.5) being the owner of Hotel Grand, it is not known how he can be lessee of that hotel. Moreover, if notice has been issued to S. Mukherjee, it is not clarified by P.W.1 how it came to his possession. Thus, the documents filed by the petitioner coupled with the evidence are not creditworthy to prove the plea taken by him that from 02.10.1997, for a period of ten years, it was leased out by him to opposite party Nos.3 to 6. Opposite party Nos.3 to 6 have not entered their appearance to support the evidence of the petitioner.

8. Of course, P.W.2, who is said to be the employee of the lessee of Hotel Grand for the period 1997-1999, has stated that the hotel was being managed by one Amit Sanyal. In cross-examination, he has admitted that he has no appointment letter to show that he was appointed by the petitioner at the relevant time. Mr. S. Mukherjee and Mr. S. Sanyal were dealing with papers and he has no idea about that. In such circumstance, the evidence of P.W.2 is not clear and cogent as to how he was employed by Mr. S. Mukherjee and Mr. S. Sanyal when he has no paper to prove the same. So, at any rate, he has not proved the plea taken by the petitioner.

9. It is well settled law that the petitioner may prove



his case by cross-examining O.P.W.1, as the facts admitted need not be proved. Of course, it is also settled law that the petitioner cannot win his case by the weakness of the opposite parties. However, I take the evidence of O.P.W.1, who is the Social Security Officer. From his cross-examination, it has been brought out that notice vide Ext.D was addressed to Mr. Mukherjee, the owner of Hotel Grand, Puri and Grand Restaurant was leased out to Mr. Sanyal and Grand Hotel was leased out in favour of Mr. Mukherjee. Again, he has stated that Achutananda Mohanty (petitioner) being the owner of the building and land, on which Hotel Grand and Grand Restaurant are situated, has leased out to Mr. Mukherjee and Mr. Sanyal respectively. At the same time, he has admitted in cross-examination that during 1995-1996, he was not the Inspector and, during inspection, he was not present. Further, it has been brought out that he has no personal knowledge about preparation of inspection report as he was not a party to such inspection. When he is not a party to the inspection and he has no knowledge about preparation of inspection report, it is not known what is the source of his knowledge that Hotel Grand and Grand Restaurant were leased out by the petitioner to Mr. Mukherjee and Mr. Sanyal respectively. Thus, the evidence brought out during cross-examination of O.P.W.1 does not provide any aid to the petitioner. That apart, the lease agreement vide Ext.3, which is for ten years, has not been registered in terms of the provisions of the Transfer of Property Act, 1882.

10. For the foregoing reasons, I find that the petitioner

has neither adduced creditworthy and positive evidence, nor proved his plea while cross-examining O.P.W.1. On the whole, he has failed to discharge his onus to prove that during the relevant time, his hotel and restaurant were leased out to opposite party Nos.3 to 6. The evidence of opposite parties needs no discussion, when the onus on the petitioner has not been discharged. Accordingly, this issue is answered against the petitioner.

**ISSUE No.4 :**

11. The petitioner has taken plea that he is not liable to pay the demand of contribution of Rs.44,616/- made by opposite party No.1 for the period 02.10.1997 to 30.09.1998, as during that period he was not the principal employer and the hotel in question was leased out to opposite party Nos.3 to 6. Opposite party No.1 has taken plea that on 04.11.1997 there was inspection of the petitioner-establishment under section 45 of the Act and, during that period, no record was produced; but, during subsequent inspection, they found 16 employees working in the hotel being employed by the petitioner and, accordingly, show cause notice in Form No.C-18 dated 10.12.1998 was issued proposing to determine the contribution amount of Rs.44,616/- for the period 02.10.1997 to 30.09.1998. It has already been held in the foregoing issue that the petitioner is the owner of the hotel and it was not leased out to opposite party Nos.3 to 6 for that period. Since opposite party No.1 has issued demand notice and, accordingly, attached the Bank Account of the petitioner with

opposite party No.2, it is for the opposite party No.1 to prove that the said demand notice was in accordance with law, valid and proper.

12. Opposite party No.1, in order to discharge its onus, has examined its Social Security Officer and produced certain documents. It appears from the evidence of O.P.W.1 that one Satrugna Sutar had made preliminary inspection of the petitioner-establishment on 04.11.1997 for verifying its coverability under the Act. He found that the petitioner-unit consisted of Lodging Section and Restaurant Section. The Attendance Register from 5/97 to 11/97 and Wages Register from 5/97 to 10/97 of the Lodging Section revealed that eight employees were employed for wages during the month of October, 1997; but no record was produced for Restaurant Section. He has further stated that the concerned officer, on physical verification, found eight employees working in Restaurant Section. So, in toto, sixteen employees were employed. He has proved the preliminary inspection report dated 04.11.1997 vide Ext.A. On going through the said report, it appears that this is a printed form and entries therein have been filled in by handwriting. The said form shows that both lodging and boarding sections of the petitioner-establishment were inspected. In fact, in the report, there was information given to the officer concerned that it has been leased out to S. Mukherjee (opposite party No.5), Ashim Panja (husband of opposite party No.3) & Dipankar Majumdar (opposite party No.6) and the

receptionist received a copy of the inspection note. The annexures to the report show the names of the employees working in restaurant and hotel of M/s. Hotel Grand. Of course, the seal and signature of that officer has been given in Ext.A. When the matter has been reported as such, the column meant for owner's name must have been filled in basing on the information given by the employees of the petitioner for which this entry is based on hear-say and, in fact, the petitioner has claimed that he is the owner of the hotel in question, although it was leased out to opposite party Nos.3 & 6, which has not been accepted in the aforesaid paragraphs. Be that as it may, since the document vide Ext.A has been maintained in course of business in official capacity and no erasers are there and no doubt has been entertained thereover, the said document is taken as that of inspection made by the Corporation in respect of the petitioner-establishment on 04.11.1997.

13. O.P.W.1 has proved Ext.B, which shows that Hotel Grand has been given notice to implement the provisions of the Act basing on the inspection made on 04.11.1997. O.P.W.1 has also proved Exts.C & D to show that Hotel Grand has been served a notice to show-cause along with the demand for payment of the contribution amount of Rs.44,616/- for the period 02.10.1997 to 30.09.1998. O.P.W.1 has also proved the letter of the Insurance Inspector addressed to the Regional Director of the Corporation about local inspection made by him to the petitioner-establishment vide Ext.E. O.P.W.1 has also proved Ext.F where

the present petitioner and M/s. Hotel Grand have been sent a letter of the Deputy Director of the Corporation asking them to appear and explain about non-payment of contribution amount of Rs.44,616/-. The said letter was sent by Registered Post in the address of the petitioner; but that has been returned as he refused to receive the same. The postal cover is marked as Ext.G. He has also proved the second inspection note dated 12.01.1999 vide Ext.H where the petitioner has been arrayed as the owner of M/s. Hotel Grand and he has been asked to comply the inspection note dated 31.08.1998. Again, a letter was sent vide Ext.J to the petitioner and M/s. Hotel Grand asking them to appear before the Authority. Similarly, a letter was also sent to them vide Ext.K asking them to explain about non-payment of contribution dues and non-submission of returns thereof and to make all round compliance in accordance with the provisions of the Act. That letter also returned unserved. Then, on 07.06.2004, order under section 45-A of the Act vide Ext.M was sent to the petitioner for compliance; but no improvement took place. Another letter was also served on the petitioner-establishment on 01.09.2004 vide Ext.N. There also, the same amount has been reflected as outstanding against the petitioner. O.P.W.1 has proved all the documents, but he has admitted in cross-examination that he was not a party to the inspection team. Moreover, he has no knowledge about preparation of the inspection report, as he was not a party to such inspection. Since the records are maintained in due discharge of official duties and they are kept in the office

of the Corporation, there seems to be no infirmity in proving those documents by O.P.W.1.

14. Thus, opposite party No.1 has discharged his onus by proving the aforementioned documents. In view of the aforesaid discussion, the irresistible conclusion is that opposite party No.1 has discharged his onus by examining its Social Security Officer. Hence, I find that opposite party No.1 has been successful in serving demand notice upon the petitioner for payment of the contribution amount of Rs.44,616/-. Hence, this issue is answered accordingly.

**ISSUE No.3 :**

15. A plea has been taken by opposite party No.1 that the case of the petitioner is barred by limitation. The cause of action, as defined under the Act, means a bundle of facts. The cause of action has been well defined in explanation to section 77(1-A) of the Act in the following manner :

“Every such application shall be made within a period of three years from the date on which the cause of action arose.

*Explanation –* For the purpose of this sub-section -

(a) the cause of action in respect of a claim for benefit shall not be deemed to arise unless the insured person or in the case of dependant's benefit, the dependants of the insured person claims or claim that benefit in accordance with the regulations made in that behalf within a period of twelve months after the claim became due or within such further period as the Employees' Insurance Court may allow on grounds which appear to it to be reasonable;

(b) the cause of action in respect of a claim by the Corporation for recovering contributions (including interest and damages) from the principal employer shall be deemed to have

arisen on the date on which such claim is made by the Corporation for the first time;

Provided that no claim shall be made by the Corporation after five years of the period to which the claim relates;

(c) the cause of action in respect of a claim by the principal employer for recovering contributions from any immediate employer shall not be deemed to arise till the date by which the evidence of contributions having been paid is due to be received by the Corporation under the regulations.”

According to Cl.(b) of section 77(1-A) of the Act, the cause of action for recovering contributions from the principal employer shall be deemed to have arisen on the date on which such claim is made by the Corporation for the first time. In the instant case, I have already discussed that as per Exts.C, D & F, demand notice was sent to the petitioner and, lastly, he remained absent to receive the same as per Ext.G. As per Exts.J & K, demand has been made to pay the contribution amount; but vide Ext.L, the petitioner refused to receive the demand notice. Hence, the demand is deemed to have been served for the first time on the petitioner on 20.09.2002 and the case appears to have been filed on 23.03.2005. So, according to section 77(1-A) of the Act, the case of the petitioner is not barred by limitation. Hence, issue No.3 is answered accordingly.

**ISSUE No.2 :**

16. I have already discussed in the foregoing paragraphs that the petitioner has failed to prove the lease deeds and the petitioner is liable to pay the contribution dues amounting to Rs.44,616/- for the period 02.10.1997 to 30.09.1998. Thus, there

is cause of action to file such dispute under the Act.

**ISSUE No.1 :**

17. It has already been held that the petitioner-establishment is run and owned by the petitioner and the demand of contribution of Rs.44,616/- is valid, legal and proper. The only other plea that has been taken by the petitioner himself is that he being the owner of the hotel cannot be reckoned as the principal employer to attract the provisions of the Act, whereas opposite party No.1 submits that he is governed under the Act and, as such, the present petition under section 75 of the Act is not maintainable. Section 2(17) of the Act says that :

“principal employer” means in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under the Factories Act, 1948, the person so named”.

Thus, the owner of the factory is a principal employer. Now, it has been found from the evidence of O.P.W.1 in para-10 that the petitioner is the owner of the building and land, on which Hotel Grand and Grand Restaurant are situated. It is further revealed from the inspection note vide Ext.A that all total sixteen employees were working and power was also used. Not only this, but also the Factories Act defines the “factory” and “manufacturing process” and on going through the said definitions, hotel and restaurant are coming as factory. As such, the petitioner being the owner of Hotel Grand comes within the purview of the Act. Hence, the petition under section 75 of the



Act is not maintainable.

**ISSUE No.6 :**

18. It has already been held that the demand of contribution of Rs.44,616/- made by opposite party No.1 from the petitioner-establishment for the period 02.10.1997 to 30.09.1998 is legal, valid and binding on the petitioner and the petitioner comes under the purview of the Act being the principal employer of having sixteen employees in Hotel Grand, including restaurant, and there is no cause of action to file this case and a sum of Rs.44,616/- is payable by the petitioner to opposite party No.1 for the period 02.10.1997 to 30.09.1998 towards contribution dues. Since the contribution money has not been paid by the petitioner, action by opposite party No.1 for realisation of the same with interest by issuing letter of request for recovery of Rs.44,616/- plus interest, which comes to Rs.86,372/- vide Exts.N & P, is justified. Accordingly, no other relief can be granted to the petitioner. Hence ordered :

**O R D E R**

The E.S.I. Misc. Case being devoid of merit stands dismissed on contest against opposite party Nos.1 and 2 with cost.

**District Judge, Khurda  
at Bhubaneswar.**

25.07.2014.

Dictated, corrected by me and pronounced in the open Court this day the 25<sup>th</sup> July, 2014.

**District Judge, Khurda  
at Bhubaneswar.**

25.07.2014.

**List of witnesses examined for petitioner.**

P.W.1 -- Achutananda Mohanty &  
P.W.2 -- Pravash Ch. Pradhan.

**List of witnesses examined for opposite parties.**

O.P.W.1 -- Sudhakar Das.

**List of documents admitted in evidence for petitioner.**

Ext.1 -- Agreement of lease,  
Ext.2 -- Agreement of lease,  
Ext.3 -- Lease Agreement &  
Ext.4 -- Notice dated 10.12.1998.

**List of documents admitted in evidence for opposite parties.**

Ext.A -- Preliminary inspection report dated  
04.11.1997,  
Ext.B -- Form No.C-11,  
Ext.C -- Form No.C-18,  
Ext.D -- Show cause notice dated 10.12.1998,  
Ext.E -- Letter with enclosure dated 31.08.1998,  
Ext.F -- Letter dated 24.11.1999,  
Ext.G -- Undelivered Registered Letter,  
Ext.H -- Inspection report dated 12.01.1999,  
Ext.J -- Letter dated 21.08.2002,  
Ext.K -- Letter dated 16.09.2002,  
Ext.L -- Undelivered letter dated 18.09.2002,  
Ext.M -- Order under section 45-A dated 07.06.2004,  
Ext.N -- Form No.C-19 dated 01.09.2004, &  
Ext.P -- Attachment order dated 04.11.2004.

**District Judge, Khurda  
at Bhubaneswar.  
25.07.2014.**

