

**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 16th Dec.'14.

E.S.I. Misc. Case No.192 of 2004.

Kalinga Equipments, Plot Nos.107 & 110, Industrial Estate, Mancheswar, P.O. – Rasulgarh, P.S. – Mancheswar, Bhubaneswar, Dist. – Khurda, Represented through its Proprietor Prasanta Kumar Das, aged about 42 years, S/o. Sri Chandra Mani Das.

... **Petitioner.**

-V e r s u s-

1. Employees' State Insurance Corporation, "Panchadeep Bhawan", Janpath, Unit-9, Bhubaneswar-22, Dist. – Khurda, represented through its Regional Director.
2. Dy. Director (Revenue), Employees' State Insurance Corporation, "Panchadeep Bhawan", Janpath, Unit-9, Bhubaneswar-22, Dist. – Khurda.
3. Recovery Officer, Employees' State Insurance Corporation, "Panchadeep Bhawan", Janpath, Unit-9, Bhubaneswar, Dist. – Khurda.
4. M/s. Orissa Small Scale Industries Corporation, Madhupatna, Cuttack, represented through its Managing Director.

... **Opp. Parties.**

Counsel :

For Petitioners -- Shri B.N. Hota & Associates.

For O.P. Nos.1 to 3-- Shri S.N. Patnaik & Associates.

For O.P. No.4 -- None (Set ex parte).

Date of arguments : 19.11.2014.

Date of judgment : 16.12.2014.

J U D G M E N T

This is an application under section 75 of the Employees' State Insurance Act, 1948 (hereinafter called "the Act") filed by the petitioner.

2. The factual matrix leading to the case of the petitioner is that the petitioner being registered under the District Industrial Centre, Bhubaneswar to manufacture steel furniture has started its operation in 1981 with three numbers of employees. Ever since the petitioner-unit started functioning, its maximum number of employees remained seven and, as such, it is not covered under the provisions of the Act. On 09.07.1991, the Inspector of Employees' State Insurance Corporation (in short, "ESI") visited the their establishment and found three to seven employees after verifying the Attendance Register. Again, on 18.01.1994, he inspected the petitioner-establishment and verified the Attendance Register and signed thereon acknowledging the number of employees as four. But, surprisingly, opposite party No.2 issued notice to show-cause as the petitioner has got eleven numbers of employees. Objection was raised by the

petitioner, but overriding such objection, the ESI passed order demanding contribution of Rs.8,452/-. The petitioner again approached the Authority of the ESI, but opposite party No.2 passed orders demanding contribution of Rs.62,664/- for the period 4/96 to 9/98. Subsequently, another notice was issued on 13.07.2002 proposing assessment of contribution for the period 10/2000 to 9/2001. It is also averred in the petition that opposite party No.2 also determined the contribution for the period 4/99 to 9/2000 as Rs.46,011/-. It is pleaded by the petitioner that when at no point of time, the petitioner has deployed more than seven numbers of employees, the demand of contribution by the ESI is illegal and, as such, the orders passed by opposite party No.2 on 02.05.2001, 29.10.2002, & 23.12.2002 are liable to be set aside. So, the petitioner filed the case to declare its unit to be not covered under the Act and to set aside the orders passed by the ESI demanding the contribution amounts and finally to set aside the attachment order dated 10.02.2004. Hence the petition.

3. Opposite party Nos.1 to 3 filed written statement refuting the allegations made in the petition and submitted that the petition is not maintainable in the eye of law and the petitioner is not entitled to any relief as prayed for. According to them, on 18.01.1994, the Inspector of ESI visited the

establishment of the petitioner, but the petitioner failed to produce Wage Register, Books of Accounts like Cash Book, ledgers, etc. On physical verification, the Inspector found eleven employees working there. Accordingly, necessary notice under the provisions of law was sent to the petitioner. He was also given sufficient opportunity for personal hearing on different occasions right from 18.01.1994 to 09/2001. Since the petitioner failed to pay the dues in spite of issuance of notice, opposite party No.3 issued attachment order dated 10.02.2004 to the State Bank of India and M/s. O.S.I.C. to pay the dues amounting to Rs.1,83,842/- involved in five certificates. It is submitted that in view of the Notice under section 45-C & 45-I of the Act, the petitioner is liable to pay the contribution. There is no merit in the petition and the demand of contributions made by the ESI is not barred by limitation. As such, it is prayed to reject the petition.

4. Opposite party No.4 filed show-cause stating that they have nothing to say in this case except the fact that they have attached the funds, but subsequently by the order of the Hon'ble High Court, they released the same.

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

I S S U E S

- i) Whether the case is maintainable ?
- ii) Whether the petitioner-establishment is covered under the ESI Act ?
- iii) Whether the petitioner is liable to pay the contributions as per the notice issued by the ESI ?
- iv) To what other reliefs, the petitioner is entitled ?

FINDINGS

Issue No.(ii & iii) :

6. Both the issues being interlinked are taken up together for discussion. In the case at hand, it is pleaded by the petitioner that he has deployed only three to seven employees in his organization and not beyond that at any point of time. It is also pleaded in the petition that for the said reason, he has informed the ESI Authority to exempt him from the purview of the Act, but the ESI Authority went on demanding contributions from the petitioner-establishment. It is well settled law that when both parties have adduced evidence, burden of proof loses its importance as the parties have to prove their respective cases. In the present case, both parties have led evidence for which they are to prove their respective plea.

7. In support of his plea, the petitioner has examined two witnesses, including himself as P.W.1, and adduced documentary evidence. It is revealed from the affidavit evidence submitted by P.W.1 that the inspection made by the

Inspector of ESI on 18.01.1994 was not correct because as a matter of fact he had verified the Attendance Register and the Wage Register and put his signature, but prepared the report otherwise. So, he challenged the notices issued from time to time imposing demand for payment of contributions on the petitioner-establishment. He appears to be the Proprietor of the petitioner-establishment. He has exhibited the documents vide Exts.1 to 12. On scrutiny of the documents, it appears that P.W.1 has proved the notice under section 45-A of the Act for the period 10/2000 to 9/2001 demanding contribution for an amount of Rs.30,674/-. He has also proved copy of the attachment order issued by the ESI vide Ext.2. Not only this, but also he has proved copy of the inspection report dated 18.01.1994 of the Inspector of ESI, which shows about physical presence of eleven employees in the petitioner-establishment on the date of inspection. He has also proved the correspondence between him and the ESI for exemption from payment of contribution vide Exts.4, 5 & 6. It appears from those documents that it has been clearly mentioned in Ext.6, which is notice under section 45-A of the Act, that the petitioner-establishment is covered under section 2(12) of the Act w.e.f. 18.01.1994. He has also proved copy of the order dated 11.05.2004 passed by the Hon'ble High Court in W.P.

(C) No.4677 of 2004 vide Ext.7, wherein the Hon'ble Court have been pleased to pass order to vacate the order of attachment on deposit of Rs.40,000/- by the petitioner-establishment. Ext.8 is copy of the order dated 19.08.2008 of the Hon'ble High Court in W.P.(C) No.9664 of 2008 wherein the petitioner-establishment was asked to deposit Rs.20,000/- as part of contribution with this Court against the statutory deposit of Rs.51,921/-. P.W.1 has also produced the Muster Roll maintained vide Exts.9 to 11 and the Wage Register maintained vide Ext.12. He has proved the signature of the Inspector vide Ext.9/a. On going through Ext.9, it appears that there are entries in respect of four employees and the Inspector is found to have endorsed the same after verification vide Ext.9/a. Perusal of Ext.3, which is copy of the inspection report, shows that the names of employees against Sl. Nos.1 to 4 mentioned therein are reflected in Ext.9; but the names of rest of the employees did not figure there. Surprisingly, on the next month i.e. February, 1994, the name of one Kailash Bhoi has been added. In fact, his name is also reflected in Ext.3 by the Inspector. So, it cannot be said that Ext.3 is prepared being not verified with the Muster Roll to ascertain the actual number of employees deployed. Moreover, the Attendance Register vide Ext.9 does not contain the page certificate.

Other registers are not connected to the year 1994, which belong to subsequent years.

8. In para-17 of his cross-examination, P.W.1 has admitted that he has filed this case challenging the contributions of different years. In the same para, denying the suggestion of contesting opposite parties, he has stated that on 18.01.1994, the Insurance Inspector found eleven persons working in his establishment. When he does not disclose about his presence on 18.01.1994 during inspection, his evidence is solely based on documents which brings the fact that the Inspector found eleven persons as per the list vide Ext.3.

9. P.W.2, who is one of the employees of the petitioner-establishment and signed on the date of inspection, does not reveal in his affidavit evidence how many persons were there on 18.01.1994 when the Inspector visited their establishment. He has stated that his affidavit evidence has been prepared as per his instructions, but in cross-examination reply came from him that he does not know how to read and write English and as per instructions of his employer, he has filed the affidavit. He simply denied the suggestion of the opposite parties that on 18.01.1994 he has signed on the paper and that eleven persons in total were working. He denied the suggestion of opposite parties that he has signed on the

paper on 18.01.1994. But, his signature made in the Court on the date of adducing his oral evidence tallies with the signature put on 18.01.1994 on the inspection note vide Ext.3. Thus, in cross-examination, his evidence is not cogent, clear and trustworthy to show that he has filed the affidavit as per his instructions and eleven persons were not working on 18.01.1994. Thus, the petitioner has failed to establish by oral and documentary evidence that on 18.01.1994, only four persons were working and at no point of time more than seven persons have worked in his establishment.

10. Opposite party Nos.1 to 3 have examined one witness and adduced a good number of documentary evidence. P.W.1, who is the Social Security Officer, has revealed that the Insurance Inspector of the ESI visited the petitioner-establishment on 18.01.1994 and on verification of the Attendance Register found eleven employees working for wages in the premises and, as such, he recorded their names, which was duly acknowledged by Santosh Kumar Swain, the Manager of the petitioner-establishment. It is further revealed from his affidavit evidence that thereafter notice in Form No.C-18 was sent to determine the contribution for the period 18.01.1994 to 30.09.1994 amounting to Rs.8,452/-. Subsequently, personal hearing was also afforded to the petitioner. But, the

petitioner went on delaying the payment of contributions for the period 10/94 to 09/95, 10/95 to 03/96, 04/96 to 09/98, 04/99 to 09/2000 & 10/2000 to 09/2001 for which certificate case was started against the petitioner-establishment. It is also revealed from his affidavit evidence that the Recovery Officer has also issued order of attachment on 10.02.2004 for recovery of total dues amounting to Rs.1,83,842/- from the petitioner. He has also proved the documents vide Exts.A to AP. On going through the said documents, it appears that on 18.01.1994, the Inspector visited the petitioner-establishment and found eleven persons working, out of whom one was absent. The documents also show that statutory notice was sent with report of the Inspector, but constantly the petitioner was taking the plea that his establishment is not coming within the purview of the Act. It is further found from Ext.K that the petitioner was avoiding to attend the hearing. Ext.L shows that contribution for an amount of Rs.11,979/- was imposed on the petitioner for the period 01.10.1994 to 30.09.1995. Same was served as per Ext.M i.e. postal acknowledgement. Thereafter, the petitioner did not participate. Ext.R shows that contribution for the period 10/95 to 03/96 amounting to Rs.5,890/- was also demanded. It is revealed from Ext.U that contribution for the period 04/96 to 12/96 & 01/97 to 09/98

total amounting to Rs.62,664/- was ordered to be levied from the petitioner. Ext.V shows that contribution for the period 10/98 to 03/99 amounting to Rs.15,337/- was demanded from the petitioner. Similarly, Ext.Y shows that notice was sent to the petitioner for payment of contribution for the period 04/96 to 09/98 & 10/98 to 03/99. Ext.AB shows that a sum of Rs.30,044/- for the period 04/96 to 09/98 was imposed on the petitioner-establishment towards contribution. Ext.AC shows that certificate proceeding has been started against the petitioner. Ext.AD reveals that letter was issued by the ESI to the Proprietor of the petitioner-establishment in Form No.C-18 and a sum of Rs.46,011/- was due for payment towards contribution for the period 04/99 to 09/2000. Thereafter, personal hearing was afforded to the petitioner vide Ext.AF for the period 04/99 to 09/2000. Ext.AH shows that for the said period, there was outstanding of Rs.62,645/-. Ext.AJ shows that due to non-payment of contribution amounts, property of the petitioner-establishment has been attached.

11. In cross-examination, it has been brought out from O.P.W.1 that contribution is calculated on the basis of number of employees deployed and payment of their monthly wages. Further, in para-14 of his cross-examination, he has stated that Ext.3 is the basis of calculation of contribution and as per

Ext.3, three persons are regular and rest of the persons are casual employees. In fact, Ext.3, which is also Ext.A, shows that out of eleven employees one was found absent at the time of inspection. When this fact is brought out in cross-examination, it is in consonance with the written statement that on 18.01.1994 there was inspection and the Inspector found ten numbers of employees working physically, but the names of eleven employees were there on record. Thus, it is proved by O.P.W.1 in consistent, clear and cogent evidence that on 18.01.1994, the Inspector of ESI inspected the petitioner-establishment and found the names of eleven employees but ten of them were physically present on that day.

12. From the aforesaid discussions, it is found that the petitioner has failed to substantiate his stand whereas the contesting opposite parties have succeeded in proving that since 18.01.1994, the petitioner has become defaulter in payment of the contributions, although eleven employees were deployed in his establishment. Section 2(12) of the Act states as under :

“Factory” means 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.”

When there were ten persons employed by the petitioner and his manufacturing process was carried on with the aid of power as per Exts.3 & A, it is found that the petitioner-establishment is coming under section 2(12) of the Act and it is also available from Exts.1 & 2 that there is outstanding of Rs.1,83,842/- against the petitioner towards payment of contribution for which the certificate case has already been started. But, it is found from Exts.7 & 8, as discussed above, that the petitioner has been directed by the Hon'ble High Court to deposit Rs.40,000/- & Rs.20,000/- in the Court. It is revealed from the order-sheet that the petitioner has deposited both the above amounts. So, after deduction of the said amounts, balance amount is required to be paid by the petitioner to opposite party Nos.1 to 3. Thus, issue Nos.(ii) & (iii) are answered in favour of opposite party Nos.1 to 3, but against the petitioner.

Issue No.(i) :

13. The contesting opposite parties have taken a plea that the petition is not maintainable being barred by limitation. In fact, the case is filed in 2004 challenging the demand of contribution made in 2001. It is revealed from the petition that challenge has been made to the entire contribution amounts right from 1994 under the provisions of section 75 of the Act. As discussed in the foregoing paragraphs, demand has been made for different years by virtue of service of notice under section 45-A of the Act. Last notice was served in the year, 2002 vide Ext.1. So, last notice is covered by this case. But, for rest of the years, the case is barred by limitation for the reason that the application has not been made within three years of those notices for the preceding years. Even if the statute is beneficial, but so far as cause of action is concerned, there is no relaxation. On the other hand, against most of the demand for contributions made by O.P. Nos.1 to 3, there is no cause of action. For the latest notice, there cannot also be cause of action because of the fact that the petitioner-establishment is coming within the purview of the Act and thus is liable to pay the contribution amount, as held above. On the whole, I find that the petition is maintainable in the eye of law. This issue is answered against the petitioner.

Issue No.(iv) :

14. Since the petitioner is coming under the purview of the Act and he is defaulted in payment of contributions i.e. Rs.1,23,842/- although is liable to pay the same to the ESI, no relief can be granted to him. Hence ordered :

O R D E R

The E.S.I. Misc. Case being devoid of merit stands dismissed on contest against the opposite party Nos.1 to 3 and ex parte against opposite party No.4, but in the circumstances without cost.

**District Judge, Khurda
at Bhubaneswar.**

16.12.2014.

Dictated, corrected by me and pronounced in the open Court this day the 16th December, 2014.

**District Judge, Khurda
at Bhubaneswar.**

16.12.2014.

List of witnesses examined for petitioner.

P.W.1 -- Prasanta Kumar Das &
P.W.2 -- Gopal Chandra Mohapatra.

List of witnesses examined for contesting opposite parties.

O.P.W.1 -- Pradeep Behera.

List of documents admitted in evidence for petitioner.

Ext.1 -- Notice under section 45-A of ESI Act,
Ext.2 -- Attachment order dated 10.02.2004,
Ext.3 -- Copy of Inspection Report dated
18.01.1994,
Ext.4 -- Notice dated 01.01.1996,
Ext.5 -- Reply dated 10.01.1996,

- Ext.6 -- Order passed under section 45-A of ESI Act,
 Ext.7 -- Certified copy of order passed by the Hon'ble High Court in W.P.(C) No.4677 of 2004,
 Ext.8 -- Certified copy of order passed by the Hon'ble High Court in W.P.(C) No.9664 of 2008,
 Exts.9 to 11 -- Muster Roll,
 Ext.9/a -- Endorsement and signature of Insurance Inspector M.R. Rout,
 Exts.12 to 12/d Wage Payment Registers for the period 01.01.1994 to 31.03.2004,
 Ext.12/e to 12/u Signatures of P.W.2 in Ext.12,
 Ext.a -- Letter dated 08.04.1996 of the petitioner, &
 Ext.a/1 -- Signature of P.W.1 in Ext.A.

List of documents admitted in evidence for contesting opposite parties.

- Ext.A -- Preliminary Inspection Report dated 18.01.1994,
 Ext.B -- Form No.C-11,
 Ext.C -- Form No.C-18,
 Ext.D -- Letter dated 08.04.1996,
 Ext.E -- Postal A.D. dated 01.02.1995,
 Ext.F -- Order under section 45-A of ESI Act,
 Ext.G -- Postal A.D. dated 18.04.1996,
 Ext.H -- Form No.C-19 dated 05.08.1996,
 Ext.J -- Notice dated 28.08.1996,
 Ext.K -- Letter dated 16.04.1996,
 Ext.L -- Form No.C-18 dated 01.01.1996,
 Ext.M -- Postal A.D. dated 08.01.1996,
 Ext.M/1 -- Order dated 05.08.1996 under section 45-A of ESI Act,
 Ext.N -- Postal A.D. dated 05.08.1996,
 Ext.P -- Form No.C-19 dated 27.01.1997,

Ext.Q	--	Notice dated 28.02.1997,
Ext.R	--	Form No.C-18 dated 05.08.1996,
Ext.S	--	Order dated 27.01.1997,
Ext.T	--	Form No.C-19 dated 03.06.1997,
Ext.T/1	--	Recovery Notice dated 27.06.1997,
Ext.U	--	Form No.C-18 dated 08.03.1999,
Ext.V	--	Form No.C-18 dated 26.10.1999,
Ext.W	--	Postal A.D. dated 11.11.1999,
Ext.Y	--	Notice dated 10.03.2000,
Ext.Z	--	Postal A.D. dated 11.03.2000,
Ext.Z/1	--	Order dated 02.05.2001 passed under
section		45-A of ESI Act,
Ext.AA	--	Postal A.D. Dated 11.05.2001,
Ext.AB	--	Form No.C-19 dated 23.09.2002,
Ext.AC	--	Recovery order dated 28.10.2002,
Ext.AD	--	Form No.C-18 dated 30.03.2001,
Ext.AE	--	Postal A.D. dated 07.04.2001,
Ext.AF	--	Order dated 29.10.2002 under section 45-A
of		ESI Act,
Ext.AG	--	Postal A.D.,
Ext.AH	--	Form No.C-19 dated 18.12.2002,
Ext.AJ	--	Recovery Officer's order dated 30.12.2002,
Ext.AK	--	Form No.C-18 dated 23.09.2002,
Ext.AL	--	Postal A.D. dated 01.10.2002,
Ext.AM	--	Order dated 23.12.2002 under section 45-A
of		ESI Act,
Ext.AN	--	Form No.C-19 dated 16.03.2004 &
Ext.AP	--	Recovery Officer's order dated 24.03.2004.

**District Judge, Khurda
at Bhubaneswar.**

16.12.2014.

