

**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 22<sup>nd</sup> Nov.14.*

**E.S.I. Misc. Case No. 109 of 2001.**

M/s. Ashirbad Work Shop, 183, Janapath, Bhubaneswar,  
Dist. – Khurda, Proprietress Mrs. Saubhagini Panigrahi,  
Represented through its Authorised Agent Sri Susanta  
Kumar Tripathy.

... **Petitioner.**

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

1. Regional Director, Employees' State Insurance Corporation, Regional Office, Orissa, Bhubaneswar - 751 007.
2. Deputy Director (Revenue), Employees' State Insurance Corporation, Regional Office, Bhubaneswar - 751 007.
3. Recovery Officer, Employees' State Insurance Corporation, Orissa Region, Bhubaneswar.

... **Opp. Parties.**

**Counsel :**

For Petitioner     --     Shri B.M. Pattanaik & Associates.  
For Opp. Parties  --     Shri S.N. Patnaik & Associates.

Date of conclusion of arguments : 30.10.2014.

Date of judgment : 22.11.2014.

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

This is a petition under section 75(1)(a) & (g) of the Employees' State Insurance Act, 1948 (hereinafter called "the Act" for brevity) filed by the applicant (petitioner) to set aside the orders of recovery of contributions issued by the opposite parties by declaring that its establishment is not covered under the Act.

2. The factual matrix leading to the case of the petitioner is that its firm has been registered under the Shops-cum-Commercial Establishment Act and is operating its business at Janapath, Bhubaneswar. The Inspector being the Authorised Officer of Employees' State Insurance Corporation ("the Corporation", for short) made inspection to the petitioner-establishment on 30.03.1998, but prepared an imaginary report to bring the said establishment under the purview of the Act. It is averred in the petition that the petitioner has not employed more than five workers at any point of time ever since its establishment is set up and, accordingly, the petitioner has maintained all the records. The Inspecting Authority under the Act counted the persons illegally showing it to be more than five for which the assessment made by the opposite parties is not correct. It is further averred that for the purpose of coverage under section 2(12) of the Act, the number of workers in a particular

establishment should be ten if there is use of electricity and twenty if it is run without the aid of electricity. When there are no workers beyond five employed in the petitioner-establishment, the question of payment of contributions does not arise. But, the opposite parties illegally sent notice dated 17.02.2001 to the petitioner regarding payment of contributions amounting to Rs.5,353/- & Rs.5,038/- for the period 3/98 to 3/99 and 4/99 to 3/2000 respectively. So, there is cause of action to file the case. Hence, the petitioner has prayed to declare that its establishment is not coming under the Act and they are not liable to pay any contribution, as demanded, and to set aside the order and notice issued by the opposite parties for payment of contributions. Hence the petition.

3. The opposite parties filed their written statement refuting the allegations made in the plaint. According to them, the petition is not maintainable, there is no cause of action to file the case. Under section 2A of the Act read with Regulation 10-B of the Employees' State Insurance (General) Regulations, 1950, every factory or establishment is amenable to the provisions of the Act. It is further averred that even if the petitioner-establishment is set up with effect from 17.10.1965, the same was not registered under the Act for which on

30.03.1998 the Inspector of the Corporation made inspection to the petitioner-establishment. There was no co-operation extended to the Inspector, but he found that sixteen employees employed for wages were working in the establishment, namely, M/s. Ashirbad Workshop and it has got its sister establishment, namely, M/s. Ashirbad Automobiles in the same premises having close link with the petitioner-establishment and there were six workers found working. Thus, it was found that twentytwo workers were working in the petitioner-establishment, which is using the power for repairing and servicing two-wheelers. He noted down the names of sixteen employees employed for wages in M/s. Ashirbad Workshop and the same was counted together with six employees of M/s. Asirbad Automobiles. Accordingly, report was prepared. Notice under section 45 of the Act was issued to the petitioner-establishment, which was duly received by the petitioner. After receiving notice, the petitioner asked for time which was allowed. There the petitioner submitted in writing that its establishment is not covered under the Act as it has got less number of employees. But, the claim of the petitioner was not accepted and again show-cause notice was issued asking the petitioner to appear for personal hearing. The petitioner submitted salary statements of its employees for the

period March, 1998 to March, 1999 and April, 1999 to March, 2000. But, after making due enquiry, notice was issued for payment of contributions with interest of Rs.4,059/- for the period 3/98 to 3/99 and Rs.4,350/- for the period 4/99 to 3/2000. According to the opposite parties, the claim of the petitioner is not tenable as twentytwo employees were found working in the petitioner-establishment along with its sister establishment M/s. Ashirbad Automobiles, which was functioning in the same premises. So, it is prayed to dismiss the petition of the petitioner with cost.

4. 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 there is cause of action to file the case ?
- iii) Whether the petitioner-establishment has employed more than ten employees for wages ?
- iv) Whether the petitioner-establishment is coming within the purview of the E.S.I. Act ?
- v) Whether the petitioner is entitled to the relief, as deemed fit and proper ?

### **F I N D I N G S**

#### **ISSUE No.(iii) :**

5. This issue is taken up at first as it is important and core issue to decide other issues. It is settled law that whoever

claims exemption of certain statutory obligation has to discharge onus of proving the facts alleged by him. In the instant case, it is the petitioner who has claimed exemption of the Act and prayed to set aside the order demanding the contributions and notice thereof. Hence, the onus lies on the petitioner to prove the facts alleged by him.

6. The petitioner, in order to prove its case, has examined one witness and adduced documentary evidence. P.W.1, who is the authorised signatory of the petitioner-establishment, stated that the inspection purported to have been made on 30.03.1998 is quite imaginary, arbitrary and baseless. He admitted to have got the notice for personal hearing. He asserted before the Authority that at no point of time, their establishment has exceeded the limits as per the certificate issued by the Statutory Authority. He further stated that their another establishment, namely, M/s. Ashirbad Automobiles is operating in other part of the premises as an integral part of their establishment. He proved the demand notice of the ESI vide Exts.1 & 2 and their reply vide Ext.3. In the reply, inspection note was simply refuted. He proved another reply given by his Advocate wherein it is alleged that not more than five employees were deployed in their Institution. He proved Certificate of Registration issued by

the Asst. Labour Officer vide Ext.8. Notices of Daily Hours of Employees were also proved by him vide Exts.9 & 10 where only the names of five numbers of adult male employees have been written. He further proved the Register of Wages vide Ext.13 where five employees have been paid the wages and it was maintained since 01.01.1996 till 30.11.1998. In cross-examination, he admitted that the Inspector of the Corporation has inspected their establishment and the petitioner is covered under section 2(12) of the Act. He also admitted that electricity was being used by the petitioner, but its establishment has not been registered under the Act. He has admitted in cross-examination that repairing and servicing of two-wheelers were being carried on with the aid of electricity energy. Further, he has stated in cross-examination that on the date of inspection, the Inspector counted the persons who had come for servicing their vehicles and included them in the report. It shows that the Inspector had visited and counted the persons. Now, the question arises whether the Customers' Register has been proved by the petitioner to separate the number of persons deployed and the number of persons visited. It is quite clear from his cross-examination that their establishment is coming under the purview of the Act and on the date of inspection by the Inspector there were persons

deployed. Since the petitioner has not filed the Customers Register, his statement cannot be relied upon to prove that the Inspector counted the persons, who were the customers on that day. Similarly, in the absence of Muster Roll of the employees, which has not been filed, it is difficult to find out whether five numbers of employees were deployed in accordance with Wage Register. Thus, the evidence of P.W.1 is not clear, cogent and positive to prove that on the date of inspection there were only five employees working in the petitioner-establishment. In the absence of Attendance Register of the employees, the documents produced and proved by P.W.1 are not enough to establish that five numbers of employees were deployed by the petitioner-establishment. On the whole, the petitioner has not been able to prove by positive, trustworthy and unimpeachable evidence that during 1998-1999 and 1999-2000, only five numbers of employees were deployed in its establishment.

7. The opposite parties, in order to disprove the case of the petitioner, has examined one witness and adduced documentary evidence. O.P.W.1 is none other than the Social Security Officer of the Corporation posted at Bhubaneswar. According to him, one Gopal Chandra Rout had visited the establishment of the petitioner on 30.03.1998, but he had not

gone to the said establishment. So, he has produced the inspection report and other documents being authorised by the Corporation. O.P.W.1 stated that on 30.03.1998 Gopal Chandra Rout found sixteen employees working for wages in the petitioner-establishment and six employees working in other establishment, namely, M/s. Ashirbad Automobiles of the petitioner. He further revealed that he is acquainted with the signature and handwriting of Shri Rout. So, he proved the report of Shri Rout vide Ext.A and also another report of the same date vide Ext.B. Ext.A shows that Shri Rout found sixteen employees working in the petitioner-establishment and Ext.B shows that he found six employees working in M/s. Ashirbad Automobiles. The employees did not disclose their names. O.P.W.1 also proved different notices given under the Act vide Exts.C & D and reply of the petitioner vide Ext.E. He also proved further notices vide Exts.F, G, H, J, K, L, M & N. On going through the same, it is found that the Corporation has demanded contributions for the period 3/98 to 3/99 with interest thereon total amounting to Rs.5,353/- and for the period 4/99 to 3/2000 with interest thereon amounting to Rs.5,038/-. In cross-examination, he revealed that he has no direct knowledge about the inspection. Since Gopal Chandra Rout made inspection, it is obvious that he has no direct

knowledge about the inspection. He further revealed that as per the inspection report, the Inspector found sixteen employees working in the petitioner-establishment, but their age and names of their father have not been mentioned in the inspection report. Also, in which capacities they were working have not been mentioned in the said report. Even if detailed particulars of the concerned employees have not been mentioned, but from their names, as written in the inspection report, it proves that Shri Rout made inspection and collected the names of the employees. In fact, at para-9, O.P.W.1 admitted that there was no door connecting both the establishments, as nothing has been mentioned in the inspection report. When he has not gone for inspection, any sort of guess work in that connection cannot be taken as legal evidence. However, after scrutinizing the evidence of O.P.W.1 with the documents with much care and caution, there remains no shadow of doubt that the Inspector had visited the petitioner-establishment on 30.03.1998 and found sixteen employees working there even if there is no legal evidence adduced by O.P.W.1 to substantiate that M/s. Ashirbad Automobiles is also connected to the petitioner-establishment. There is no fruitful cross-examination to this witness. Rather, the evidence of O.P.W.1 coupled with the documentary

evidence prove that the petitioner had engaged sixteen employees in its establishment.

8. From the aforesaid analysis, by balancing the evidence of both sides, it is clear that the petitioner has failed to discharge its onus whereas the opposite parties have been successful in proving their case. Thus, I find that on 30.03.1998, although the petitioner engaged sixteen employees in its establishment during the period 1998–1999 and 1999–2000, but did not pay the contribution amount due to the Corporation. This issue is answered accordingly.

**Issue No.(iv) :**

9. It has already been held that sixteen employees were found working in the petitioner–establishment in 1998–1999 & 1999–2000. Not only this, but also the evidence of the petitioner shows that its establishment is using electricity. Moreover, P.W.1 has admitted that their establishment is coming under section 2(12) of the Act. Thus, it is found that the petitioner is coming under the coverage of the Act. Accordingly, this issue is answered.

**Issue No.(ii) :**

10. It has already been held that the petitioner had engaged sixteen employees for wages in 1998. It is further revealed from the evidence of P.W.1 and O.P.W.1 read with

the documents that notices have been served on the petitioner to pay the contributions. Exts.M & N show that during 1998-1999 & 1999-2000, the petitioner is liable to pay the contributions for the respective period. Thus, there is no cause of action to declare the notices to be illegal and to declare that the petitioner is not covered under the Act. Issue No.(ii) is answered accordingly.

**Issue No.(i) :**

11. When the petitioner is liable to pay the contributions, as stated above, and there is no cause of action to file this case, it cannot be said that the suit is maintainable. On the other hand, the suit is not maintainable. This issue is answered accordingly.

**Issue No.(v) :**

12. The petitioner has come up with the plea that he is not coming under the purview of the Act for which he is not liable to pay any contribution. But, in view of the aforesaid findings, the petitioner cannot take such plea to avoid the payment of contributions. Moreover, notices in question are proper and legal, as held in the above findings. So, the petitioner is not entitled to any relief, as prayed for. Hence ordered :

**O R D E R**



Ext.A -- Inspection report,  
Ext.A/1 -- Signature of G.C. Rout in Ext.A,  
Ext.A/2 -- Letter to the Deputy Director of ESI  
Division,  
Ext.B -- Preliminary Inspection Report,  
Ext.B/1 -- Signature of G.C. Rout in Ext.B,  
Ext.B/2 -- Copy of notice,  
Ext.B/3 -- Signature of G.C. Rout in Ext.B/2,  
Ext.C -- Notice under Form No.C-11,  
Ext.C/1 -- Postal A.D.,  
Ext.D -- Demand Notice,  
Ext.D/1 -- Signature of M.R. Samal in Ext.D &  
Ext.D/2 -- Postal A.D.

**District Judge, Khurda  
at Bhubaneswar.**

22.11.2014.

