2024 INSC 441

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 1833 OF 2024

THE EMPLOYEES STATE INSURANCE CORPORATION LTD. ...APPELLANT(S)

VERSUS

NAGAR NIGAM ALLAHABAD AND ANR. ..RESPONDENT(S)

J U D G M E N T

Mehta, J.

1. The instant appeal by special leave is directed against the impugned order dated 25th October, 2021 passed by the High Court of Judicature at Allahabad in Writ-C No. 14971 of 2009 whereby the writ petition filed by respondent No. 1-Nagar Nigam, Allahabad was allowed.

2. The learned Single Judge of the High Court vide impugned order held that the employees of respondent-Nagar Nigam are not covered under the Employees' State Insurance Act,

1948(hereinafter being referred to as the 'Act of 1948') and as a consequence thereof, the notice dated 3rd February, 2009(hereinafter being referred to as 'recovery notice') issued by the Authorised Officer of the appellant-Corporation was quashed and amount already realized was directed to be refunded to the respondent-Nagar Nigam(subsequently designated as the Municipal Corporation) within three months.

3. The appellant-Corporation herein has preferred the instant appeal with a pertinent plea that the respondent-Nagar Nigam operates a Central Workshop(hereinafter, 'the workshop'), where activities of repairing and maintaining different types of vehicles are carried out. As per the appellant-Corporation, the workshop is covered by the definition of a 'factory' within the meaning of the Act of 1948. In the year 1964, respondent-Nagar Nigam was allotted Code No. 21-4404-74 under the Act of 1948. Recovery certificates were issued from time to time by the appellant-Corporation to the respondent-Nagar Nigam on account of non-payment of mandatory contributions under Section 40 of the Act of 1948, whereunder the principal employer is obligated to pay both employer's and employee's contribution in respect of every employee working in the factory. The respondent-Nagar Nigam

continued to make statutory contributions under the Act of 1948 till the year 1978, whereafter it stopped paying without any reason.

4. Owing to the non-payment of the statutory contributions by the employer, the Authorized Officer of the appellant-Corporation issued a notice dated 20th November, 2003 to respondent-Nagar Nigam under Section 45A of the Act of 1948 directing it to pay Rs. 4,72,186/-, assessed on ad hoc basis pertaining to the contributions for the period commencing from June, 2002 to September, 2003 and called upon the respondent-Nagar Nigam to appear before it on 19th December, 2003. The respondent-Nagar Nigam, however, neither appeared before the Authorized Officer nor did it file any response to the notice, whereupon the Authorised Officer of the appellant-Corporation, vide letter dated 21st September, 2004 directed the Recovery Officer to recover the amount of contribution along with interest to the tune of Rs. 5,88,227/- under Sections 45C to 45I of the Act of 1948 from the respondent-Nagar Nigam. This amount subsequently came to be deducted by the appellant-Corporation from the bank account of respondent-Nagar Nigam i.e. UCO Bank, which has been arrayed as respondent No. 2 in the present appeal.

5. As the respondent-Nagar Nigam failed to make timely payments of the statutory contributions in the manner prescribed under the Employees' State Insurance(General) Regulations, 1950, framed under the Act of 1948, a show cause notice dated 5th/6th June, 2006 was issued to the respondent-Nagar Nigam calling upon it to explain as to why damages under Section 85B of the Act of 1948, should not be levied upon it. The respondent-Nagar Nigam chose not to appear before the Authorized Officer and rather sought time to respond. On request being made on behalf of the respondent-Nagar Nigam, the hearing was adjourned on two occasions.

6. The Authorised Officer of the appellant-Corporation, vide letter dated 30th January, 2009 directed the Recovery Officer to recover damages to the tune of Rs.3,52,670/- under Section 85B of the Act of 1948 from the respondent-Nagar Nigam. On the basis of above-mentioned letter, the Recovery Officer issued recovery notice dated 3rd February, 2009 to the respondent-Nagar Nigam for payment of the amount as determined under Section 85B of the Act of 1948.

7. Being aggrieved by the recovery notice dated 3rd February 2009, the respondent-Nagar Nigam filed the captioned Writ

Petition No. 14971 of 2009 before the Allahabad High Court challenging the said recovery notice and seeking a direction to restrain the appellant-Corporation from realising the amount.

8. The learned Single Judge of the Allahabad High Court proceeded to allow the writ petition vide order dated 25th October, 2021 holding that the writ petitioner-Nagar Nigam(respondent herein) was not covered under the Act of 1948 and as a consequence, recovery notice dated 3rd February, 2009 was quashed and the amount already realized by the appellant-Corporation was directed to be refunded within three months.

9. The order dated 25th October, 2021 is assailed in this appeal by special leave at the instance of the appellant-Corporation i.e. The Employees State Insurance Corporation Ltd.

10. Learned counsel for the appellant has placed reliance on the judgment of this Court in the case of ***Employers' State Insurance Corporation v. Kakinada Municipality and Others***[1] and urged that the controversy involved in the present appeal is fully covered by the said judgment wherein it has been clearly held that in respect of factory belonging to the local authority, unless power of exemption is exercised by the Government, it would be covered by

[1] (2022) 2 SCC 56

the provisions of Section 1(4) of the Act of 1948 and thus, liable to pay contribution.

11. It was further contended that if at all, respondent- Nagar Nigam was desirous of getting the exemption from the operation of the Act of 1948, then it had to apply to the appropriate Government and procure an order of exemption and only thereafter, could it seek exemption from making payment of the employer's contribution under Section 40 of the Act of 1948.

12. Learned counsel further urged that the respondent-Nagar Nigam did not appear to defend the proceedings wherein it was called upon to pay the contributions for the period June, 2002 to September, 2003. It also failed to participate in proceedings for determination of damages under section 85B of the Act of 1948. The damages were determined by the appellant-Corporation vide recovery certificate dated 30th January, 2009, however, only the consequential recovery notice dated 3rd February, 2009 was assailed in the writ petition. His fervent contention was that since, the recovery certificate determining the damages not having been questioned, the respondent-Nagar Nigam was not entitled to challenge the subsequent recovery notice which is consequential to the determination of the damages.

13. Learned counsel further urged that though a ground was taken in the writ petition that the Act of 1948 is not applicable to the respondent-Nagar Nigam because the workshop of the respondent-Nagar Nigam is not covered under the definition of 'factory' but the fact remains that in the proceedings for recovery of contribution, no such plea was taken that the workshop of the respondent-Nagar Nigam is not covered by the definition of 'factory' or that no manufacturing process is carried out in the workshop.

14. He urged that the recovery certificate dated 22nd July, 1976, issued by the officials of the appellant-Corporation, demanding the contribution for period from 11th December, 1973 to 22nd July, 1976 was satisfied by the respondent-Nagar Nigam which voluntarily deposited the contributions with the appellant-Corporation for this period. However, compliance was stopped by the respondent-Nagar Nigam after the year 1978, without intimation to the appellant-Corporation.

15. Learned counsel further urged that even otherwise, if at all the respondent-Nagar Nigam was desirous of contesting the recovery notice on the ground that it was not covered under the provisions of the Act, the remedy of filing an appeal to the Employees' Insurance Court(hereinafter being referred to as

'Insurance Court') under Section 75 of the Act of 1948 was available to it. Rather than availing the said statutory remedy, the respondent invoked the writ jurisdiction of the High Court without any justification. He thus, implored the Court to accept the appeal and set aside the impugned order of the High Court.

16. *Per contra*, learned counsel appearing for the respondent-erstwhile Nagar Nigam and presently the Municipal Corporation, Allahabad, urged that there is no material on record to show that any manufacturing activity was being undertaken in the Workshop of the respondent-Nagar Nigam. The employees of the respondent-Nagar Nigam who were already being provided all possible amenities and facilities including the medical assistance etc., were being occasionally assigned the task of in-house repairs of the equipment and machinery of the respondent-Nagar Nigam and thus, by no stretch of imagination, can it be concluded that the workshop was a 'factory' within the meaning of the Act of 1948 where any manufacturing process was being undertaken.

17. He thus urged that the learned Single Judge of the High Court was justified in exercising the writ jurisdiction and quashing the impugned recovery notice dated 3rd February, 2009 which was *ex-facie* unsustainable in the eyes of law. He contended that the

impugned order does not suffer from any infirmity warranting interference of this Court and the appeal should be dismissed.

18. We have given our thoughtful consideration to the submissions advanced at bar and have gone through the material available on record.

19. The core issues presented for consideration of this Court in this appeal are: -

(i) Whether the workshop of respondent-Nagar Nigam was indulged in manufacturing process while carrying out repairs and maintenance of the tractors, trailers, loaders belonging to the respondent-Nagar Nigam by employing more than 20 workmen?

(ii) Whether the workshop of respondent-Nagar Nigam was covered under the definition of 'factory' within the meaning of Act of 1948?

20. The issue whether the workshop of the Municipality/local body where the job of repairs of the machinery, etc. are carried out is a 'factory' within the meaning of the Act of 1948 was examined *in extenso* by this Court in the case of ***Kakinada Municipality****(supra)*. Akin to the facts of the case at hand, in the said case also, the Municipality/local body, was covered under the

Act of 1948 since the year 1965 and statutory contributions were paid till 1996. However, the Municipality stopped making the statutory contributions whereafter various orders and notices raising demands, as found due from the local body under the Act of 1948 were issued. A speaking order under Section 45A was passed which was challenged by the local body by filing an application to the Insurance Court under Section 75(1)(g) of the Act of 1948 which rejected the same. The order passed by the Insurance Court was challenged by filing a statutory appeal to the High Court as provided under Section 82 of the Act of 1948. The High Court allowed the appeal which led to the filing of the special leave petition in this Court. After extensive consideration of the material available on record and detailed analysis of the statutory provisions, this Court came to a conclusion that the first respondent therein(Municipality/local body) was running a 'factory' as defined under the Act of 1948. It was also held that the Act of 1948 applies to all factories including factories belonging to the Government other than the seasonal factories. The relevant extracts from the said judgment are reproduced hereinbelow: -

> **"14. <u>Considering Section 1(4) of the Act, it is clear as daylight, that the Act is to apply to all factories including factories belonging to the Government other than seasonal factories.</u>**

15. A factory is defined under Section 2(12) as follows:

> "**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;"

16. Section 2(14-AA) defines "manufacturing process":

> "**2. (14-AA) "manufacturing process"** shall have the meaning assigned to it in the Factories Act, 1948 (63 of 1948);"

17. In the facts of this case, there is no dispute that the first respondent was running a factory within the meaning of the Act, insofar as it is undertaking manufacturing activities within the meaning of the expression "manufacturing process" as defined in Section 2(14-AA). The proviso to Section 1(4), undoubtedly, operates as an exception to the main provision. In other words, from the generality of factories that stand covered under the Act, the legislature has carved out an inroad by providing that the Act would not apply to the factory which belonged to the Government. It also makes it clear that the provisions of the Act will not apply to a factory under the control of the Government. This is however subject to the further condition in the proviso that the employees of such a factory, which is either owned or controlled by the Government, should be otherwise in receipt of benefits substantially similar or superior to the benefits provided under the Act. It is upon satisfaction of these conditions that even a factory which is owned or controlled by the Government would stand exempted from the purview of the Act.

18. As far as the facts of this case is concerned, the first respondent does not have the case that the factory in question is a factory which is owned by the Government. As far as the question relating to control of the Government is concerned, the learned Senior Counsel for the first respondent has, in fact, upon being queried as to whether he has a case that it is under the control of the Government, he does not address us on the issue on the lines that the Government controls the factory. He very fairly does submit that the factory is under the control of the first respondent. The first respondent is a local body. It might be true that it is a creature of statute, being created

under the relevant Act. It also has a constitutional position after the amendment of the Constitution. But the words used in the Act are that the factory must be under the control of the Government. Any further doubt, in this regard, which we may entertain, is banished by the provisions of Section 90.

19. Section 90 contemplates exemption of factories or establishments belonging to the local authority. Initially, the said provision contemplated power to exempt any factory or establishment belonging to the Government or any local authority. After the omission of the words "the Government or" by Act 29 of 1989 with effect from 20-10-1989, the said provision contemplates power with the appropriate Government after consultation with the Corporation ("ESI Corporation") to exempt any factory or establishment belonging to any local authority from the provisions of the Act. It must be noticed that proviso to Section 1(4) was inserted by the very same amendment with effect from 20-10-1989. The results of this legislative exercise cannot be overlooked. **The position, therefore, is that in respect of a factory, which is belonging to a local authority, unless power of exemption is exercised by the Government, it would be covered by provisions of Section 1(4) of the Act. In other words, it would be a factory like any other factory.** It would have to be compliant with the provisions of the Act. This is for the reason that a factory or an establishment belonging to or under the control of the Government alone are within the purview of the proviso, which in turn is subject to the imperative condition or rather the indispensable requirement that the employees are in receipt of the substantially similar or superior benefits than provided under the Act.**"**

(emphasis supplied)

21. We feel that the facts of the case at hand are almost identical. Neither in the pleadings of the writ petition nor in the counter affidavit filed on behalf of the respondent-Nagar Nigam in this Court, is there any indication that the respondent ever sought for or was granted exemption by the appropriate Government by exercising powers under Section 90 of the Act of 1948.

22. In the case of ***J.P. Lights India v. Regional Director E.S.I. Corporation, Bangalore***[2], it has been laid down that the job of repairing the machinery is covered under the definition of "manufacturing process".

23. The appellant-Corporation had issued notices to respondent-Nagar Nigam to show cause as to why the recovery of statutory contribution under Section 40 of the Act of 1948 should not be effected from it. However, admittedly, no response was given by the respondent-Nagar Nigam to such notices. There is also no dispute that for the earlier periods, between 1964 to 1978, the respondent-Nagar Nigam made regular contributions under the Act of 1948 thereby conceding to the position that its workshop was covered under the definition of 'factory' where manufacturing process was being carried on. If, at all, this situation had changed in the period subsequent to 1978 and before issuance of the notice under Section 45A of the Act of 1948, the respondent-Nagar Nigam would be required to demonstrate the same by providing appropriate evidence to the Authorized Officer in response to the said notice and establish that it was not covered under the definition of 'factory' and that no 'manufacturing process' was

[2] 2023 SCC OnLine SC 1271

being undertaken in its premises. Examining such an issue would require the collection of evidence and the appreciation thereof. Hence, only the Insurance Court constituted under Section 74 of the Act of 1948 would be in a position to examine such disputed questions of facts.

24. We thus feel that it was a fit case wherein, rather than interfering in the matter in exercise of the writ jurisdiction, the respondent-Nagar Nigam should have been relegated by the learned Single Judge to approach the Insurance Court by filing an application under Section 75(1)(g) of the Act of 1948.

25. In the wake of the discussion made hereinabove, we are of the opinion that the learned Single Judge of the High Court clearly erred in entertaining the writ petition and interfering with the recovery notice dated 3rd February, 2009 while exercising the extraordinary writ jurisdiction conferred under Article 226 of the Constitution of India.

26. As a consequence, the appeal is allowed, and the impugned order is hereby quashed and set aside. No costs.

27. We, however, make it clear that above observations shall not prejudice the rights of the respondent No.1-Nagar Nigam to seek

benefit of exemption as contemplated under Section 90 of the Act of 1948.

28. Pending application(s), if any, shall stand disposed of.

.....J.
(J.B. PARDIWALA)

.....J.
(SANDEEP MEHTA)

NEW DELHI;
May 17, 2024