IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21ST DAY OF NOVEMBER 2023

PRESENT

THE HON'BLE MRS. JUSTICE K.S.MUDAGAL

AND

THE HON'BLE MR.JUSTICE RAMACHANDRA D. HUDDAR

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MISCELLANEOUS FIRST APPEAL No.7749/2013 (ESI)

BETWEEN:

M/S GROUP 4 SECURITAS GUARDING LIMITED
HEMKUND, NO.32, 80 FT ROAD
HAL III STAGE, BANGALORE – 560 075
NOW M/S.G4S SECURITY SECURE
SOLUTIONS INDIA (P) LTD
NO.507, HBR LAYOUT, I STAGE
4TH BLOCK, NEAR HENNUR CROSS
BANGALORE – 560 043
REPRESENTED BY ITS
REGIONAL MANAGER – HR & IR
MR.S BALARAJU (MAJOR) ...APPELLANT

(BY SRI J.PRADEEP KUMAR, ADVOCATE)

AND:

1. THE REGIONAL DIRECTOR
   ESI CORPORATION
   REGIONAL OFFICE (KARNATAKA)
   NO.10, BINNY FIELDS
   BINNYPET, BANGALORE – 560 023

2. RECOVERY OFFICER
   ESI CORPORATION
   BANGALORE – 560 023 …RESPONDENTS

(BY SRI M.N.KUMAR, ADVOCATE)

THIS MISCELLANEOUS FIRST APPEAL IS FILED UNDER SECTION 82(2) OF THE EMPLOYEES' STATE INSURANCE ACT, 1948

PRAYING TO SET ASIDE THE ORDER DATED 02.08.2013 PASSED BY THE EMPLOYEES STATE INSURANCE COURT, BANGALORE IN ESI APPLICATION NO.19/2002 DISMISSING THE APPLICATION FILED UNDER SECTION 75 OF THE ESI ACT.

THIS MISCELLANEOUS FIRST APPEAL HAVING BEEN HEARD AND RESERVED ON 06.10.2023, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, **K.S.MUDAGAL J**., DELIVERED THE FOLLOWING:

JUDGMENT

Challenging the dismissal of it's application under Section 75 of the Employees State Insurance Act, 1948 ('the Act' for short), the applicant in ESI Application No.19/2002 on the file of the Employees State Insurance Court, Bengaluru ('ESI Court' for short) has preferred this appeal. By the impugned judgment and order, ESI Court has rejected the application of the appellant for declaration that it is not liable to pay contribution of Rs.65,20,855.18 determined by respondent No.1.

2. The brief facts of the case are as follows:

The appellant is engaged in providing Security Services to various clients across India and is covered under ESI Act. During the course of its business, the appellant has employed several workmen as security guards. Appellant is liable to contribute to the Employees State Insurance Funds, the employers share of contribution.

3. On 03.08.2000, 29.08.2000, 12.09.2000 and 13.09.2000 the Inspector of the Corporation visited the appellant's establishment at Bangalore and demanded for production of records for verification of contributions. After inspection, the ESI Inspector issued observation slip dated 13.09.2000. As per the Inspector's observation, the appellant was paying overtime wages to its employees in the disguise of conveyance allowance to avoid payment of ESI contribution and had not accounted that for ESI contribution.

4. The appellant by letter dated 29.08.2000 addressed to the respondents sought time for production of the documents to substantiate that what was paid was only conveyance allowance, on the ground that its establishments are spread over across India, therefore it needs time to consolidate all those documents such as cash vouchers, bank vouchers, travel vouchers and invoices and submit the same.

5. Respondent No.1 served notice on 19.10.2000 to the appellant claiming that as per their calculation, the appellant was liable to pay Rs.65,20,855/- as ESI contribution in respect of it's employees and called upon the appellant to show cause

why the said amount shall not be recovered. The appellant attended the hearing on 20.11.2000 and requested for time to produce the documents. Thereafter, the appellant did not produce the documents. Ultimately, the respondents passed order under Section 45A of the Act on 08.02.2002 determining that the appellant is liable to pay Rs.65,20,855/- towards contribution on overtime wages of its employees.

6. On 20.02.2002, the appellant wrote a letter to the respondents claiming that the notice dated 22.11.2001 notifying the hearing date on 21.12.2001 was not served on it. Ultimately appellant filed application before the ESI Court for setting aside the order dated 08.02.2002 and to declare that it is not liable to pay the amount determined by the respondents. In the application, the appellant contended that the amount reflected under the head overtime wage was payment towards conveyance allowance of the employees and that was not the overtime wages. The appellant further contended that it was not given reasonable opportunity of hearing. The appellant further contended that the notice of hearing was not served on it. On

such grounds, the appellant sought for quashing of the order under Section 45A of the Act.

7. The Corporation contested the application of the appellant on the ground that the payments reflected in wage register under the head overtime wages was towards the overtime wages of the employees itself. It was further contended that the said amount was camouflaged by mentioning that, as conveyance charges. The Corporation further contended that though the appellant was given sufficient opportunity to establish its contention that whatever was paid was conveyance charges, the appellant did not avail such opportunity. It was contended that the appellant failed to establish its contention that the amount shown in the register was in fact the conveyance charges. The allegation that reasonable opportunity was not given to the appellant was denied. It was contended that despite service of notice, the appellant failed to appear and substantiate its contentions and dragged the matter sufficiently. Therefore the application deserves no merit and liable to be dismissed.

8. The ESI Court based on the pleading of the parties, framed the following issues:

(i) Whether the applicant proves that they have not paid any overtime wages to their employees and it was only conveyance allowance?

(ii) Whether the applicant further proves that claiming contribution on conveyance is bad in law?

(iii) To what relief the applicant is entitled to?

9. The ESI Court on recording the evidence of the parties and on hearing them by order dated 04.02.2005 partly allowed the application. By the said order, the ESI Court modified the order dated 08.02.2002 passed by the Corporation reducing the liability of the appellant to Rs.61,99,375-60. It was further held that as the appellant has deposited Rs.13,04,271/-, it shall pay balance amount of Rs.48,95,204.60/- towards contribution.

10. The appellant challenged the said order before this Court in M.F.A.No.2893/2005 (ESI). This Court on hearing the parties by order dated 12.08.2010 allowed M.F.A.No.2893/2005 (ESI) holding that the appellant has failed to discharge its initial burden that the amount entered in the register was the

conveyance allowance. It was further held that similarly the respondents also did not discharge the burden of proof that the amount paid was overtime wages. Therefore the matter was remanded to ESI Court for fresh consideration by giving opportunity to both the parties to lead evidence.

11. After such remand, the parties did not adduce any further evidence. Thereafter the ESI Court by order dated 12.04.2011 again dismissed the application. Challenging the said order, the appellant filed M.F.A.No.4881/2011 (ESI) before this Court. This Court again by order dated 17.11.2011 set aside the order of the ESI Court dated 12.04.2011 and remanded the matter to the ESI Court with a direction that, if the appellant was to produce any fresh evidence, it is at liberty to do so, otherwise, the appellant can point out from the documents already filed to demonstrate its case. It was further directed that the ESI Court shall apply its mind and pass appropriate order.

12. After such remand, the appellant did not lead any further evidence. The respondents further examined in chief

RW.1 Muralidhar Nair and he was cross-examined by the appellant.

13. The ESI Court on hearing the parties, by the impugned judgment and order dismissed the application holding that admission of AW.4 shows that the security guards were working overtime. It was held that as per his admission, security persons after finishing their shift duty would continue their work if their reliever does not come. The ESI Court further held that despite granting sufficient opportunity, the appellant failed to produce the required documents to establish that the amounts mentioned as conveyance charges were in fact the conveyance charges paid to the employees. It was held that making entries regarding such payments in the wage register itself goes to show that, what was paid was overtime wages. Thus the ESI Court held that the appellant has failed to establish the contention that such payments in the overtime registers were the payments towards conveyance charges and not the wages.

14. An appeal of this kind under Section 82(2) of the Act lies only on the substantial questions of law. However in the

earlier two rounds, the appeals were heard and disposed of without formulating the substantial questions of law. Even this appeal was initially listed for final hearing without formulating the substantial question of law. On noticing that, both side were heard and the following substantial question of law is formulated for consideration:

> "Whether the finding of the ESI Court that the appellant has failed to establish that the entries in the wage register under 'conveyance charges' reflected reimbursement of conveyance charges of the employees suffers illegality and perversity?"

Submissions of Sri Pradeep Kumar.J, learned Counsel for the appellant:

15. The grounds of appeal were reiterated. The contribution is payable only on the wages, Section 2(22) of the Act does not include the conveyance charges. Ex.A14 the operating manual clearly shows that whenever the employees used their own vehicle for official duty, they were to be paid conveyance charges per kilometer at the rate fixed or if they traveled in hired vehicle, that hiring charges have to be reimbursed. Whatever was paid to the employees was such

reimbursement of conveyance charges. For the auto charges and petrol bunk reimbursement, the bills cannot be generated. The appellant is a very big organization and had employees in three shifts, therefore there was no need for the appellant to deploy the workers overtime. As per Section 45 of the Act, the primary liability of payment of contribution lies on the principal employer, only then the appellant who is the immediate employer comes into picture. Section 45A of the Act requires the respondents to provide reasonable opportunity to the appellant. No such opportunity was given to the appellant in the proceedings under Section 45A of the Act. Ex.R16 is said to be the basis for determining the contribution. The Inspecting Officer has not taken the head counts of the employees present during inspection. Since the clients of the appellant were spread all over the country, it was difficult to secure all the documents and whatever records were available were produced before the Inspector and the ESI Court. The burden was on the respondents to prove that the amount paid under the head CONV was not the conveyance charges which was not discharged, whereas the appellant examined AW.4 who was its former security guard/employee. The ESI Court was not

justified in rejecting his evidence. The ESI Court has failed to take into consideration the voluminous documents produced by the appellant. The impugned judgment and order suffers perversity. The appellant shall be given another opportunity by remanding the matter to prove its case.

16. In support of his submissions, he relies on the following judgments:

(i) ***Achoor Estate v. Nabeesa***[1]

(ii) ***Free India (P) Ltd. V. Regl.Dir., E.S.I.C.***[2]

(iii) ***E.S.I.C. v. Pioneer Laundry***[3]

(iv) ***Hardev Singh v. E.S.I.Corporation***[4]

(v) ***E.S.I.Corpn. v. Kar. Asbestos Cement Products***[5]

(vi) ***E.S.I.C. & Anr. V. Hotel Samrat***[6]

(vii) ***E.S.I.Corporation v. Subbaraya Adiga***[7]

(viii) ***S.T.Reddiar & Sons v. Regional Director***[8]

(ix) ***Nazir Mohammed v. J.Kamala***[9]

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[1] 1994 (2) LL J 969
[2] 1973 (2) LLR 584
[3] 1966 (2) LLR 425
[4] 1981 (1) LLN 106
[5] 1991 (2) LLN 519
[6] 1999 (2) LLP 153
[7] 1988 (II) LLN 452
[8] 1989 (2) LLJ 285
[9] Civil Appeal Nos.2843-2844/2010 DD 27.08.2020

Submissions of Sri M.N.Kumar, learned Counsel for the respondents:

17. As per the documents furnished by the appellant during the inspection which are enclosed in Ex.R5 the register had two columns called duty wages and overtime remittance. In overtime remittance payment was purportedly made under the head 'CONV' etc. It was for the appellant to prove that it had paid conveyance charges as shown in the said document to the guards. During inspection and even during the proceedings under Section 45A of the Act, the appellant neither produced any records nor examined any of the employees to show that such head depicted the payment of conveyance charges or reimbursement of the conveyance charges. If such payment was made certainly the appellant should have collected the vouchers from the employees, but no such vouchers were produced. No documents were produced to show that AW.4 was employed as Security Guard during the relevant period, though he tried to help the appellant saying that they used to sign in the register receiving the conveyance charges. Even AW.1 was not working in the appellant's establishment during the relevant time. Therefore he had no personal knowledge about such

payments. The documents mentioned in the requisition slip Ex.R7 namely the attendance and wage register, the records relating to the contractor, accounts books consisting of ledgers, cash books, bank books, day books and the vouchers should have been produced before the authorities. But they were not produced. The documents produced before the ESI Court were different from those records. None of the principal employers, operation managers or supervisors were summoned and examined. The appellant camouflaged overtime wages as conveyance allowance. Therefore the respondents based on the available records made the best judgment assessment and that was reasonable. The opportunities given under Section 45A of the Act were not availed. The presumption under Section 45A(2) of the Act regarding correctness of the claim was not rebutted. The ESI Court on judicious appreciation of the oral and the documentary evidence by well reasoned order dismissed the application. The same does not warrant interference of this Court.

18. In support of his submissions, he relies on the judgment in ***ESI Corpn. v. C.C.Santhakumar***[10].

Analysis

19. In this case both the parties do not dispute that the conveyance allowance/charge is not covered in the definition of 'wage' under the Act. The only dispute is whether the payment shown in overtime wage registers as conveyance charges were actually the conveyance charges of the employees or they were the misnomer to overtime wages, to evade the ESI contribution.

20. Before discussing the evidence of the parties, it is necessary to examine some of the provisions of the Act. The appellant also does not dispute that it was covered under the Act. Section 39(1) (3) & (4) of the Act which are relevant for the purpose of this case read as follows:

> **"39. Contributions**.—(1) The contribution payable under this Act in respect of an employee shall ***comprise contribution payable by the employer*** (hereinafter referred to as the employer's contribution) and contribution payable by the employee (hereinafter referred to as the employee's contribution) and ***shall be paid to the Corporation***.
>
> (2) ……

[10] (2007) 1 SCC 584

(3) The ***wage period*** in relation to an employee shall be the unit in respect of which all contributions shall be payable under this Act.

(4) The contributions payable in respect of each wage period shall ordinarily fall due ***on the last day of the wage period***, and where an employee is employed for part of the wage period, or is employed under two or more employers during the same wage period the contributions shall fall due on such days as may be specified in the regulations."

21. The above provisions show that it was mandatory for the appellant to pay it's share of contribution periodically on the basis of wages paid. Section 43 of the Act empowers the Corporation to make regulations providing for manner and time of payment of contributions and the date on which the evidence of contributions paid is to be received by the Corporation.

22. Section 44 of the Act makes it mandatory for the employer to maintain the registers and furnish the records, returns/information required by the Corporation to determine the contribution. Section 45 of the Act which is relevant for the purpose of this case reads as follows:

"**45. Social Security Officers, their functions and duties.** — (1) The Corporation may appoint such persons as Social Security Officers, as it thinks fit, for the

purposes of this Act, within such local limits as it may assign to them.

(2) Any Social Security Officer appointed by the Corporation under sub-section (1) (hereinafter referred to as Social Security Officer), ***or other official of the Corporation*** authorised in this behalf by it, may, for the purposes of enquiring into the correctness of any of the particulars stated in any return referred to in section 44 or for the purpose of ascertaining whether any of the provisions of this Act has been complied with—

(a) ***require any principal or immediate employer to furnish to him such information as he may consider necessary*** for the purposes of this Act; or

(b) at any reasonable time ***enter any office, establishment, factory or other premises occupied by such principal or immediate employer and require any person found in charge thereof to produce*** to such Social Security Officer or other official and allow him to examine such ***accounts, books and other documents relating to the employment of persons and payment of wages or to furnish to him such information as he may consider necessary***; or

(c) ***examine,*** with respect to any matter ***relevant*** to the purposes aforesaid, the principal or immediate employer, his agent or servant, or any person found in such factory, establishment, office or other premises, or any person whom the said Social Security Officer or other official has reasonable cause to believe to be or to have been an employee;

(d) make copies of, or take extracts from, any register, account book or other document maintained in such factory, establishment, office or other premises;

(e) exercise such other powers as may be prescribed.

(3) An Social Security Officer shall exercise such functions and perform such duties as may be authorised by the Corporation or as may be specified in the regulations.

(4) ***Any officer of the Corporation*** authorised in this behalf by it may, ***carry out re-inspection or test inspection*** of the records and returns submitted under section 44 for the purpose of verifying the correctness and quality of the inspection carried out by a Social Security Officer."

23. It is not in dispute that RW.1 the Assistant Director of the Corporation along with Inspector V.R.Nagaraj, exercising powers under Section 45 of the Act inspected the establishment of the appellant on 28th and 29th of August and 12th and 13th of September 2000. They inspected the records for the period April 1997 to July 2000. He prepared the Inspection report Ex.R5 with additional remarks at Ex.R6 and the observation slip Ex.R7. According to him, the appellant furnished Ex.R8 series the authenticated copies of summary of number of guards, duty wage sheet and overtime wage sheet of various area officers.

On verification, he opined that to evade payment of contribution, the appellant camouflaged the overtime wages paid to the employees as conveyance charges. According to him the required records indicating the total hours of work of each employees/guards were not produced. He submitted the Inspection Report. Based on such report, the respondents took recourse for determination of contributions exercising the powers under Section 45A of the Act.

24. Section 45A of the Act which deals with the determination of the contribution reads as follows:

> "**45A. Determination of contributions in certain cases.**—(1) Where ***in respect of a factory or establishment no returns, particulars, registers or records are submitted,*** furnished or maintained in accordance with the provisions of section 44 or any Social Security Officer or other official of the Corporation referred to in sub-section (2) of section 45 is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under section 45, ***the Corporation may***, ***on the basis of information available to it, by order, determine the amount of contributions payable*** in respect of the employees of that factory or establishment:

Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a ***reasonable opportunity*** of being heard:

Provided further that no such order shall be passed by the Corporation in respect of the period beyond five years from the date on which the contribution shall become payable.

(2) ***An order made*** by the Corporation under sub-section (1) ***shall be sufficient proof*** of the claim of the Corporation under section 75 or for recovery of the amount determined by such order as an arrear of land revenue under section 45B or the recovery under sections 45C to 45-I."

25. The above provisions show that, if the employer fails to furnish the documents required, the Corporation itself can determine the contribution payable on giving a ***reasonable*** opportunity to the employer.

26. In the case on hand, the respondent's Inspector issued notice Ex.R15 dated 12.09.2000 calling upon the appellant to produce the following documents for determining the correctness of the contribution:

"(i) ***Original attendance registers*** maintained at the units ***mentioning the IN and OUT timings*** and signature of the respective employees.

(ii) Relevant ***records relating to mode of calculation, rate payable per guard, Supervisors, Inspectors, Area Manager*** in respect of the ***wages booked in the OT wage sheet*** marked as conveyance payments.

(iii) ***Agreement*** if any entered into ***between the establishments and employees*** with regard to item No.2 above."

27. The said notice was received by the appellant. The respondents issued another notice dated 18.10.2000 as per Ex.R19 pointing out certain irregularities in the payment of contribution and to rectify the same. Again the Regional Director of the Corporation issued notice dated 19.10.2000 fixing the hearing date on 20.11.2000. But the appellant did not produce the documents. Another notice dated 19.12.2000 was issued by the Corporation to the appellant giving the final opportunity of personal hearing on 09.01.2001 as per Ex.R21. Exs.R22 to R25 are the postal acknowledgements for having served the notices. The appellant did not do the needful. Ultimately, the Deputy Director of the Corporation passed order Ex.R26 dated 08.02.2002 under Section 45A of the Act determining the contribution payable at Rs.65,20,855/- for the period April 1997

to July 2000. The above circumstances show that more than one year time was granted to the appellant which constitutes not only reasonable opportunity contemplated under Section 45A of the Act but substantial opportunity.

28. During the evidence, AW.2 admitted the receipt of the notices issued by Corporation for personal hearing. Though at one stretch he alleged that one Naval Kapoor the representative of the appellant appeared before the Corporation with his Advocate for personal hearing, he later admitted that none appeared before the Corporation for personal hearing. Under the circumstances, the contention that the respondents have not given proper opportunity to the appellant during the hearing of the proceedings under Section 45A of the Act carries no merit.

29. On holding that in the proceedings under Section 45A of the Act the reasonable opportunity was given, the presumption under Section 45A(2) of the Act to the effect that the order is sufficient proof of the claim of the corporation in the proceedings by the Insurance Court under Section 75 of the Act arises.

30. Section 75(1)(g) of the Act provides for the ESI Court to decide the dispute between the employer and the Corporation in respect of contribution payable etc. It is needless to say that if a statute states that a fact "***shall be presumed***", the analogous provision in Section 4 of the Indian Evidence Act, 1872 says that the ***Court shall regard such fact as proved unless and until the same is disproved***. Therefore it is not a simple discretionary or rebuttable presumption. It was for the appellant to disprove the correctness of determination made under Section 45A of the Act.

31. Considering Section 45A of the Act, the Hon'ble Supreme Court in para 15 of the judgment in ***C.C.Santhakumar's*** case referred to *supra* held that the order under Section 45A(1) of the Act shall be used as sufficient proof of the claim of the Corporation. It was further held that when there is a failure in production of records and when there is no cooperation, the Corporation can determine the amount and recover the same as arrears of land revenue under Section 45B of the Act.

32. In the present case since the records were not produced before the Corporation during determination under Section 45A of the Act, the ESI Court had to accept such determination unless and until the same was disproved by the appellant. Therefore the question is whether the appellant had let in such evidence to disprove the determination made by respondents under the order under Section 45A of the Act.

33. We have to analyze the evidence in the case with a caveat that this matter has to be decided on a substantial question of law. A decision on the question of facts does not become a substantial question unless the same suffers from perversity. While considering when a substantial question arises on a question of facts, what shall be the approach of the Court, the Hon'ble Supreme Court in para 15 of the judgment in ***Santosh Hazari v. Purushottam Tiwari***[11] held as follows:

> "15. .....
>
> ***The judgment of the appellate Court must, therefore, reflect its conscious application of mind, and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. The task of an appellate Court affirming the***

[11] AIR 2001 SC 965

findings of the trial Court is an easier one. The appellate Court agreeing with the view of the trial Court need not restate the effect of the evidence or reiterate the reasons given by the trial Court; expression of general agreement with reasons given by the Court, decision of which is under appeal, would ordinarily suffice (See Girijanandini Devi v. Bijendra Narain Choudhary, AIR 1967 SC 1124). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate Court for shirking the duty cast on it. While writing a judgment of reversal the appellate Court must remain conscious of two principles. Firstly, the ***findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court,*** more so when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law ***if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or*** on ***conjectures and surmises, the appellate Court is entitled to interfere with the finding of fact*** (See Madhusudan Das Vs. Smt. Narayani Bai, AIR 1983 SC 114)."

(Emphasis supplied)

34. It was further held that the ***First Appellate Court continues to be final Court of facts***. Pure findings of fact remain immune from the challenge ***unless it is shown that the order shows perversity or patent illegality, that means relying on inadmissible evidence, or in total ignorance or contrast to the evidence before it***. The order of the ESI Court has to be tested now on the said touchstone. The burden was on the appellant to prove that the payments noted as 'conveyance charges' were made to the employees towards their travel expenses.

35. As rightly pointed out by the ESI Court, the enclosures to Ex.R5 styled as wage registers from April 1997 to July 2000 consist of two parts. One is duty wages and the other one is OT Wages/others not considered for remittance/SAL, PAT, CONV-ALL. Certain remittances were made under the OT wages column. The appellant interprets "CONV" as conveyance charges reimbursement. Admittedly, those remittances were not accounted for the contribution. According to the respondents those payments in the wage sheets were the overtime wage payments.

36. Admittedly, the attendance registers for the relevant period were not produced. According to the appellant none of its employees worked beyond 8 hours which was their working hours. The ESI Court examined Exs.R1 to R14 the wage registers wherein time in and time out of the employees were reflected. They show that large number of employees had worked 12 hours or more than 12 hours.

37. As rightly pointed out by the ESI Court, none of the employees mentioned therein was examined to show that they worked only 8 hours and not 12 hours or more as reflected in those documents. The ESI Court analysed the evidence of AWs.1 to 4 examined on behalf of the appellant and the documents produced by them. As rightly pointed out by the ESI Court, Exs.A1 and A2 related to November 2001 and March 2001 respectively, therefore they were irrelevant.

38. AW.1 was examined on 11.12.2002. He says that he was working with the appellant since one year three months as Regional Personnel Manager. He admits in his cross examination that he was not in service of the appellant's establishment when the ESI Inspector inspected the

establishment. He further states that he was deposing only on the basis of the records. Thus he had no personal knowledge as to what transpired during the relevant period or during inspection. AW.1 states that they have more than 400 clients and their employees/guards work in those clients' establishment, therefore their attendance records will be available with the customer establishments. He also deposed that they have site Supervisors at their clients' sites and they report the entry and exit of the employees. The clients or Supervisors who worked at the relevant time were not examined. The vouchers collected from the employees for having received the conveyance charges were not produced.

39. AW.2/the Personnel Manager of the appellant was examined to state that he was present during the inspection and produced the wage registers and muster rolls. He states that the muster rolls and wage register produced by him were prepared by their supervisors and Inspectors at the clients' sites. AW.2 in his cross-examination admitted that in Exs.A8 to A12 the muster rolls, the names of such Supervisors and the Inspectors are not forthcoming. Though he stated that their

clients submit the copies of the attendance registers for raising bills, none of those documents were produced nor the clients were examined. Though according to AW.2, the Supervisor and the Inspectors report to the Branch Manager about working hours and conveyance expenses and on that basis bills were prepared and payments were made, such reports were not produced.

40. AW.3 claims to be the Regional Manager (Accounts). In his chief examination he states that he joined the company in 1995 as Senior Executive. He does not say what was his designation and nature of work during the check period. He claims to have handled the petty cash book and the records of the salary of the staff. According to him the reimbursement of the conveyance expenses to the guards used to be made once in a month out of the amount in petty cash and he used to calculate the said amount on the basis of the information furnished by the Operation Department. No official from operation department was examined. There was no evidence to establish all those procedures.

41. AW.4 was examined to show that he was working in the appellant/company as Security Guard since October 1992 and he was promoted from time to time as Security Supervisor and ultimately as Senior Controller. He says in his chief examination that as security guard he used to receive the conveyance charges and subscribe his signature in the conveyance register. But no document was produced to show that he was working as Security Guard in the appellant company either in 1992 or during the relevant period namely April 1997 to July 2000. In the cross-examination he admits that he has no document to show that he was receiving reimbursement from the appellant towards conveyance charges. He deposed that ***while claiming conveyance charges, he was producing the vouchers to the appellant management***. He admits that, if the reliever of the security guard failed to report, such security guards would continue to work even after his shift hours. But he says that the applicant company was not paying extra money for the same. The evidence of AW.4 falsifies the appellants' contention that their employees never used to work overtime and they were not submitting vouchers for conveyance charges.

42. The ESI Court on examining all the relevant documents and sound appreciation of the oral and the documentary evidence held that the appellant has not proved that the payments mentioned in the column "OT wages" were the reimbursement of the conveyance charges, which is not accountable for contribution. In fact the appellant was required to disprove the order under Section 45A of the Act and the materials relied for the said purpose. The ESI Court neither relied on inadmissible evidence nor omitted the consideration of any material documents or evidence.

43. The judgment in ***Subbaraya Adiga's*** case referred to *supra* relied on by the appellant's Counsel related to the criminal proceedings under Sections 84 and 85 of the Act for non compliance of the provisions of the Act. Moreover the question involved was whether the establishment therein was covered under the Act. In such context it was held that, it was for the prosecution to prove that the employer therein had more than the prescribed numbers of employees. The said judgment is not applicable. In the light of the judgment of the Hon'ble Supreme Court in ***C.C.Shanthkumar's*** case referred to *supra,* the other

judgments relied on by learned Counsel for the appellant cannot be justifiably applied to the facts of the present case.

44. At last learned Counsel for the appellant argued that the matter may be remanded for fresh consideration. The records of the case show that the appellant is habituated to seek remand of the matter even in the absence of substantial questions of law, only to gain time. Since the appellant has failed to discharge its burden of disproving determination made under the order under Section 45A of the Act and the impugned judgment and order is passed on weighing the evidence and other materials on record in a judicious manner, there are no grounds to consider the said prayer for remand.

45. For the aforesaid reasons, the substantial question of law is answered against the appellant. Hence the following:

ORDER

The appeal is dismissed with costs of Rs.1,00,000/- payable to the Karnataka State Legal Services Authority.

If the costs are not paid within two weeks from the date of this order, the Karnataka State Legal Services Authority shall recover the same as arrears of land revenue.

Communicate the copy of this order to the Karnataka State Legal Services Authority.

Sd/-
JUDGE

Sd/-
JUDGE

KSR