(2001) 11 RAJ CK 0010

In the Rajasthan High Court

Case No : Civil Special Appeal (Writ) No. 742 of 1999

All India I.T.D.C. Employees Union APPELLANT

Vs

Employees State Insurance Corp. and Others RESPONDENT

Date of Decision : 20-11-2001

Acts Referred:
Employees State Insurance Act, 1948 — Section 1(4), 74, 75

Citation : (2000) 84 FLR 869 : (2002) 3 LLJ 917 : (2003) 1 RLW 25

Hon'ble Judges : Rajesh Balia, J;Harbans Lal, J

Bench : Division Bench

Advocate : P.P. Choudhary, in Saw No. 742/99 and Govind Mathur, in Saw No. 1005/99, for the Appellant; P.P. Choudhary in Saw No. 1005/99, Govind Mathur in Saw No. 742/99 and V.K. Mathur, for the Respondent

Final Decision : Dismissed

Judgement

Balia, J.—Heard learned counsel appearing for the parties.

2. These appeals are directed against the judgment dated 5.5.99 passed by the learned Single Judge dismissing the writ petition filed by All India I.T.D.C. Employees Union challenging the notification issued by Laxmi Villas Palace Hotel on 30.1.97 (Annex. P/7) informing its employees that in terms of the amendment made in the provisions that in terms of the amendment made in the provisions of the Employees State Insurance Act vide notification dated 23.12.96 which became effective with effect from 1.1.97, its provisions shall be made applicable to those employees with effect from 1.1.97 who were drawing monthly salary upto Rs. 6,500/- which limit was earlier upto Rs. 3,000/- and deduction on account of employee''s contribution towards the Employees State Insurance was increased from 1.5% to 1.75%. So also, the employer''s contribution was increased from 4.75% with this notification, it was required of those employees who were drawing salary upto Rs. 6,500/- to secure new insurance cards after fulfilling the requisite declaration.

3. The principle objection on behalf of the employees union of the said Notification is that in view of the Proviso to Section 1(4), the provisions of the Act are not applicable to the respondent employer company. However, the term used by the petitioner in the writ petition is to claim exemption. It is the case of the appellant/petitioner union that the hotel in question is a Government of India undertaking and is State within the meaning of Article 12. Therefore, it being a State Hotel, the provisions of Section 1(4) are not attracted so as to extend the applicability of the Act of 1948 to the employees of the said establishment, therefore, the contribution demanded from the employees to be deducted from the salary of the employees of the said establishment is not warranted.

4. Apart from raising preliminary objection that the basic notification issued by the Union of India dated 23.12.96 has not been challenged by the petitioner which is the foundation for issuing the impugned notification by the Management and without making U.O.I. as a party respondent, the petition is not maintainable. It has been contended by the respondents that the applicability of the Act has been extended vide notification dated 23.12.96 been extended vide notification dated 23.12.96 amending the provisions of the Act and, therefore, it is not entitled to any relief. It was also contended that the determination of question of applicability of the Act to any particular establishment depends upon determination of basic facts which could be done by the proper forum under the Industrial Disputes Act and not by resorting to extraordinary jurisdiction under Article 226 of the Constitution of India. The factum of I.T.D.C. being on instrumentality of the State was also denied.

5. The plea of the respondents found favour of the learned Single Judge and the Court held that if the applications for exemption or for determination of the applicability of the Act to the establishment in question is made before the appropriate government or Employees Insurance court, it would take decision thereon but as the question depends upon determination of the certain issues of the fact, to make a reference to the Industrial Tribunal/Labour Court, the court refused to exercise the extraordinary jurisdiction to determine the controversy by taking evidence and adjudicate the same as the court of original jurisdiction. Considering the fact that during the pendency of the writ petition, the petitioner was allowed not to pay the contribution under the interim orders of this Court, which has not been deducted from their salary, the Court directed that the same should not be realised now because they were not availing the facility of E.S.I. during pendency of the writ petition.

6. Aggrieved with the aforesaid decision, two appeals have been filed. Appeal No. 742/1999 has been preferred by the Employees'' union and the appeal No. 1005/1999 is by the Employees State Insurance Corporation.

7. The Corporation''s appeal is to the extent that the learned Single Judge, has directed to consider the waiver of realisation of contribution of the period during which the interim order passed by this Court has remained operative whereas the appeal by the employees'' Union is on the merit of issue as noticed by us

above.

8. In the first instance, learned counsel contended that there is no forum for adjudication of the dispute as to the applicability of the dispute as to the applicability of the Act to the establishment, therefore, there is no alternate remedy available under which this question can be decided and, therefore, the order under appeal cannot be sustained. There being no alternate remedy, the controversy ought to have been adjudicated by the learned Single Judge.

9. This contention does not stand the test of scrutiny. Under the scheme of the Act of 1948, Chapter VI specifically deals with the adjudication of the disputes and claims. Section 74 envisages establishment of Employees Insurance Courts for resolution of the disputes arising under the Act. Section 75 of the Act enlist the matters to be decided by the Employees Insurance Court. Under Section75(1)(a), the question where any person is liable to pay the employee''s contribution is raised, it is a matter to be decided by the Employees Insurance Court. Under Section75(1)(g), which is like a residuary clause invest the Insurance Court to decide any dispute between the principal employer and the Corporation or between a principal employer and immediate employer, or between a person and the Corporation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues payable or recoverable under this Act or any other matter required to be or which may be decided by the Employees Insurance Court under this Act. Sub-section 2B requires that if any dispute is raised by a principal employer against a Corporation in respect of any contribution or any other dues, he can raise such dispute only on depositing with the Court 50% of the amount as due from him as claimed by the Corporation.

10. Clauses (a) and (g) of Section 75(1) are wide enough to cover a dispute about the applicability of the Act to any establishment which obligates an employer to deduct the ESI contribution from the emoluments payable to the employer for the purpose of depositing the same to the Corporation. This question is inherent in the dispute as to whether a person is liable to pay the contribution. The dispute can be raised by the employer as well as the employee so also any matter which can be subject matter of the dispute as to the applicability of the Act to any particular employee or the principal employer, it falls to be determined by the Court established u/s 74 in terms of Clauses (g) of Section 75(1). Section 75(3) excludes the jurisdiction of the civil court to entertain such matters which are to be decided by the Employees Insurance Court or by a Medical Board or by a Medical appeal Tribunal under the provisions of Section 75.

11. Section 81 of the Act enables the employees Insurance Court to submit any question of law for decision of High Court and on such reference being made, the High Court shall decide such questions and the matter shall then be decided by the Court in accordance with decision rendered by he High Court. Where the reference has not been submitted u/s 81, an appeal lies to the High Court u/s

82(2) if it involves substantial question of law.

12. Thus, it is apparent that under the scheme of the Act, not only a remedy but an efficacious remedy has been provided for any dispute arising under the provisions of the Act including as to its applicability whether to the principal employer, immediate employer or the employees in general or individual. The questions may be raised by any of the persons affected by the provisions of the Act.

13. In these circumstances, petition under Article 226 are ordinarily not to be entertained. The principle has been stated as far as back by the Hon''ble Supreme Court in case of Basant Kumar Sarkar and Ors. v. Eagle Rolling Mills Ltd. and Ors. (1), The question of applicability of the Act to a particular establishment was raised by filing a writ petition before the Patna High Court. The Patna High Court refused to entertain the petition on the ground of availability of alternative remedy. It had been contended that the alternative remedy is by way of raising a dispute under the Industrial Disputes Act and it is in the discretion of the appropriate Government to refer and cannot be considered as an efficacious remedy. The Supreme Court affirmed the judgment of High Court and said that,

"without expressing any opinion on the merits of the contention, we would confirm the finding of the High Court that the proper remedy which is available to the appellants to ventilate their grievances in respect of the said notices and circulars is to take recourse to Section 10 of the Industrial Disputes Act, or seek relief, if possible, under Sections 74 and 75 of the Act.''"

14. It was again stated by the Apex Court in the case of Employees State Insurance Corporation v. R.K. Swamy and Ors. (2). Considering the question of interpretation put by the Government on the applicability of the Act to a particular establishment by issuing notification, the Court said that,

"It is for the courts to interpret the notification once it is issued."

15. It was a matter in which the question whether the advertising agencies are shops within the meaning of the Act has been decided by the Industrial Tribunal contrary to the opinion expressed by the Government.

16. In view of the aforesaid, we are in agreement with the learned Single Judge that in the present case, the question of applicability of the Act to a particular establishment or its ouster from its applicability under the provisions of the Act depends upon the determination of basic foundational facts and that has to be decided by the proper forum by raising dispute before it and not by invoking extra ordinary jurisdiction.

17. It would be appropriate to reproduce Sub-section 4 of Section 1 of the Act, which is as under :-

"(4) It shall apply, in the first instance, to all factories (including factories belonging to the Govt.) other than seasonal factories.

Provided that nothing contained in this sub-section shall apply to a factory or establishment belonging to or under the control of the Govt. whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act."

18. From the aforesaid, it is apparent that the Act in the first instance has been made applicable to all factories other than seasonal factories on its own force without any notification. The proviso was inserted by ESI (Amendment) Act No. 29 of 1989 with effect from 20.10.89. Under the proviso, a factory or establishment belonging to or under the control of the Government whose employees are otherwise entitled to the similar or superior benefits than provided under the Act, were excluded from the applicability of the Act, Exhypothesi, all factory, including the one belonging to Government, were brought within the cimbit of operation of the Act. So also, exhypothesi any factory or establishment which directly or indirectly under the control of Government, if its employees are in receipt of benefits substantial, similar or superior to the benefits provided under the Act stood excluded from the purview of the Act. However, notwithstanding this automatic result of the provisions of the Act, the facts on the basis of which exhypothesi application of law or exclusion of the provisions of the Act would become effective remains to be determination by the human agency and that has been provided under Chapter-Vi of the Act by establishing Employees Insurance Court and the dispute as to whether a particular establishment is a factory or not; if it is factory whether belonging to or under the control of the Government and that if it is establishment belonging to or under the control of the Government, whether its employees are in receipt of benefits substantially, similar or superior to the benefits provided under the Act, has to be established by leading evidence, raising issues and determination of such facts by adjudicating body.

19. The question, therefore, cannot be decided merely on the basis of assertion made in the writ petition by the appellant. This being the case, appropriate remedy for the petitioners if they chose to claim falling within the proviso to Section 1(4), is to approach before the Employees Insurance Court u/s 75 and if so possible, to raise an industrial dispute by approaching appropriate Government and seek a reference to the Industrial Tribunal for adjudication.

20. The petition filed by the Union has, therefore, rightly not been entertained and the appeal should, therefore, fail and is accordingly dismissed.

21. So far as the appeal filed by the Corporation is concerned, we are of the opinion that the interest of all the parties will be safeguarded by making following directions :-

"(i) the deduction of the employees'' contribution will be made by the employer and along with the employees contribution, employer''s contribution shall be deposited with the ESI Corporation.

(ii) Such deposits shall be kept in a separate account by the ESI Corporation for a period of three months.

(iii) If within the said period of three months, any dispute is raised about the applicability of the Act to the establishment in question by the employer or employees before the appropriate forum, the said arrangement of regular deposits of the contribution and maintenance of separate account by the Corporation shall continue until the adjudication of that dispute by the said forum.

(iv) However, if no such application is made within three months, the amount of contribution of the employee''s and the employer''s so deposited with the Corporation shall be appropriated to the normal fund in accordance with the law.

(v) If any such dispute is raised and the petitioners succeed, the refund of the amount can appropriately be ordered at the end of such adjudication."

22. As far as the directions made by the learned Single Judge about realisation of the contribution during the operation of the interim order is concerned, being in consonance with justice and equity, we are not inclined to interfere with the same.

23. With the above directions, these appeals stand disposed of with no orders as to costs.