
(1981) 04 BOM CK 0042
In the Bombay High Court
Case No : First Appeal No. 490 of 1980

Associated Cement Cos. Ltd.

APPELLANT

Vs

The Regional Director, E.S.I.C.

RESPONDENT

Date of Decision : 14-04-1981

Acts Referred:

Constitution of India, 1950 — Article 38, 39, 41, 42, 43

Employees State Insurance Act, 1948 — Section 2, 26, 28, 32, 38

Citation : (1981) 83 BOMLR 504

Hon'ble Judges : Dharmadhikari, J

Bench : Single Bench

Judgement

Dharmadhikari, J.—The appellant company is registered under the Indian Companies Act and runs about 24 cement factories in various parts of the country. All these factories are covered by the definition of "factory" under Sub-section (12) of Section 2 of the Employees' State Insurance Act, 1948, hereinafter referred to as the Act. These factories are also registered under the Factories Act. It is an admitted position that the relevant factories to which the Act applies are paying employer's special contribution in respect of the employees covered by the Act. However, the employer company is not paying the employer's special contribution and the employees' contribution in respect of the employees employed in the head office and the branch offices. The head office of the company is, at Bombay while the branch offices are at New Delhi and Calcutta. It is in respect of these offices that the employer company was not making any payment towards the contribution as per the Act. Therefore on September 14, 1971 the Employees' State Insurance Corporation sent one letter to the head office of the company informing it that the appellant company's head office situate at Bombay is also covered by the Act and, therefore, the employer company should arrange to furnish a detailed information regarding all their factories throughout India in the pre-forma attached to the letter. As soon as this letter was received by the company, it filed an application u/s 75 of the Act.

2. The main contention raised in the application was that the employees who are working in the head office or the branch offices are not covered by the provisions of the Act. It was contended by the company that even the amended definition, in Sub-Section (9) of Section 2 of the Act is not applicable to the employees working in the head office or the branch offices. According to the appellant company, in the head office work connected with the administration of the factories which are either exempted or are not covered by the Act is also carried out and the number of the said factories is 13 whereas the factories covered by the Act are only 11. Therefore, according to the appellant company the major part of the work carried on by the employees working in the head office or the branch offices relates to the administration etc. of the factories which are not covered by the Act and only because these employees are also doing work connected with the administration etc. of the 11 factories which are covered by the Act the said employees working in the head office or the branch offices are not covered by the Act concerned.

3. Apart from this certain other contentions were also raised in the application with which I am not concerned in this appeal. It also appears that a contention was also raised by the appellant company that in any case the departments viz. Geological and Mining Department, Village Welfare Department, Concrete Association of India, the department connected with the work of overseas factories and the office superintendent's department had no connection whatsoever with the working of the factories covered by the Act and therefore, in any case the employees exclusively working in these departments are not the employees within the meaning of Section 2(9) of the Act.

4. The respondent corporation resisted the claim of the employer company by filing a detailed written statement. According to the corporation, the employees employed in the head office or branch offices are doing the work connected with the administration of the factories covered by the Act including the purchase of raw material, distribution or sale of the products etc., and therefore are employees within the meaning of Section 2(9) of the Act. In view of the pleadings of the parties as many as 7 issues were framed by the Employees' Insurance Court. The appellant company adduced evidence, both oral and documentary, in support of its contention, whereas the respondent corporation did not examine any witness. After appreciating all the evidence on record, the learned Judge of the Employees' Insurance Court, vide order dated May 15, 1980 came to the conclusion that the employees working in the head office or the branch offices of the company who are paid salary less than Rs. 1000/- are employees within the meaning of Section 2(9) of the Act. In this appeal I am not concerned with the findings recorded on the other issues because before me it is not disputed that in view of the decision of the Supreme Court in Hyderabad Asbestos Cement Products Ltd. Vs. Employees Insurance Court and Another, even the employees working in the branch offices or the head office and doing work connected Hyderabad Asbestos Cement Products Ltd. Vs. Employees Insurance Court and Another, with the administration or purchase of raw

materials for, or distribution or sale of the products of the factories covered by the enactment are also employees within the meaning of Section 2(9) of the Act. It is also not disputed before me that no separate notification is necessary for extending the provisions of the Act to the employees working in the head office or the branch offices.

5. Shri Bhabha, learned Counsel appearing for the appellant company contended before me that the learned Judge of the trial Court committed an error in coming to the conclusion that the employees working in the head office or the branch offices are covered by the provisions of the Act. According to Shri Bhabha out of the 24 factories, run by the appellant company 13 factories are not covered by the Act. Therefore, only 11 factories are covered by the enactment concerned. The employees working in the head office at Bombay or the branch offices are doing work connected with all these 24 factories. As majority of the factories are not covered by the Act, it cannot be said that the employees working in the head office or the branch offices are primarily or principally doing the work connected with the administration etc. of the factories covered by the Act. On the admitted position the employees working in these offices are doing the work connected with the administration of the 13 factories which are not covered by the Act and as major portion of their work weighed either on the technique of workload or otherwise is in connection with the factories not covered by the Act, the learned Judge of the trial Court committed an error in coming to the conclusion that the employees working in these offices are the employees with the meaning of Section 2(9) of the Act. He also contended that even prior to the notice dated September 14, 1971 and thereafter no benefits are extended to the employees working in the head office or the branch offices. The contribution which is recovered from the employer or the employees under the Act is in nature of fee and not tax. Since the respondent corporation has not extended any benefit to the employees working in these offices during all this period, the corporation is not entitled to recover any amount either from the employees or the employer towards the contribution as the contribution payable under the Act is not in the nature of tax but is a fee which could be recovered only in lieu of the services rendered. In support of this contention Shri Bhabha has placed a strong reliance upon the following decisions Between Tata Oil Mills Co. Ltd., Ernakulam And E.S.I.C. Tiruchur [1978] 2 L L J 182, Foods Fats and Fertilizers Ltd. v. Regional Director Employees" State Insurance Corporation ILR (1972] A P 1103. Between Hindustan Aeronautics Limited and Regional Director, Employees" State Insurance Corporation and another ITT (1974) L. J. 115. These are the only contentions raised and argued before me.

6. On the other hand it is contended by Shri Jaykar, learned Counsel appearing for the corporation that once it is established or admitted that the employees working in the head office are doing some work connected with the administration etc. of the factories covered by the Act, then such employees are wholly covered by the definition u/s 2(9) of the Act. According to Shri Jaykar mathematical calculation as to whether majority of the factories are covered by

the enactment or not is wholly irrelevant while deciding the question as to whether the employees working in these offices are the employees within the meaning of Sub-section (9) of Section 2 of the Act. According to Shri Jaykar it is an admitted position that out of the 24 factories at least 11 factories are covered by the enactment. It is also an admitted position that the employees working in the head office or the branch officers are doing work connected with the administration etc. of the 11 factories which are covered by the Act. Therefore, according to the learned Counsel the employees working in these offices are also covered by the Act. According to Shri Jaykar u/s 68 the corporation is entitled to recover the amount of contribution. All contributions paid under the Act are paid into a fund, known as employees' State Insurance fund. The liability to pay contribution is that of the employer in the first instance and unless such contribution is paid, there is no liability on the part of the corporation to extend benefit. The said contribution is in the nature of cess or tax and, therefore, the corporation is entitled to recover the whole of the amount from the appellant company. He also contended that in any case the appellant company cannot be permitted to take an advantage of its own wrong. According to him, the corporation could not extend the benefits to employees working in these offices because the company did not perform its part of the duty by paying the required contribution. In support of his contentions, Shri Jaykar has relied upon the decisions of Kerala and Madras High Courts, in *M/s. Gwalior Rayon Silk Manufacturing Co. v. E.S.I. Corporation* [1975] 2 Lab. I. C. 1395, and *Sakthi Ltd. v. Regional Director, E.S.I.C. Madras* [1978] Lab. I.C. 410.

7. For properly appreciating the contentions raised before me it will be worthwhile if a reference is made to the admitted position. As already observed it is an admitted position that the appellant company is running in all 24 factories out of which 11 are covered by the Act. 13 other factories, which include two exempted factories, are not covered by the enactment. From the evidence of Shri Mohan Sing, a witness examined on behalf of the appellant company, it is further clear that (1) manager of each factory is appointed by the head office (2) customer in order to purchase cement has to obtain permit from the Government and then approach either the head office or the godown at Bombay to deposit money in order to collect cement stock under the permit; (3) information regarding daily production of the factories is sent to the head office and the statistics of it is maintained by the operation division, or the marketing division; (4) general manager of each and every factory is under the direct control of the director (production) in the head office (5) operating department can question the general manager of the cement factory about the production in the concerned factories and suggest suitable remedies for overcoming difficulties etc. if any; (6) indent for machinery to be imported is always placed by the head office (7) consolidated balance sheet of the profit and loss account of all the units of the company and budgetary provisions for each factory for every year are maintained and sanctioned by the board of directors of the company; (8) as regards the sale of products of the factory necessary orders are given by the

head office and the branch office concerned, which include payment of the amount as well as the collection of the cement required and (9) there is no bifurcation so far the sales are concerned either in respect of staff in the head office or the branch offices.

8. However, it appears that the employees working in the Bombay head office or the branch offices are not in any way responsible to the factory authorities for the work done by them and are also not subject to the standing orders of the factory (2) their wages are not disbursed by or under the instructions of the factories concerned nor their wages are debited to the factories account; (3) the employees working in the head office or the branch offices are not under the control of the authorities attached to the factory. Shri Mohan Singh has further admitted in para. 4 of his deposition that the workers in these offices do the work in connection with the factories which are covered under the scheme of the Act and also in connection with other 13 factories which are not covered. If this evidence is read as a whole and between the lines it appears to be an admitted position that the head office has an overall control over all the factories and the employees working in this office and branch offices do the work in connection with administration, purchase of materials and distribution or sale of the products of the factories covered by the Act, as well as other factories. As already observed it is also an admitted position that the covered factories are 11 in number whereas uncovered factories are 13. Therefore, relying upon the decision of the Kerala High Court in *Tata Oil Mills Co, Ltd. Ernakulam v. E.S.I. Corporation*, (supra) it is contended by Shri Bhabha that the employees working in the head office or the branch offices are employed principally for the work of the uncovered 13 factories although they do some other work also which is connected with the covered factories. According to Shri Bhabha the workload of these employees including the degree of relationship, is more qua uncovered factories than the covered ones and, therefore, the said employees working in these offices cannot be termed to be "employees" within the meaning of Section 2(9) of the Act. In substance it is contended by Shri Bhabha that the principle of degree, weightage, workload will have to be applied while deciding such a mixed question and only because the employees working in these offices are also doing the work of covered factories which are lesser in number, it cannot be said that all the employees working in these offices are covered by the Act.

9. As already observed after the amendment of Section 2(9) of the Act the Supreme Court had an occasion to consider the import and the scope of the said amendment in *Hyderabad Asbestos Co.'s case* (supra). In the said decision it is held by the Supreme Court that even the employees working in the zonal offices or the branch offices of the factories are employees within the meaning of Sub-section (9) of Section 2 of the Act. It is further clear from the decision of the Supreme Court in *Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation*, Therefore it is by now well settled that the employees working in the head office or the branch offices and doing work connected with the administration etc. of the covered factories, would also be covered by the

provisions of the Act. Therefore, the only question which requires consideration in this appeal is to find out as to whether, the employees working in the head office or the branch offices who are doing the work in connection with all the 24 factories, out of which 11 are covered by the Act and are employees within the meaning of Section 2(9) of the Act.

10. Prior to the amendment of Sub-section (9) of Section 2 of the Act there was a doubt as to whether the employees working in the head offices or branch offices are also covered by the definition of the term "employee." To remove the said doubt by amending Section 2(9) the import of the said expression is widened so as to include the workmen! employed for wages on any work connected with the administration of the factories etc. In the present case I am concerned with the offices in which persons are employed for wages on the work connected with the factories which are admittedly 24 in number out of which 11 factories are covered by the Act. It is also an admitted position that the employees working in the head office or branch offices are doing the work connected with the administration, purchase of materials and distribution and sale of products of the factories which are covered by the enactment. This is not a case where it could be said that in comparison with the total work carried out by the employees in the head office or the branch offices the work connected with the covered factories is wholly insignificant or negligible. Comparative workload between 11 and 13 factories cannot be decided on mathematical calculation or precision. In these circumstances it will not be fair to hold that the work which is being carried out by the employees in the head office or the branch offices is so insignificant that on the touchstone of weightage or workload the employees working in the head office or branch offices could be said to be disqualified to claim protection of the Act. The majority of 13 versus 11 is neither vast nor substantial.

11. The decision of the Kerala High Court in Tata Oil Mills case (supra) is distinguishable on facts. In that case the Kerala High Court was concerned with a question as to whether the employee concerned was employed principally for doing the work of a particular factory although he may be doing some other work also. In that context the Kerala High Court applied the principle of degree of relationship with the factory with which the employee was sought to be connected for the purpose? of the Act. In the present case I am not concerned with such a contingency. Admittedly the head office or branch offices are the head office or branch offices of the 11 factories covered by the Act. The work carried out by these offices is directly connected with the administration etc. of the 11 factories. These 11 factories have no independent head office or branch offices. As already observed, such a question cannot be decided on the touchstone of mathematical calculations or statistical precision. It will have to be decided after taking a commonsense view of the matter. It is the substance of the matter which is relevant for deciding such a question. The work connected with the 11 factories is a substantial work. In these circumstances it could safely be said that the employees in the head offices or branch offices who are doing

work connected with the 11 covered factories are devoting substantial part of their time to the work in connection with the covered factories. The Employees' State Insurance Act is a piece of social legislation intended to confer certain benefits on the employees and, therefore, obviously it should receive liberal and beneficial construction. While construing the provisions of such an enactment, the interpretation which will further the very object of the Act will have to be preferred and if there is any doubt about any provision, the same will have to be interpreted in favour of the persons upon whom the legislature intended to confer benefits. It would be most inappropriate to construe the relevant provisions in a technical or a narrow sense which might result in defeating the very purpose of the legislation. It is further clear that by amending the definition of the word "employee" in Section 2(9) the legislature wanted to widen the scope of the enactment so as to confer the benefits upon the employees working in the head offices. Therefore, by mathematical calculations or precision or putting a technical interpretation on the said provisions the benefits cannot be denied to the employees when it is found that they are otherwise entitled to it as they are doing work in connection with the 11 factories covered by the Act. The principle of weightage or majority cannot apply to admittedly such bare majority where out of 24, 11 factories are covered by the Act. Therefore, taking a broad view of the matter and considering the totality of the circumstances I have no hesitation] in coming to" the conclusion that the employees working in the head offices or the branch offices who are doing work in connection with 11 covered factories are also covered by the Act,

12. I am not called upon to decide the question, if out of the total volume of the work carried on by an employee the work connected with the covered factories is microscopically insignificant or wholly negligible, then also- could it be said that he is also governed by the definition, In the present case overall; control is with the head office and the employees working in the head office and concerned branch offices are doing substantial work in connection with the covered factories. The covered factories have no independent head office or branch office, and all the work connected with administration, sale, distribution etc. of the covered factories is carried out by these offices only. Therefore, the learned Judge of the trial Court was right in coming to the conclusion that the employees working in the head offices and branch offices who are doing work in connection with the administration etc. of the covered factories, are the employees within the meaning of Section 2(9) of the Act.

13. So far as the second contention raised by Shri Bhabha is concerned viz. that the respondent corporation is not entitled to recover any amount from the appellant company since they have not rendered any services, it will have to be seen as to what is the true nature of the contribution payable under the Act. The Andhra Pradesh High Court in Food and Fertilizer etc. v. Regional Director of E.S.I.C. (supra) has come to the conclusion that the nature of the contribution is fee and not tax and therefore, principle of quid pro quo must apply to the provisions of the Act. To the similar effect is the view taken by the Orissa High

Court in the dispute between Hindustan Aeronautics Ltd. etc. and Regional Director, E.S.I.C. [1974] 2 Lab. L.J. 115 . A contrary view has been taken by the Allahabad High Court in Anand Kumar Bindal Vs. Employees' State Insurance Corporation and Others, and by Kerala and Madras High Court in M/s. Gwalior Rayon Silk Manufacturing Co. v. E.S.I. Corporation [1975] Lab. I. C. 1396 and Sakthi Pipes Ltd. v. Regional Director, E.S.I.C. [1978] Lab. T. C. 410.

14. In this context Shri Bhabha has also placed reliance upon a Supreme Court decision in The State of Maharashtra and Others Vs. The Salvation Army, Western India Territory, wherein distinction between tax and fee has been pointed out. To say the least the distinction between tax and fee is by now well settled and it is not necessary for us to make any detailed reference to the said difference. The only thing which requires consideration in this appeal is to find out as to what is the nature of the contribution payable under the E.S.I. Act. In the first instance it cannot be forgotten that the enactment by its very nature is a social insurance Act. The scheme is financed from the central fund called E.S.I. fund. This fund is mainly derived from the contribution of the employers and employees and interest etc., though it appears that the Government also shares part of the cost of medical treatment.

15. Section 26 in terms lays down that all contributions paid under the Act and the other moneys received on behalf of the corporation shall be paid into a fund called Employees State Insurance Fund. Section 28 lays down as to for what purposes the fund could be spent. By Section 32 the corporation is expected to frame a yearly budget showing receipts and expenditure. Then, come chapter IV which deals with the contribution. By Section 38 it is declared that all the employees working in the factory or establishments to which the Act applies are insured in the manner provided by the Act; by Section 39 a duty is cast upon; the employer to pay contribution as provided for in the Act to the corporation. The principal employer has to pay contribution in the first instance, both the employer's contribution as well as employees' contribution. Employees' contribution is not payable in the case of an employee whose average daily wages are below one rupee and fifty paise. Thus though such an employee is entitled to receive benefits, there is no corresponding obligation upon him to contribute obviously because of his paltry wages. Then Section 43 lays down the method of payment of contribution. Subsequent provisions of the Act deal with the determination of the contribution as well as its recovery. Chapter V deals with the benefits to which the insured person is entitled which includes sickness benefits, maternity benefits, disablement benefits etc. The scheme contemplated by the legislation is in the nature of an insurance, and the amount of contribution received from a particular employer or employee is not earmarked but is deposited in common fund. The benefits which a particular employee receives under the Act has no co-relation with the contribution made by him or his employer. The contribution! is payable by the employer and the employee irrespective of the benefits availed of or services rendered. Therefore, in my opinion it will not be fair to import or apply the principle of quid pro quo to such

a contribution.

16. As a matter of national policy and in tune with the directive principles of State policy incorporated in the Constitution the legislature has made a provision providing for insurance to the employees working in the factories and other establishments to which the Act applies, providing insurance benefits for sickness, disablement and maternity etc. Thus, the provisions are made as a matter of national policy providing for social security to the employees. The enactment deals with the insurance of the employees. Though a person pays premium or contribution to insure himself from certain contingencies, normal expectation or desire is that an occasion should never arise when he is forced to claim a benefit. Normally a person wants, insurance in case of an unforeseen contingency and prays that such a contingency should! never arise. There is no requirement of minimum return nor there is an expectation of service as a return for contribution made by the employer or employee. Therefore, to such a scheme the principle of quid pro quo cannot apply. Hence it is not possible for me to follow the decisions of Orissa or Andhra Pradesh High Courts.

17. The Supreme Court had an occasion to consider the scheme of the present Act in *The Workmen of Sur Enamel and Stamping Works (P) Ltd. Vs. State of West Bengal and Others*, From this decision of the Supreme Court it is clear that the provisions of the Act unmistakably indicate that the whole scheme is dependent upon the contributions made by the employer not only with respect to the amounts payable by him but also in respect of those payable by the employee. This liability on the employer is categorical and mandatory. It cannot be forgotten that the enactment is a part and parcel of social security scheme. It provides for the protection from certain happenings against which the individual of small means cannot effectively provide, by his own liability or foresight. As observed by Supreme Court in *Royal Talkies" case* (supra) this is a post independence measure and shares the passion of the constitution for social justice as envisaged by Articles 38, 39, 41, 42, 43 and 43A of the Constitution which shows concern for workers and their welfare. In a welfare State as the State exists for the general well being of the people it is a proper function of the State to promote social security. In the scheme relating to social insurance the principle involved is mutual insurance and pooling of resources to provide benefits to those in need. In other words it is a device to provide benefits to persons with small earnings, in amounts which combine the contributive effort of the insured with subsidies from the employer and the State. The social security measure which is in nature of social insurance, constitute an important step towards the goal of a welfare State by improving living and working conditions and affording the employees protection from future uncertainties. Lack of social security hinders production and results in industrial dispute and unrest. The Act provides for an insurance as a safeguard against sickness, death etc. As observed by the Madras High Court in *Sakthi Pipes Ltd.* (supra) it is not possible to discern any reasonable, decent nexus between the impost and the benefits. The benefit cannot be said to be arising from the services rendered. A direct link

between! the contribution and indirect benefits resulting from the provisions of the Act is not established so as to conclude that the impost is compensated by quid pro quo of the services rendered. Therefore I respectfully agree with the view taken by the Allahabad, Kerala and Madras High Courts in (1) Anand Kumar v. E.S.I.C. (supra) (2) M/s. Gwalior Rayon v. E.S.I.C. (supra) and (3) Sakthi Pipes Ltd. v. Regional Director, (supra) and hold that the nature of the contribution payable under the Act is not a fee as contended by Shri Bhabha.

18. It is no doubt true that the trial Court has come to the conclusion that the employees working in (1) Geological and Mining Departments, (2) Village Welfare Departments, (3) Concrete Association of India and (4) Office Superintendent's Department are also employees within the meaning of Sub-section (9) of Section 2 of the Act. From the evidence of Shri Mohan Singh it appears that the work done by the employees in these departments is not connected with the factories which are covered by the Act. There is no cross-examination of Shri Mohan Singh so far as this part of his evidence is concerned, nor the respondent corporation has chosen to adduce any evidence in rebuttal. However, it is rightly contended by Shri Jaykar that the Corporation has not challenged this part of his evidence in cross-examination nor has adduced any evidence in rebuttal because this was not put in issue. It is also contended by Shri Jaykar that these departments cannot be treated as water tight compartments as they are interdependent and form part and parcel of the overall working of the head office or branch offices. He also contended that work carried on by these departments is also connected with the covered factories and services of the employees are inter se transferable. However it is conceded by him that there is no evidence on record to support his contentions. Shri Jaykar also stated before me that while holding an inquiry u/s 45A of the Act the appellant company will be given a) reasonable opportunity to put forward its case in this behalf. In view of this the findings recorded by the trial Court so far as these five departments are concerned, will have to be set aside and the question will have to be left open to be determined and decided by the corporation in the inquiry under s . 45A of the Act. It is needless to say that in the said inquiry the appellant company will be entitled to adduce such evidence as it desires. I am also not concerned in this case with the question as to whether the corporation is entitled to recover the amount for all these years by taking recourse to Sections 75, 76 or 77 of the Act. Therefore, I do not propose to decide the question of limitation which was fatedly argued before me during the course of arguments. It is open to the appellant company to raise such a contention before a proper forum including during the course of inquiry u/s 45A. If such a contention is raised, the authorities concerned, including the corporation, are at liberty to decide it in accordance with law.

19. In the result, therefore, the appeal is partly allowed. Finding of the trial Court qua the employees working in five departments viz. (1) Geological and Mining Department, (2) Village Welfare Department, (3) Concrete Association of India (4) Office superintendent's department and (5) overseas department are set aside and the said question is left open. However, other findings are hereby

confirmed. In the circumstances of the case there will be no order as to costs.