

(2000) 10 KL CK 0058
In the High Court Of Kerala
Case No : M.F.A. No. 236 of 1992

Cochin Cadalac Pvt. Ltd.

APPELLANT

Vs

E.S.I. Corporation

RESPONDENT

Date of Decision : 25-10-2000

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(17), 2(22), 2(9)
Income Tax Act, 1961 — Section 10, 7

Citation : (2000) 10 KL CK 0058

Hon'ble Judges : N. Krishnan Nair, J; J.B. Koshy, J

Bench : Division Bench

Advocate : M.V. Joseph, for the Appellant; P. Sankarankutty Nayar, for the Respondent

Judgement

J.B. Koshy, J.—Appellant is questioning correctness of the judgment in I.C. No. 33 of 1990 passed by the Employees' Insurance Court, Alleppey. The substantial questions of law raised are (1) whether the Managing Director and Executive Directors of the Company are employees as defined u/s 2(9) of the Employees State Insurance Act (in short "the Act") and (2) whether apprentices engaged on stipend are also employees u/s 2(9) of the Act. Appellant-establishment is a covered establishment. According to the Appellant, contributions are paid regularly in respect of covered employees. But a letter was issued on 28th February 1989 stating that full contributions on the salary was not paid on the basis of inspection report. According to the E.S.I. Corporation, remuneration paid to Managing Director upto December, 1986 and Executive Directors upto June 1986 were within the ceiling limit and contribution in respect of their salary should be paid. According to the Corporation, company is a different entity and paid Directors are employed by the company. Corporation also demanded to pay contribution on stipend paid to trainees. Ext. D-4 is the final demand which was challenged by the Appellant before the Employees Insurance Court. The Tribunal found that apprentices are also employees and Managing Director and Executive Directors who are receiving remuneration as authorised by the Board of Directors

are also employees and, therefore, contribution in respect of their remuneration should be payable.

2. Section 2(9) of the Employees State Insurance Act defines the term "employee" during the relevant time as follows:

(9) "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and-

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or

(ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;

and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment; but does not include-

(a) any member of the Indian naval, military or air forces; or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed one thousand and six hundred rupees a month:

Provided that an employee whose wages excluding remuneration for overtime work exceed one thousand and six hundred rupees a month at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period;

3. There is no case for the Corporation that Managing Director and Executive Directors are employed by the immediate employer. Even though company is the employer there should be a human agency to exercise the functions of "employer". Therefore, we may examine who is the principal employer. The term "principal employer" is defined in Section 2(17) of the Act which, reads as follows:

17. "principal employer" means-

(i) in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory

under the Factories Act, 1948 (63 of 1948), the person so named;

(ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed the Head of the Department;

(iii) in any other establishment, any person responsible for the supervision and control of the establishment;

4. The Insurance Court relied on the judgment of the Supreme Court in *Ram Pershad Vs. The Commissioner of Income Tax, New Delhi*, and held that contribution is payable on remuneration payable to Managing Director and Executive Directors. It also relied on the decision in *The Frontier Motor Car Co. (P) Ltd. v. Regional Director, Employees' State Insurance Corporation* 1991 Lab. I.C. 765. The Apex Court in *Ram Pershad Vs. The Commissioner of Income Tax, New Delhi*, decided whether the remuneration received by the Director is chargeable u/s 7 or Section 10 of the Income Tax Act and whether it is allowable deduction. There the Supreme Court held as follows:

...Generally it may be possible to say that the greater the amount of direct control over the person employed, the stronger the conclusion in favour of his being a servant. Similarly the greater the degree of independence the greater the possibility of the services rendered being in the nature of principal and agent. It is not possible to lay down any precise rule of law to distinguish one kind of employment from the other. The nature of the particular business and the nature of the duties of the employee will require to be considered in each case in order to arrive at a conclusion as to whether the person employed is a servant or an agent. In each case the principle for ascertainment remains the same.

7. Though an agent as such is not a servant, a servant is generally for some purpose his master's implied agent, the extent of the agency depending upon the duties or position of the servant. It is again true that a director of a company is not a servant but an agent inasmuch as the company cannot act in its own person but has only to act through directors who qua the company have the relationship of an agent to its principal. A Managing Director may have a dual capacity. He may both be a Director as well as employee. It is therefore evident that in the capacity of a Managing Director he may be regarded as having not only the capacity as person of a director but also has the persona of an employee, or an agent depending upon the nature of his work and the terms of his employment.... In other words, whether or not a Managing Director is a servant of the company apart from his being a Director can only be determined by the articles of association and the terms of his employment.

Again it was held that:

...As pointed out earlier under the terms of the agreement he can be removed within the period of 20 years for not discharging the work diligently or if he is found not to be acting in the interest of the company as Managing Director.

These terms are inconsistent with the plea that he is an agent of the company and not a servant.

Based on this finding it was held that remuneration paid is salary and Managing Director is an employee on the basis of term of appointment. Term "employee", "principal employer" etc. are defined in the Act and, therefore, whether remuneration paid to Managing Director or Director's of a company is salary as defined under the Income Tax Act may not be much relevant. But it is also relevant to note that in this case there is no evidence that Managing Director or the Executive Director is bound to do certain work assigned to him as work is assigned to an employee and their services are terminable as in the case considered by the Supreme Court as per the conditions of service fixed by the Board. They were not getting salary or other benefits as received by other "employees" in the establishment. Directors were Managing Director's father, mother and one uncle. E.S.I. Corporation did not give any evidence that anyone of them was working under a "contract of employment" with the company. Only case is that payments made to them were authorised by the resolution of the Board.

5. The next decision considered by the Tribunal is 1991 L.A.B. I.C. 765 (supra). In that case Court was considering the question whether Managing Director and another Director-cum-Purchase Officer are employees. It was held as follows:

...Regarding the Managing Director, there is nothing on record to show that there was any contract of employment between the company and the Managing Director and as such, in my opinion, he will not come within the definition of "employee" of the Act. On the other hand, from the definition of principal employer vide Section 2(17), I am of the opinion that Board of Directors of the company shall include the Managing Director, being the Chief Executive and the said Board is the principal employer.... Whether he will be an employee or not for the purpose of the Act would depend on the contract of employment, whether implied or written. I have already stated that regarding Managing Director, there was no contract of employment with the company. Regarding other director, I find from the evidence of the Managing Director that he was also a purchase officer and in other words, he was an employee of the company, as he was employed for the work of the company and for which he received remuneration.

Thus it was held that when there was contract of employment and one works as an employee even a Director can be an employee under the Act. But merely because some amounts are paid by the company on the basis of Board resolution to a family run company to one or two Directors, they will not become "employees" in the absence of a contract of employment and assigned duties of an employee. On the facts of the case under appeal it was not proved that there was any contract of employment with the company and Managing Director or Executive Director.

6. The Calcutta High Court in B.M. Chatterjee Vs. The State of West Bengal and

Another, , the Punjab and Haryana High Court in *Bombay Metal Works Pvt. Ltd. v. Regional Director, Employees State Insurance Corporation* 1985 Lab. I.C. 1318 and the Bombay High Court in *Employees State Insurance Corporation, Bombay v. Western India Theatres Ltd., Bombay* 1995 (71) F.I.R. 969 held that Directors of a limited company are come under "principal employer" within the meaning of Section 2(17) and, therefore, merely some payments were made to them they cannot be termed as "employees" and no E.S.I. contribution can be collected from their payment.

7. The Supreme Court in *Regional Director, Employees" State Insurance Corporation, Trichur Vs. Ramanuja Match Industries, ,* held that partners of a firm, notwithstanding the receipt of remuneration, are not employees. The Supreme Court held as follows:

The partnership business belongs to the partners and each one of them is an owner thereof. In common parlance the status of a partner qua the firm is thus different from employees working under the firm, it may be that a partner is being paid some remuneration for any special attention which he devotes but that would not involve any change of status and bring him within the definition of employee.

8. After considering the entire matter a Division Bench of this Court in *The Regional Director, E.S.I. Corporation, Trichur v. Sarathi Lines (Pvt.) Ltd.* 1997 Lab. I.C. 1423 held that all depends on the facts of the case and whether Director or Managing Director is an "employee" as defined under the Act depends upon Articles of Association, contract of employment, if any, actual functions etc. For the Division Bench Usha, J. (as she then was) observed as follows:

Merely because it is legally possible for a Director or Managing Director to function in the capacity of an employee also it does not mean that in all cases a Director or a Managing Director who receives remuneration has necessarily to be treated as an employee. It has to be further established that either under the provisions of articles of association or of separate agreement there was a contract of employment between the company and the Managing Director or the Director. In the present case the Appellant has not pleaded or placed any material either before the Employees" Insurance Court or before this Court to the effect that there was such a contract of employment with the Managing Director and the Respondent Company.

After observing so since E.S.I. Corporation did not prove that there was a contract of employment with the company, it was held that no contribution is payable from the remuneration paid to Managing Director in that particular case.

9. The Supreme Court finally decided the matter in *Employees" State Insurance Corporation Vs. Apex Engineering Pvt. Ltd.,* In that case the Apex Court held that merely because Managing Director or Director is a "principal employer", it cannot be said that he cannot be an employee also and upheld the decision of this Court

in Insurance Inspector v. Victory Tile Works 1973 KLT 927. The Apex Court also held that Managing Director of the company cannot be equated in par with partner of a firm. In paragraph 11 of the judgment it was observed as follows:

It must, therefore, be held that the Managing Director of the Respondent-company could not be treated on a par with the partner of a partnership firm being given some remuneration for his extra work....

10. Here in this case none of these contentions were considered. Whether there is any contract of employment between the Company and the Managing Director, what are the functions they are entrusted to do etc. have to be considered and there should be a finding whether the Managing Director or Executive Director is an "employee" as defined u/s 2(9) of the Act and whether remuneration paid to them attract the ingredients of Section 2(22) of the Act. Then only contribution can be demanded. Since there is no material in this case, decision of the E.I. Court has to be set aside. Fresh evidence has to be adduced by both sides on this point and fresh decision has to be taken by the E.I. Court in the light of the decision of the Supreme Court in Employees" State Insurance Corporation Vs. Apex Engineering Pvt. Ltd., and the Division Bench decision of this Court in 1997 Lab. I.C. 1423.

11. With regard to apprentices also the question of coverage relates to period prior to the amendment by Act 29 of 1989 with effect from 20th October 1989. Thereafter, it was specifically included certain kinds of apprentices as employees. By amendment in the definition of "employee" it was specifically included any person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961, or under the standing orders of the establishment. Since this case relates to period prior to the amendment, that is from 1st April 1984 to 30th June 1988, we are not looking into the scope of amendment. It has been held by the Supreme Court in The Employees" State Insurance Corporation and Another Vs. The Tata Engineering and Locomotive Co. Ltd. and Another, that an apprentice is a learner and not an employee. Further it is stated in the order itself that only stipend was received by them and not wages as received by other employees. Therefore, to include them as employees, it is for the Corporation to adduce evidence to show that they are not apprentices in spite of nomenclature but actually employees. In the absence of evidence liability cannot be fastened upon the employer. In the total absence of evidence to show that stipend paid to apprentices are "wages" it cannot be stated that contribution should be paid on the stipend paid to apprentices. No evidence was adduced by the Corporation that apprentices in the establishment are really employees. Before the amendment it was not the case that only Act apprentices or under standing order apprentices are excluded from the definition. Since the matter is remanded, both parties are free to adduce evidence in this aspect also.

In the circumstances of the case, we set aside the judgment in I.C. No. 33 of 1990 and remand the matter for fresh consideration de novo. Both parties will be free to adduce fresh evidence.