(1992) 12 BOM CK 0034

In the Bombay High Court

Case No : Appeal Under ESI Act No. 1 of 1988

Dessai Metal Works APPELLANT

Vs

Esic and Another RESPONDENT

Date of Decision : 14-12-1992

Acts Referred:
Employees State Insurance Act, 1948 — Section 2(12), 2(14AA), 2(17), 44, 45
Factories Act, 1948 — Section 2

Citation : (1993) 1 LLJ 1085

Hon'ble Judges : N.M. Kasliwal, J;Lalit Mohan Sharma, J;A.S. Anand, J

Bench : Full Bench

Advocate : S.K. Kakodkar, for the Appellant; Smt. A. Agni, for the Respondent

Judgement

1. This is an appeal under the Employees'' State Insurance Act. 1948, against the order dated July 12, 1988, in Application No. EIC/5 of 1985 which was taken by the appellants u/s 75 of the Act. The challenges available for an appeal, as Section 82 itself indicates, are highly of a limited nature-only when the matter involves a substantial question of law.

2. Before I come to the various challenges, it is advantageous to set out the story of the matter. The appellants are a registered partnership firm of which Dr. Sulokshana Dessai (A.W. - 1) is said to be the managing director-partner. It is common ground that the firm has got some quarry for extraction of basaltic stones in a village called Pilliem in Sanguem Taluka. After the extraction operation, the boulders are carried to another village called Sal Curti in Ponda Taluka, where with the use of electric power the boulders are broken into smaller sizes to be sold as concrete metal for the use of construction. On November 27, 1981, the Inspector under the Act, Shri Nair (R.W. - 1) inspected the premises at Sal Curti; called for information from one Gopal Rama Kudvekar (A.W. - 2) and, accordingly, Form O-1 was obtained. Based upon the disclosures made therein, it is common ground that the order was made on March 8, 1984, u/s 45-A(1) of the Act demanding from the appellants a payment of Rs. 26,418 together with

interest of Rs. 1,915.45 as contributions towards the insurance for the period from July 2, 1977, to February 28, 1983. According to the Department, the Employees'' State Insurance Act is applicable to the appellant firm on the ground that the operation carried out at Sal Curti in Ponda Taluka is a factory within the meaning of the Act, the process involved is a manufacturing process and the total number of employees employed at a time were to the tune of sixteen and hence the liability to contribute under the Act. Soon after this order dated March 8, 1984, was made, the firm came with an application, vide Application No. EIC/5 of 1985, contending that the Act is inapplicable to the firm. On issues raised in the application, parties led evidence, both oral as well as documentary, and by the order dated July 12, 1988, the Employees'' Insurance Court of the State Government held, while dismissing the application, that action of the Department by virtue of its order dated March 8, 1984, is valid.

3. Needless to mention that in view of the provisions of Section 82 of the Act the so-called substantial questions of law are incorporated in the memo of appeal, based upon which this appeal was admitted.

4. The first of the questions argued by Shri Kakodkar, learned counsel for the appellants, is that, regard being had to the established fact that the basaltic stones are quarried at Pilliem and thereafter crushed into smaller pieces at Curti in Ponda Taluka, the element of the integrality of the activity when viewed in proper perspective must lead to the conclusion that the action carried out at Curti is nothing but the same mining operation which is in fact taking place in the village Pilliem. He urged that the extraction of big boulders at Pilliem are brought over to Curti and crushed to smaller sizes only with a view to make them a marketable product and being so, there can be no severance from the operation carried out at Pilliem and, therefore, the aspect of integrality cannot be overlooked. It may be mentioned at this stage that the expression "factory" has been defined u/s 2(12) of the Act to be any premises including the precincts thereof (a) whereon ten or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on, or (b) whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power or is ordinarily so carried on but the definition clearly bars and excludes a mine subject to the operation of the Mines Act, 1952. Shri Kakodkar now says that the facts involved and upon consideration of the definition of factory, the operation at Curti must be viewed as a part of the mining activity at Pilliem and when that is so, as a mine, the same is outside the purview of the Act of 1948.

5. With a view to get out of the situation that the quarry is situated at Pilliem of Sanguem Taluka, and the process of making it a marketable product at Curti in a different village, Shri Kakodkar, says that having regard to the definition of a mine under the Mines Act, 1952, it can pose no difficulty in so far as his

submission is concerned.

6. u/s 2(j) of the Mines Act, 1952, a mine has been defined to be any excavation where any operation for the purpose of searching for or obtaining minerals has been or is being carried on and includes any premises in or adjacent to and belonging to a mine on which any process ancillary to the getting, dressing or preparation for sale of minerals or of coke is being carried on. This inclusion is available under clause (xi) of Section 2(j).

7. According to learned counsel, premises in or adjacent to and belonging to a mine need not be in the immediate vicinity of the mine itself and no matter what the distance is, if there is integrality of the activity of the mine in such event nothing can be viewed adversely merely because one process is carried out at some distant place. In other words, the submission is that the word "adjacent" in Section 2(j)(xi) is not used in its restricted sense. He relies on the decision of Therapeutics Chemicals Research Corporation v. Central Government Industrial Tribunal, (1989) 74 FJR 30 (Bom). He says looked at the extended meaning of dock workers under the Dock Workers (Regulation of Employment) Act, 1948, which has been spelt out despite the fact that the employees involved were away from Mormugao Harbour and doing the work of sampling or chemical analysing at Margao in spite of the fact that u/s 2(b) of the Dock Workers (Regulation of Employment) Act, 1948, a dock labourer is a person who is employed in, or in the vicinity of, any port and in addition works in connection with the loading, unloading, movement or storage of cargoes, or in connection with the preparation of ships for the purpose of receipt or discharge of cargoes or leaving port. In other words, it is canvassed that the expression "in the vicinity of any port" is given a restricted meaning that the samplers who were doing the work of testing the ore in an entirely different town could not have been considered as dock labourers. The reason as to why even samplers were held as dock labourers was because they were connected with the sample ore drawn from the ore that was sought to be exported on the sole basis that there is integrality of the activity.

8. Samplers were included as ''dock workers'', regard being had to the definition as contained in Section 2(b) of the Dock Workers (Regulation of Employment) Act, 1948. Regard being had that the testing or sampling was in connection with the receipt of the ship or discharge of cargo leaving the port and regard being had to the entire operation as such, though the samplers were not working in the vicinity in the real sense of the term, they were held to be dock labourers on an extended meaning thereof. I am afraid that the decision cannot help the appellants in the present case for finally I will have to find out as to what is the position available to the firm and the Department based upon the provisions of the Employees'' State Insurance Act, 1948. It is just not possible for this Court while construing the provisions of one statute to import wholesale the construction of provisions of different statutes. Viewed in this context, it is necessary to see what is a factory and for that matter what is a manufacturing

process within the meaning of the Employees'' State Insurance Act. I have already seen what is a factory u/s 2(12) and which in terms excludes a mine. Manufacturing process has been defined u/s 2(14-AA). Manufacturing process has the meaning assigned to it under the Factories Act, 1948. Therefore, what is process will have to be looked into as defined under the Factories act, 1948. The Factories Act, 1948, in its interpretation of "manufacturing process" u/s 2(k) thereof has mentioned any process for (1) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, etc., etc. Shri Kakodkar now says that the quarry boulders brought from Pilliem and crushed to smaller sizes does not fall within the manufacturing process as understood in Section 2(k) of the Factories Act, 1948. According to him, none of the predicates can be imported and the operation carried out at Curti can at the most be said to be dressing, which obviously, cannot mean any manufacturing process. He now says that a Division Bench of this Court in In Re: Pandurang Xete Tilve of Ponda (deceased) through legal representatives, , has in terms held that crushing stones into smaller sizes is not a manufacturing process. He, therefore, contended that there is no manufacturing process involved.

9. There is considerable merit in the submission made by Smt. Agni, learned counsel for the respondents, that the decision of Anant Saji is not available to the appellants nor can it be imported in the matter of understanding what is a manufacturing process as envisaged under the Factories Act, which has been imbibed in the Employees'' State Insurance Act. She is equally right when she mentions that the question for decision in that case was whether crushing of bigger stones into smaller ones was required to be viewed in the context of the Transfer of Property Act, 1882. The question whether a notice of 30 days or a notice of six months in the case of a manufacturing process for terminating the tenancy had arisen. The Division Bench held that crushing of the stones did not involve any production of a commodity in the first place, nor the process of production involved either labour or machinery in the second place and the end product which came into existence was not different in the third place. In the context of these three tests and restricted to the provisions of the Transfer of Property Act, it was held that crushing of stones is not a manufacturing process.

10. What is manufacturing process will have to be understood from what it means and how it is defined in the Act itself. When in terms Section 2(14-AA) of the Act says that the meaning of manufacturing process is what is assigned to it under the Factories Act, the question now is whether bringing of boulders from Pilliem and crushing them into various smaller sizes with a view to its use and sale falls in any of the predicates mentioned in Section 2(k) thereof. Undoubtedly, the operation consists of crushing for without crushing the boulders one cannot get different sizes. Breaking up is also included within the definition of Section 2(k) under the manufacturing process. I, therefore, find no difficulty in saying that this operation is absolutely falling within what is understood by the

expression "breaking up". The question that arises is whether it is a dressing. The boulder for making it a marketable commodity can, in my view, come only after the boulder is broken up. Therefore, undoubtedly what is being done at Curti is nothing but a manufacturing process within the meaning of Section 2(14-AA) of the Act. A reference may be made in this connection to some authorities relied upon by Smt. Agni for the proposition that in construing the different statutes, the Court is duty bound to give a natural and literal meaning to the words. Not much effort is needed that this is an open proposition of law and as rightly pointed out by Smt. Agni if any decision is required on the subject it is Shahdara (Delhi) Saharanpur Light Railway Co. Ltd. v. S. S. Railway Workers Union, (1969) 35 FJR 207 (SC).

11. Cutting wood into planks was held to be a manufacturing process and this is clear from the decision in Bharat Udyog v. Employees'' State Insurance Corporation, (1982) L.I.C. 1644. A question arose whether the operation of slicing bread using electric power at the place where this slicing was carried out is a factory was decided by another Judge of this Court in the decision of New Grand High Class Bakery v. Employee''s State Insurance Corporation, (1976) 49 FJR 405 (Bom). There is another decision in the field in Kalpana Dresses, Bombay v. Employees'' State Insurance Corporation, (1977) 50 FJR 219 (Bom), wherein the Division Bench of this Court while considering what is a manufacturing process held that ironing clothes with the aid of power is a manufacturing process. The question was whether upon manufacture of garments subsequently being ironed on electric power with the purpose of their use for sale involved manufacturing process within the meaning of the Act. It is indeed true that Shri Kakodkar, learned counsel appearing for the appellants, had shown to me a decision of Employees'' State Insurance Corporation v. Ramanuja Match Industries, (1985) 66 FJR 108 (SC), to contend that merely because some legislation is a beneficial statute there is no justification for extending such a benefit by expanding the scope of the Act. It is true that in paragraph 9 of this authority, the Supreme Court clearly observed that the beneficial legislation should have liberal construction with a view to implementing the legislative intent but where such beneficial legislation has a scheme of its own, there is no warrant for the Court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the scheme.

12. Shri Kakodkar now attacked the impugned order that the Insurance Court ought not to have fastened liability on the appellant firm relying upon the contents of Form O-1 signed by the said Gopal Rama Kudvekar (A.W. - 2), firstly, on the ground that on a true interpretation of Section 2(17)(iii), Shri Kudvekar cannot be held to be a person responsible for the supervision and control of the establishment and, secondly, Form O-1 was obtained by Inspector Nair by suggesting answers to queries which, when extracted, brought the firm within the fold of the Employees'' State Insurance Act, 1948.

13. Evidence was read before me of Gopal Rama Kudvekar to suggest that on November 27, 1981, Employees'' State Insurance Inspector had come to the premises at Curti, handed in Form O-1 and called upon Gopal Rama Kudvekar to fill up the same. This Kudvekar in his evidence says that he filled the form in his own handwriting. According to him, whatever information he knew he filled it according to his own knowledge and the other details he filled as told to him by the Inspector. He clearly says that items 1, 2, 3, 4, 5 and 6(a) have been filled by Kudvekar on his own knowledge whereas item 6(b) was filled in by him as told to him by Inspector Nair. Again, he says that items 7,8(a) and 8(b) in that form were filled by him based upon his own knowledge and items 8(c), 8(d), 9,10,11,12,13,14 and 15 were filled in as dictated by the said Inspector Nair. He denied having anything to do with the figures mentioned in the said columns at items 15 (iii). Shri Kakodkar says that in the first place this Kudvekar does not know English or knows so little English that he could not have filled the form on his own and whatever was filled by Kudvekar was dictated by Inspector Nair. Kudvekar has himself stated that he has done his S.S.C. in Marathi, but clearly admitted that he knows to read and write English. The fact that he has filled so many columns itself goes to show that he understood the various columns of Form O-1. Even going by his case that in relation to some columns Inspector Nair dictated to him, it is impossible to accept that Inspector Nair had dictated to him the figures in relation to the male and female workers employed. It is impossible to accept that Mr. Nair could have supplied such figures. It appears that all this has been put in the mouth of Kudvekar in order to wriggle out of this situation. They are the findings of the Insurance Court itself and I am unable to depart and I only affirm them. Shri Kakodkar now says that it is mandatory for any employer to furnish information in relation to the particulars required in terms of Section 44 of the Act but, according to him, that section is applicable only when the employer believes that the Act is applicable to him. In other words, the submission of Shri Kakodkar is that when the employer believes that the Act does not apply to him, such an employer need not volunteer the giving of the information u/s 44. Shri Kakodkar, however, does not dispute the mandate of the Act u/s 45 thereof that it is open to the Inspector under the Act to solicit information with a view to find out whether the Act is applicable to a firm or party, as the case may be, but, however, his quarrel is two-fold, firstly, that such information can be extracted by giving an appropriate notice calling upon the employer to furnish such information and, secondly, even when the information is sought to be extracted, it must be extracted from the employer directly or from a supervisor or any person responsible for the supervision and control of the establishment u/s 2(17)(iii) of the Act. In this connection, he has read the evidence of Kudvekar as also Dr. Sulokshana Dessai (A.W. - 1). Both of them have pointed out that finally one Hede had been deputed to give information to Inspector Nair when he held out on November 27, 1981, that he would come to the premises at 4.00 p.m. on that day. It appears that Hede came to the site but having found that Inspector had not come, he left and after departure of Hede, Inspector Nair came to the premises, made Kudvekar to write all the particulars

in Form O-1 in terms of Regulation 10-B of the Employees'' State Insurance (General) Regulations, 1950. The sole question for the purpose of appreciating this controversy is that Kudvekar now says that there are not more than two or three employees working at Curti and otherwise employees working at the mine at Pilliem come to Curti, some times for the purpose of working. Indeed an attempt is made that there are not more than ten employees so as to make the appellants contribute under the Employees'' State Insurance Act, 1948. The trial Court has given a clear finding based upon the documents on records, namely the attendance in a note book, to show the attendance of the employees. Some other documentary evidence was also produced which suggests that there were some female workers and in all there were sixteen employees. The statement recorded in Form O-1 reflected from the attendance register and some other written documents as mentioned by the Insurance court and the conclusion drawn by the Insurance Court is based upon the same. Therefore, on facts it just not possible to dispute that there were sixteen employees working on that day. The only question required to be answered now is whether Kudvekar is a person competent to have given the information so as to bind the appellants. In my view, there is no difficulty in accepting that Kudvekar who was a supervisor at the relevant time was in charge and control of the factory. I would presently point out that Kudvekar himself has stated in his examination-in-chief and cross-examination that he had been working for the firm for the last eight to ten years. He then lists out his duties to be : taking attendance of the labourers, making payments to them and selling the stones. The activities of this supervisor, in my view, practically cover the entire operation in the sense that employees are responsible to him, he pays them their wages and he effects the sale of the metal. It is not understood that for the purpose of Section 2(17)(iii) how this Kudvekar would not be a person responsible and suitable for the supervision and control of the establishment. The story of Hede appears also to be a got-up story for finally it turns out that Hede is the employee of the brother-in-law of Dr.Sulokshana Dessai. It may be possible to accept Shri Kakodkar''s contention that a person-in-charge and control of a factory need not be a full time worker but then the question in reality is to see for the purposes of Section 2(17)(iii) who was responsible for the supervision and control of the establishment. Now u/s 2(17) "principal employer" has been defined under clause (i) to be 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, or the person so named. Clause (ii) says any authority appointed by Government if the establishment is under the control of the Department of the Government and clause (iii) in terms says in any other establishment any person responsible for the supervision and control of the establishment. It is, therefore, clear that any person responsible for the supervision and control need not be a person who is already included under clauses (i) and (ii) above and can be any person who is made responsible and who has otherwise the control of the establishment. Now Kudvekar says that the employees report to him because he takes their attendance. He says that he pays their salaries/wages and finally he says that he sells the stones. These three items in my view contribute responsibility for the supervision and control of the establishment. I do not think any other view is possible in this matter to hold that Kudvekar was not a person responsible. The Insurance Court has rightly come to the conclusion that whatever information supplied by the said Kudvekar was binding on the firm.

14. Shri Kakodkar relied upon the dictionary meaning of the word "control" in Black''s Law Dictionary (Sixth Edition), page 329. It is true that "control" would mean power or the authority to manage, direct, superintend, restrict, regulate, govern, administer or to exercise restraining or directing influence over something, etc., etc. I may assure the parties that I am not influenced by the designation of Shri Kudvekar when he holds out that he is a supervisor but the question is as to what functions he carries out. From the functions that are carried out by Kudvekar, it shows that he controls the establishment regard being had to the word control.

15. Nothing survives in this appeal. Appeal accordingly dismissed. Costs quantified at Rs. 150 to be paid by the appellants to the respondents.

