

(2009) 04 MAD CK 0384

In the Madras High Court

Case No : C.M.A. No. 766 of 2001

E.A. Peeran Sahib Sons by Partner, E.A.P. Akbar Basha,
Peervan Bidi Merchants

APPELLANT

Vs

Joint Regional Director and Deputy Director, Employees State
Insurance Corporation and Deputy Regional Director,
Employees State Insurance Corporation

RESPONDENT

Date of Decision : 15-04-2009

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2
Employees State Insurance Act, 1948 — Section 1(4), 1(5), 1(6), 2(12), 2(2)
Limitation Act, 1963 — Section 12, 5

Citation : (2010) 3 LLJ 470

Hon'ble Judges : P.R. Shivakumar, J

Bench : Single Bench

**Advocate : C. Chinnaswamy for S. Arunachalam, for the Appellant; S.
Jayakumari, for the Respondent**

Final Decision : Allowed

Judgement

P.R. Shivakumar, J.—This Civil Miscellaneous Appeal preferred u/s 82 of the Employees' State Insurance Act, 1948 is directed against the judgment of the Employees State Insurance Court (Principal District Judge), Erode dated 11.09.2000 made in E.S.I.O.P.No.1 of 1997.

2. The petitioner in the E.S.I.O.P. before the Court below is the appellant herein. The respondents are the Joint Regional Director and Deputy Regional Director of Employees' State Insurance Corporation, Coimbatore. E.A. Peeran Sahib Sons is a partnership firm doing business as Beedi Merchants in Erode. They are manufacturing and marketing beedies in the name of Peeran Beedi. Claiming that the establishment run by the appellant comes under the definition of factory as per Section 2(12) of the Employees' State Insurance Act, 1948, the Deputy Regional Director of the Employees' State Insurance Corporation at the first instance issued a communication dated 31.03.1995 calling upon the appellant

herein to register its establishment under the Employees' State Insurance Act, 1948 and to pay contribution in respect of its employees covered under the Act. The appellant raised his objection for the same and contended in his letter dated 13.05.1996 addressed to the Deputy Regional Director of Employees' State Insurance Corporation, Coimbatore that the appellant's establishment did not come under the definition of factory as found in Section 2(12) of the Employees' State Insurance Act, 1948 and hence, the provisions of the Employees' State Insurance Act, 1948 could not be made applicable to the establishment of the appellant. After exchange of several communications between the appellant and the Employees' State Insurance Corporation Authorities, the Deputy Regional Director of Employees' State Insurance Corporation informed the appellant in his communication dated 26.12.1996 that the appellant should comply with the provisions of Employees' State Insurance Act, 1948 immediately with effect from January 1993. The Deputy Regional Director, namely the second respondent herein ultimately passed a final order in his communication No. 56-44139-100/Ins. II directing the appellant to pay a sum of Rs. 4,61,932/- within 15 days along with an interest at the rate of 15% for each day of default from the due date till date of payment. The said communication also warned the appellant that appropriate legal action for non-compliance under the Employees' State Insurance Act, 1948 would be initiated, in case of failure on the part of the appellant to comply with the said direction.

3. The Said order of assessment of contribution and the direction to make payment of the same and comply with the provisions of the Employees' State Insurance Act, 1948 was challenged by the appellant by filing the above said E.S.I.O.P. No. 1 of 1997 before the Employees' State Insurance Court under Sections 76 and 77 r/w Section 75 of the Employees' State Insurance Act, 1948, wherein the appellant prayed for a declaration that the establishment of the appellant, namely E.A.Peeran Sahib Sons was not covered under the provisions of the Employees' State Insurance Act, for a declaration that the final letter No. 56-44139-100/Ins-II dated 09.05.1997 issued by the Deputy Regional Director to be void and unenforceable and for a direction not to implement and enforce the provisions of the Employees' State Insurance Act against the establishment of the appellant.

4. The petition was resisted by the respondents contending that on inspection, the authorities of the Employees' State Insurance Corporation found the appellant establishment to be a factory as per the definition found in Section 2(12) of the Employees' State Insurance Act, 1948 and that the same was made based on the report of the Inspector of Employees' State Insurance Corporation and in the light of the failure on the part of the appellant to produce the records relating to payments of contribution under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, despite a direction to the appellant to produce the same.

5. In the enquiry before the Court below, one witness was examined on either

side as P.w.1 and R.W.1 respectively. 8 documents were marked as Exs.A.1 to A.8 on the side of the petitioner (appellant herein) and 8 documents were marked on the side of the respondents as Exs.B.1 to B.8. The Court below considered the evidence brought before it, in the light of the arguments advanced on either side and came to the conclusion that the establishment run by the appellant was a factory as defined u/s 2(12) of the Employees' State Insurance Act, 1948 Act and on that basis, dismissed the said ESIOP without costs by its order/judgment dated 11.09.2000. Aggrieved by and challenging the same, the appellant has brought forth this Civil Miscellaneous Appeal u/s 82 of the Employees' State Insurance Act, 1948 on various grounds set out in the memorandum of appeal.

5. Section 82 of the ESI Act reads as follows:

82. Appeal - (1) Save as expressly provided in this section, no appeal shall lie from an order of an Employees' Insurance Court.

(2) An appeal shall lie to the High Court from an order of an Employees' Insurance Court if it involved a substantial question of law.

(3) The period of limitation for an appeal under this Section shall be sixty days.

(4) The provisions of Sections 5 and 12 of the Limitation Act, 1963 (36 of 1963), shall apply to appeals under this Section.

Clause 1 of the above said Section makes it clear that no appeal shall lie from an order of Employees' Insurance Court, save as expressly provided in Sub-section 2. Sub-section 2 says that an appeal shall lie to the High Court from an order of an Employees' Insurance Court, if it involves a substantial question of law. It is now well settled that an appeal on facts in the absence of involvement of a substantial question of law against the order of the Employees' State Insurance Court is not maintainable. A proper interpretation of the said sub-clauses preserve that an appeal from the order of the Employees' Insurance Court shall lie to the High Court on a substantial question of law.

6. The appeal has been admitted on the following substantial question of law:

Whether the lower Court has not erred in construing the definition of employee under the provisions of the Employees State Insurance Act and Employees Provident Fund act to be one and the same?

7. The submissions made by Mr. C. Chinnaswamy, learned Senior Counsel appearing on behalf of the appellant and by M/s. S. Jayakumari, learned Counsel appearing on behalf of the respondents were heard. The relevant records were also perused.

8. The learned Senior Counsel for the appellant would submit that the Court below adopted an erroneous approach to the definition of factory envisaged in Section 2(12) of the Employees' State Insurance Act, 1948, by assuming that the definition of establishment and employer found in the Employees' State

Insurance Act, 1948 and the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, are one and the same, whereas in fact, it is not so. The learned Counsel for the respondents is not in a position to deny the correctness of the above said submission made by the learned Senior Counsel for the appellant.

9. Section 2(g) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 Act defines "factory" as follows:

factory means any premises, including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily so carried on, whether with the aid of power or without the aid of power.

The said Section simply says that the premises, wherein any manufacturing process is being carried on irrespective of the number of persons employed therein, shall be a factory for the purpose of application of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, whereas a remarkable deviation from the same is found in the definition of factory adopted for the Employees' State Insurance Act, 1948 in Section 2(12) of the said Act, which reads as follows:

2(12). ? "factory" means 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.

10. In case a manufacturing process is carried on with or without the aid of power in any part of the premises and not less than the prescribed number of persons are employed or were employed for wages on any day of the preceding 12 months, then the same shall be a factory for the purpose of application of the Employees' State Insurance Act, 1948. If power is used in the manufacturing process, then the minimum number of persons employed to make it a factory coming under the purview of the Employees' State Insurance Act, 1948 shall be ten. If no power is used for carrying on a manufacturing process, the minimum number of persons employed should be 20 to make it a factory that comes under the purview of the Employees' State Insurance Act, 1948. Therefore, the mere fact that an establishment is deemed to be a factory under the provisions of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 shall not make it ipso facto a factory coming under the provisions of the Employees' State Insurance Act, 1948.

11. As rightly pointed out by the learned senior Counsel for the appellant, the

court below, without considering the scope of definition of factory under the Employees' State Insurance Act, 1948 to find out whether the appellant's establishment would come under the purview of the Employees' State Insurance Act, 1948, seems to have carried away by the fact that contributions to the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 were made by the appellant in respect of the home workers and the persons employed by immediate employers, namely contractors for rolling the beedies and that the final touch given to the rolled beedies in the head quarters of the appellant for making it marketable, namely labelling and bundling was also part of manufacturing process. It is not the case of the appellant that no kind of manufacturing process is being carried on in the establishment of the appellant at its head office. On the other hand, it is the contention of the appellant that in the said establishment, no power is used for such manufacturing process and the persons employed were less than 20 to bring it under the definition of factory under the Employees' State Insurance Act, 1948. It is the case of the appellant, as per the evidence of P.W.1, that the maximum number of persons employed, at any point of time, was only 12 and that now the persons employed are only 10.

12. On the other hand, the sole witness examined on the side of the respondents would contend that in the head office of the appellant, 17 persons were employed. He would add that there were 125 contract employees and 54 other persons were employed through contractors. According to his conclusion, there were totally 196 persons employed under the appellant. The name of the home contract employees have not been furnished. As many as four contractors' names have been found in the report of the Employees' State Insurance Corporation Inspector (R.W.1) marked as Ex.B2. All the four contractors are having work sites at various places, like Rasipuram, Salem and Namakkal. Except one A.A. Subhan, all others had employed less than 20 persons in their respective work sites. A.A. Subhan is said to have his work site at Namakkal, wherein according to the report, he had employed 24 persons. If at all the said contractor has got a separate work site in which more than 20 persons have been employed the said work site alone shall be construed to be a factory and not the work site of the appellant which has been described to be the head office. It is candidly admitted that the appellant does not use power for any manufacturing process in its establishment. It is also not the case of the respondents that the alleged work site of A.A.Subhan at Namakkal was under the control and supervision of the appellant. Under such circumstances, this court has to countenance the argument advanced by the learned senior Counsel for the appellant that the decision arrived at by the court below that the appellant's establishment is a factory to which the provisions of the Employees' State Insurance Act, 1948 are applicable is patently erroneous. Even there is no proof to the effect that the alleged contractor, having his work site at Namakkal, namely A.A.Subhan, had employed not less than 20 persons on any day. Admittedly no power was used by him for manufacturing purpose. The Employees' State Insurance Act, 1948 is made applicable as per Section 1(4)

of the Act to all factories other than seasonal factories. However, as per Section 1(5) of the Act, the appropriate Government, in consultation with the Employees' State Insurance Corporation, may extend the provisions of the Act to any other establishment or class of establishments. As per Section 1(6) of the Act, the factory or establishment to which the Act applies shall continue to be governed by the Act notwithstanding the fact that the number of persons employed may fall below the limit specified or the manufacturing process carried on therein may cease to be carried on with the aid of power.

13. A comparative study of these provisions will show that for application of the provisions of the Act to an establishment, it must come within the definition of establishment to which the provisions of the Act are specifically made applicable by the appropriate Government. In this case, there is no material placed before the court to show that the provisions of the Act are made applicable to beedi factories irrespective of the fact whether it comes under the definition of factory as found in Section 2(12) of the Employees' State Insurance Act, 1948. In fact, the intra-departmental communication and the representations made by the trade union show that since Beedi Workers Welfare legislations and regulations made for the benefit of beedi and cigar workers are more beneficial, they have claimed exemption for beedi establishments from ESI coverage. S. Kasi Viswanathan, Member, ESI Regional Board, Tamil Nadu has written a letter to the Director General of Employees' State Insurance Corporation on 13.08.1996 stating that the reasons why the beedi workers were not willing to be covered by Employees' State Insurance Act, 1948. The reasons are found in paragraph-5 of the said letter which reads as follows:-

5. The beedi workers are not willing to cover themselves under ESI Act, because:

(a) They are already getting medical benefit from the Welfare scheme for which they are not paying any contribution, while they have to bear the burden of paying contribution to ESI in duplication of Welfare facilities.

(b) They cannot avail the medical facilities from the hospitals run by the Welfare scheme and from the ESI hospital at the same time.

(c) The Welfare scheme given an over all coverage including medical facilities while ESI's benefits are limited.

14. AITUC also passed a resolution on 24.11.1996 stating that the beedi workers should continue to be exempted from Employees State Insurance Act, as they were covered under the Beedi Workers Welfare Fund. From the said communications, it is obvious that there was a demand that beedi manufacturing units should be exempted from the Employees State Insurance Act, even though they come under the definition of factory u/s 2(12) of the Act, as they found the benefit conferred on them under the Beedi Workers' Welfare Scheme were more beneficial to them. We are not concerned with the same in this case, because the contention of the appellant herein is not that the Employees' State Insurance Act will not be applicable to any factory in which beedi is manufactured and that the

employees of beedi manufacturing factories are exempted from the Employees' State Insurance Act. On the other hand, it is the specific contention of the appellant that the manufacturing unit of the appellant is not a factory as per the definition found in Section 2(12) of the Employees' State Insurance Act, as no power is used for manufacturing process and less than 20 persons are employed therein.

15. It is the admitted case of the respondents that in the appellant's unit, no power is used for manufacturing process and less than 20 persons are employed. The considerations for contribution towards the Employees' Provident Fund are on different footing. As per the scheme found in the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, the term factory defined in the said Act is not qualified by the number of employees employed therein. Therefore, the order of the court below holding that the appellant unit shall come under the definition of factory u/s 2(12) of the Employees' State Insurance Act, for the simple reason that contributions were collected towards Employees' Provident Fund under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 is erroneous. The appellant has clearly made out a case for interference with the order of the court below on the above said substantial question of law. The substantial question of law is answered in favour of the appellant and against the respondents.

16. For all the reasons stated above, this court comes to the conclusion that the order of the court below holding that the appellant establishment comes under the purview of Employees' State Insurance Act is erroneous and infirm and that the same deserves to be set aside.

17. While arriving at such a conclusion, this court wants to make it clear that the judgment will not come in the way of the authorities of the Employees' State Insurance Corporation once again inspecting the appellant's premises to find out the number of employees employed, subsequent to the earlier proceedings and find out whether the same has become a factory as per the definition found in the Act because of employment of more number of persons. The officials of the Employees' State Insurance Corporation also shall be at liberty to proceed against the so-called contractor, if the work site under his control comes under the definition of factory as per the Act.

18. For the reasons stated above, the appeal is allowed and the order dated 11.09.2000 passed in E.S.I.O.P.No.1 of 1997 by the Principal District Judge, Erode District is set aside. ESIOP No. 1/1997 shall stand partly allowed and a declaration that the petitioner establishment M/s.P.A.Peeran Sahib Sons at No. 17, Meera Mohideen Street, Erode, was not covered by the provisions of the Employees' State Insurance Act as on the date of impugned communication is granted. A further declaration that the final letter/communication No. 56-44139-100 INS/II dated 09.05.1997 as void and unenforceable, is also granted.

19. However, it is made clear that the authorities of the Employees State Insurance Corporation may once again inspect the appellant's premises to find out the number of employees employed therein subsequent to the earlier proceedings and find out whether the same has become factual as per the definition found in the Act. The officials of the Employees' State Insurance Corporation shall be at liberty to proceed against the so-called contractor, if the work site under his control comes under the definition of the factory. There shall be no order as to costs.