(1984) 09 KAR CK 0015

In the Karnataka High Court

Case No : M.F.A. No. 591/80

East West Hotels Ltd. APPELLANT

Vs

Regional Director E.S.I.C. RESPONDENT

Date of Decision : 21-09-1984

Acts Referred:
Employees State Insurance Act, 1948 — Section 1 (5), 2 (12), 75 (g)

Citation : (1985) ILR (Kar) 373 : (1985) 1 KarLJ 162 : (1986) 1 LLJ 172

Hon'ble Judges : S.A. Rajasekaramurthy, J;G.N. Sabhahit, J

Bench : Division Bench

Judgement

Rajasekhara Murthy J.

1. This appeal arises out of order dated 19th September, 1979 passed by the Employees'' Insurance Court, Bangalore, on an application filed by the appellant herein, under S. 75(g) of the Employees'' State Insurance Act, 1948, (hereinafter referred to as the ESI ACT on ESI Application No. 2/1976.

2. The appellant-company, a hotelier, was called upon by the Respondent to pay contributions from 1st April, 1975 to 27th September, 1975 under the ESI Act in respect of the 82 workmen employment in Hotel East-West, Bangalore.

The appellant thereupon filed an application under S. 75(g) of the ESI Act before the ESI Court, Bangalore, seeking a declaration that its establishment, namely, Hotel East-West, Bangalore, is not covered by the provisions of the ESI Act, and that therefore, they are not liable to make the contributions demanded.

The ESI Court, by its order dated 19th September, 1979, dismissed the application and held that the appellant is a ''factory'' and is bound to pay the contribution under the Act. This appeal is preferred by the appellant against the said order of the ESI Court.

3. It is contended on behalf of the appellant that the ESI Court erred in holding that the kitchen, attached to its hotel, is a ''factory'' within the meaning of that

word as defined under S. 2(12) of the ESI Act. It is also urged that the ESI Court erred in holding that the activities carried on in the kitchen attached to the respondent-hotel involve ''manufacturing process'' and hence the appellant is under an obligation to make contributions as required under the Act. Lastly, it is contended that the State Government has not issued any notification under S. 1(5) of the ESI Act extending the provisions of the Act to establishment like the appellants Hotel and that therefore the appellant is not amenable to the provisions of the ESI Act.

4. The points that arise for our consideration in this appeal are :

(i) whether the appellant''s establishment is a ''factory'' as defined under S. 2(12) of the Act ?

(ii) whether preparation of articles of food in the kitchen, attached to the respondent hotel, involves ''manufacturing process,'' and,

(iii) whether a Notification under S. 1(5) of the Act by the State Government is necessary in order to extend the provisions of the Act to a hotel ?

5. In order to appreciate the contentions of the appellant, it is necessary to set-out the scheme of the Act and its objects.

The ESI Act is a Social Security Legislation. It seeks to provide for certain benefits to the employees in case of sickness, maternity and employment injury and makes provisions for certain other matters relating thereto. The provisions of the Act, in the first instance, are made applicable to all ''factories'' other than ''seasonal factories'' under S. 1(4). They may be extended to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise, by an appropriate notification issued by the State Government as provided under S. 1(5) of the Act.

"''Employee'' under the Act means, any person employed for wages in or in connection with the work of a factory or establishment to which the Act applies -".

''Factory'' is defined in the ESI Act, but not ''Establishment''. ''Establishment'' is a far wider term than ''factory'' which has a specific legal connotation and meaning under the Act. Since ''establishment'' is not defined in the ESI Act, we have to adopt its ordinary meaning and for all purposes, we may adopt its ordinary meaning and for all purposes, we may adopt its meaning as defined in the Karnataka Shops and Commercial Establishment Act, 1961. ''Establishment'' as defined under that Act means a shop or a commercial establishment.

''Commercial Establishment'' is defined under the said Act as follows :

''Commercial establishment'' means a commercial or trading or banking or insurance establishment, an establishment or administrative service in which persons employed or mainly engaged in office work, a hotel, restaurant, boarding or eating house, a cafe or any other refreshment house, a theatre or any other place of public amusement or entertainment and includes such establishment as the State Government may by notification declare to be a commercial establishment for the purposes of this Act''.

6. So far as the first point is concerned, the ESI Court has dismissed the application of the appellant holding that the appellant did not prove that the kitchen Section of its hotel, is not a factory as defined under S. 2(12) of the ESI Act. It is contended on behalf of the ESI Corporation in this appeal, that the appellant is a ''factory'' for the purpose of the Act and has relied upon the three decisions of the High Courts of Madras, Bombay and Karnataka in support of its contentions. It is laid down in the said decisions that the definition of the word ''factory'' as defined in the ESI Act, includes a hotel, in the kitchen of which power is used for manufacturing articles of food. We will refer to the said decisions later.

7. ''Factory'' as defined in S. 2(12) reads :

"Factory", means any premises including the precincts thereof 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 with the aid of power or is ordinarily so carried on but does not include a mine subject to the operation of the Mines Act, 1952 or a railway running shed :

"Seasonal factory" means a factory which is exclusively engaged in one or more of the following manufacturing processes, namely, cotton ginning, cotton or jute processing, decortication of groundnuts, the manufacture of coffee, indigo, lac, rubber, sugar (including gur) or tea or any manufacturing process which is incidental to or connected with any of the aforesaid, processes and includes a factory which is engaged for a period not exceeding seven months in a year -

(a) in any process of blending, packing or repacking of tea or coffee; or

(b) in such other manufacturing process as the Central Government may, by notification in the Official Gazette, specify".

8. The sole test to decide whether any premises is a factory under the Act, therefore, depends on the finding whether any manufacturing ''process'' is being carried on with the aid of power or is ordinarily so carried on in the premises or precincts thereof employing more than twenty persons on any day of the preceding twelve months. It is, therefore, necessary to find out what is ''manufacturing process'' as under stood with reference to a factory.

9. The expression ''manufacturing process'' is not defined in the ESI Act, but it is provided in the Act, that the expressions ''manufacturing process'' and ''Power'' shall have the same meanings, respectively, assigned to them in the Factories Act.

''Manufacturing process'' is defined in S. 2(k) of the Factories Act as follows :

"manufacturing process" means any process for -

(i) 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, or

(ii) pumping oil, water, sewage or any other substance or

(iii) generating, transforming or transmitting power; or

(iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding; or

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; or

(vi) preserving or storing any article in cold storage," ''Power means electrical energy, or any other form of energy which is mechanically transmitted and is not generated by human or animal agency.

10. Since the respondent has largely depended upon the decisions rendered by the Madras and Bombay High Courts which are relied upon by this Court in a latter decision, in support of its action, we advert to those decisions at the outset.

(i) The earliest case on the subject is that of the Madras High Court in ESI v. Spencer and Co. (1978 L.I.C. 1759).

The Madras High Court held, while dealing with the case of a hotel run by Sponsor and Company, that preparation of coffee, peeling of potatoes, making bread-toast, etc., in a hotel, involve ''manufacturing process'' within the meaning of that expression in S. 2(12) of the ESI Act. While dismissing the Writ Appeals by the ESI Corporation their Lordships observed as follows :

"It cannot be gainsaid that the preparation of food would be manufacturing process, as envisaged by the Act. This is clear from the definition. Any process of cleaning raw materials for the preparation of food would be work incidental to or connected with the manufacturing process, namely, preparation of food, and it will be difficult to say that the work of cleaning or preparation of raw material as the first step before cooking food or of preparing it by other means to make it more delectable and palatable will not be a work connected with or incidental to the process of preparing food, which, as already indicated, would be a manufacturing process. Potatoes have to be peeled before the potatoes are used for the preparation of food. The peeling of potatoes will be a work incidental to or connected with the preparation of food. The persons engaged it that work would be employees who are engaged in the preparation of food, can be taken into account for the purpose of deciding whether 20 or more persons, mentioned in S. 2(12) of the Act exist or not. What we have said above applies with greater force to persons who are using the Coffee boiler for preparing Coffee. Here there is a more intimate connection, and boiled water is used for preparing Coffee and it cannot be said that boiling water is not part of the manufacturing process of preparing coffee. The same applies to the use of the electric toaster. it is well known that bread is often tasted before it is used and it is a form of adaptation of bread and will come within the meaning of manufacturing process. The definition is wide enough to take in any aspect of treating or adapting any article or substance with a view to its use. On a reading of the definition of ''manufacturing process'' along with the definition of term ''employee'', we find it difficult to accept the contention that the persons who are engaged in peeling potatoes or in preparing coffee or in toasting bread are not employees, who are doing work incidental to or connected with the manufacturing process of preparing food in the kitchen. Admittedly there are 20 persons in the kitchen, and when the other persons who are engaged in the activities mentioned above are taken into account, the number exceeds 20 and, since manufacturing process is carried on with the aid of power, the definition of the term ''factory'' is attracted."

(ii) The next case, is the decision of the Bombay High Court in Poona Industrial Hotel Limited v. I. C. Sarin (1980 L.I.C. 106), wherein, the Bombay High Court held that the kitchen attached to Hotel Blue Diamond run by the Petitioners therein, should be considered as a ''factory'' for the purpose of ESI Act. Their Lordships observed as follows :

"That the preparation of the food in the kitchen of the hotel is done with the aid of power is admitted. Now the question is whether manufacturing process is employed in the preparation of the food. In our opinion, the preparation of the food necessarily implies making of the food which is an article or substance as mentioned in the definition of the phrase ''manufacturing process''. Several other articles which go into the preparation of the food are altered or cleaned or otherwise treated or adopted before the ultimate items of food emerged in the kitchen. We do not see how this process for making food or for washing, cleaning, or otherwise treating or adopting raw materials with a view to prepare food, cannot be treated as manufacturing process as defined in S. 2(1) of the Factories Act. It must also be noted that such manufacturing is being employed for making of food article either for use or for disposal. In our opinion therefore, the process which have been described in the petition itself viz., use of the various electrical appliances involve manufacturing process as defined in Clause (k) of S. 2 of the Factories Act."

These two decisions have been referred to in a decision rendered by Rama Jois, J. in All India ITDC Employees'' Union v. Hotel Ashoka, Bangalore 1984(1) K.L.J. 99. His Lordship has held that preparation of articles of food in the kitchen attached to Hotel Ashoka, is done with the aid or power and its activities therein thus involve ''manufacturing process'' and so Hotel Ashoka should be considered as ''factory'' for the purpose of the ESI Act. In the course of his order his Lordship has observed as follows :

"I am unable to agree with the Learned Counsel for the petitioner that unless a further notification under S. 1(5) of the ESI Act was issued by the Central

Government extending the provisions of the Act to Hotel Ashoka, the provisions of the ESI Act were inapplicable, for ''factory. The contention would have been tenable if only the Hotel Ashoka, did not come within the definition of the word ''factory'' and was only regarded as an establishment other than factory............ In the earlier part of my order, I have pointed out that once an establishment comes within the definition of the word ''factory'' the provisions of the ESI Act become automatically applicable on the date on which the provisions of the ESI Act stand extended to that area under a notification issued by the Central Government under S. 1(3) of the ESI Act. Therefore, there can be no doubt that the provisions of the ESI Act had become applicable to such of the hotels which fell within the definition of the word ''factory'' as defined in the ESI Act with effect from the date the provisions of the ESI Act were extended to the area in which such hotels were located. That being the position, in respect of a factory or a Hotel which is ''factory'' as defined under S. 2(12) of the ESI Act established thereafter the ESI Act applied from the date of its establishment. As Hotel Ashoka was established in or about the year 1970, the ESI Act was applicable from the date of its establishment. Because of lack of correct understanding of the provisions of the ESI Act, i.e. the scope of Ss. 1(3) and (4) of the ESI Act and the meaning of the word ''factory'' the same had not been enforced, but the position had been made clear by the judgment of the Madras High Court in respect of Connemera Hotel and by the Bombay High Court in respect of Hotel Blue Diamond and it is obviously for this reason the ESI Corporation has called upon the Hotels of ITDC to implement the provisions of the ESI Act with effect from 1st February, 1980 a date shortly after the judgment of the Bombay High Court. The fact that the ESI Corporation had called upon the hotels to implement the scheme with effect from 1st February, 1980 does not in any way affect the legal position that the provisions of the ESI Act had already come into force in respect of these hotels."

His Lordships, while dismissing the petition filed by the employees'' union of Hotel Ashoka, held that Hotel Ashoka should be treated as a ''factory'' and the provisions of the ESI Act, are applicable to it.

11. Thus, it may be seen that the sole test adopted in all the three decisions above referred to, in order to determine whether a Hotel could be treated as a ''factory'' for the application of the provisions of the ESI Act, is that preparation of food in the kitchen attached to a Hotel, done with the aid of power necessarily involves ''manufacturing process'' within the meaning of that expression assigned to it in the Factories Act. Therefore, any decision on this issue which arises predominately in this appeal, therefore, depends upon the interpretation of the expression ''manufacturing process'' occurring in the definition of ''factory'' in the ESI Act.

12. Now, let us examine the scheme of ESI Act vis a vis the Factories Act in so far as the definition of ''manufacturing process'' in S. 2(k) of that Act is adopted for purposes of ESI Act also.

13. Factories Act is enacted to consolidate and amend the law regulating the labour and working conditions of the employees in the factories, whereas, the ESI Act is enacted to provide certain benefits to persons employed for wages or in connection with the work of a factory or an establishment to which the Act applies. The definition ''manufacturing process'' in the Factories Act is very widely worded and such a comprehensive definition had to be provided obviously, with the object of including all the processes incidental or ancillary to the completion of a manufacturing product, with the purview of ''manufacturing process''.

14. So far as the activities that take place in an establishment like a hotel and in its kitchen proper and concerned, several commodities along with other ingredients are subjected to a process or treatment in the preparation of different dishes to cater to its customers.

15. Undoubtedly, the articles of food undergo a change-as a result of some operation performed on it or in regard to it all such transformation or amalgam of different articles of food and ingredients in certain quantities, is nothing but a process for adapting or treating it with a view to its use or sale within the meaning of ''manufacturing process'' in S. 2(k) of the Act.

16. Though, at the first blush, it might seem incongruous that a culinary process should be regarded as a ''manufacturing process'' yet the language of S. 2(k) of the Factories Act which defines ''manufacturing process'' is wide enough to include all the stage or processes or work done in the course of preparing food stuffs and other dishes which are supplied and sold and these establishments. The definition of ''manufacturing process'' is made wide enough and comprehensive to include all other kinds of processes or works which may be incidental to or connected with the ''manufacturing process'' conceived as a whole in a hotel which caters to the needs of its customers. In the definition of ''manufacturing process'' each of the words, has got an independent meaning and which may, by itself, constitute ''manufacturing process'' in the context it is used, such as, altering, repairing, ornamenting, finishing, packing, oiling, washing, blending, treating or adapting any article or substance with a view to its use, sales transport, delivery or disposal.

17. We may refer to the observations made by Hidayathulla, J. (as he then was) in this connection, in State of Kerala v. V. M. Patel [1961 I llj 549], "in so far as the ''manufacturing process'' is concerned, we have no doubt that in view of the width of the definition given in the Factories Act in S. 2(k), the work of garbling pepper or curing ginger would come within that definition." The work that was carried in the Respondent''s factory, in that case, consisted of winnowing, cleaning, washing and drying pepper on concrete floor. A similar process was also being applied to ginger, which was dipped in lime and laid out to dry in a ware-house on the premises. The work also consisted in putting the product into bags and baskets. The Supreme Court upheld the order of the High Court of Kerala and held that the premises in which the workers were engaged, was a factory and the work that was carried on in its premises as described above, was a

''manufacturing process."

18. Innumerable illustrations of processes which have been considered in decided cases and held as ''manufacturing process'' could be given, such as :

i) conversion of paddy into rice; ii) conversion of latex into sheet-rubber; iii) work of washing, peeling and cleaning of prawns; iv) cutting and drying of arecanuts; v) slicing of bread manufactured in the bakery; vi) blending, packing and re-packing of tea or coffee; vii) process of ''converting sea-water into salt and the like, (sea-water, a non-commercial article is converted into a different thing, ''salt'' a commercial article).

19. We may now refer to a decision of the Supreme Court in which the question whether, supply of food-stuffs or service of meals to customers amounted to ''sale'' of goods under the Sales-Tax Act, came up for consideration. In the case of Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi (45 S.T.C. 212 S.C.), the Supreme Court (while dismissing the review petition) held, "that where food is supplied in an eating-house or restaurant, and it is established upon the facts that the substance of the transaction, evidenced by its dominant object, is a sale of food and the rendering of services is merely incidental, the transaction would undoubtedly be eligible to sales tax."

20. By the Constitution of India (46th Amendment) Act of 1982, even this lacuna was removed by an amendment of Art. 366 by including Sub-clause (f) Clause 29-A under the heading : "Tax on the same or purchase of goods" includes :-

(f) a tax on the supply by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration."

21. It is, therefore, now settled law that preparation and service of food both to the residents in a hotel as well as to non-residents or casual customers, who come to eat in its restaurant, amounts to ''sale'' within the meaning of ''sale'' in Sales-Tax Legislation. This enunciation becomes relevant for the purpose of this case in the context of the definition of ''manufacturing process'' in S. 2(k) of the Factories Act, under which is included, treating or adapting for use or sale "with particular reference to articles of food."

22. We are, therefore, of the considered view that an establishment like a Hotel or a Restaurant, satisfies the definition of a ''factory'' for the purpose of ESI Act, subject to other conditions being satisfied.

23. No dispute was raised before us regarding the other conditions namely that electricity was used in the manufacturing process in the kitchen and that total number of employees was more than twenty.

24. It was brought to our notice by the Learned Counsel appearing for the appellant that Bopanna, J. in a batch of Writ Petitions (W.P. Nos. 14064/1981 and

connected cases) Babu Rao v. ESI Corporation & others decided on 9th February, 1984, quashed the notices issued by the ESI Corporation demanding contributions from the Petitioners (Hotel), in those cases, reserving liberty to the authorities to take such action in accordance with Regulation IOB of the ESI (General) Regulation, 1950 read with S. 2A of the Act. It is obvious that this decision was not brought to the notice of Rama Jois, J. when the case of Hotel Ashoka was decided. Bopanna, J. also observed, that ESI Corporation may consider whether it is advisable to await the decision of the Supreme Court on the jurisdiction issue in the appeal preferred by Poona Industrial Hotel Ltd, against the decision of the Bombay High Court. He, further, observed that the authorities may also consider whether the petitioners'' - establishments could be brought under the purview of the Act without a Notification under S. 1(5) of the ESI Act. Since we have taken the view that the appellant''s establishment, viz., Hotel East-West is a ''factory'' for purposes of ESI Act. We do not think it necessary to keep the matter in abeyance till the Supreme Court decides the appeal.

25. We, therefore, approve the ratio of the decision in All India ITDC Employees'' Union v. Hotel Ashoka (supra), though, for different reasons.

In the result, the appeal is dismissed and the order dated 4th February, 1976 issued by the Regional Director, ESI Corporation Bangalore (Annexure-A), calling upon the appellant to pay contributions as per Annexure thereto, is sustained and the order of the ESI Court under S. 75(g) of the Act, dismissing the petition is confirmed. No costs of this appeal.

