
(2001) 10 AP CK 0169
In the Andhra Pradesh High Court
Case No : A.A.O. No. 2070 of 2001

E.I.D. Parry (India) Ltd.

APPELLANT

Vs

Employees' State Insurance Corporation and Another

RESPONDENT

Date of Decision : 01-10-2001

Acts Referred:

Employees State Insurance Act, 1948 — Section 2, 2(9), 77

Citation : (2002) 2 ALT 567 : (2002) 3 LLJ 145

Hon'ble Judges : C.Y. Somayajulu, J

Bench : Single Bench

Advocate : C.R. Sridharan, for the Appellant; Pushpinder Kaur, for the Respondent

Final Decision : Allowed

Judgement

C.Y. Somayajulu, J.—Appellant who is a manufacturer, stockist and distributor of its goods throughout India, has a branch at Vijayawada also. The officials of E.S.I. Corporation (Corporation), i.e., respondents visited the establishment of the appellant on several dates, and verified its records, and since they found that appellant paid handling; freight and forwarding charges involving labour elements during the periods April, 1990 to March, 1991, April 1991 to January, 1992, February, 1992 to December, 1993 and January, 1994 to March, 1994 to a tune of Rs. 9,18,977.98 ps. they demanded the appellant to produce evidence regarding the labour element in the freight and forwarding charges shown in its ledgers. Since the appellant failed to produce the vouchers, respondent, by two notices dated February 27, 1998. demanded (i) Rs. 19,948/-, i.e., Rs. 17,114/-, for the period February 1990 to December 1993 and Rs. 2,834/- for the period January 1994 to March 1994, and (ii) Rs. 47,778/- i.e., Rs. 19,773/- for the period April 1990 to March 1991 and Rs. 26,005/- for the period April 1991 to January 1992, as its contribution under the Employees' State Insurance Act (the Act), for which appellant sent a reply denying its liability, alleging that those amounts were paid to the Central/State Warehousing Corporation, where its

stocks were stored, and that they did not engage any persons or labour, to handle their goods and that the Central/State Warehousing Corporation, where its goods are stored, only engaged the labour and paid charges to the labour engaged. Thereafter, respondents issued two notices dated November 27, 1998 and December 11, 1998, claiming a total of Rs. 70,239/- as contribution from the appellant under the Act before the Tribunal. Questioning the said notices, appellant filed E.I.C. No. 2 of 1999. Respondents filed a counter contesting the claim of the appellant.

2. In support of its case, appellant examined one witness as P.W.I and marked Exs.P-1 to P-16. In support of their case respondents examined 5 witnesses R. Ws. 1 to 5 and marked Exs.R-1 to R-11. The Tribunal, negating the contention of the appellant that hamalies were not engaged by them, and that a part of the claim in any event is barred by time, dismissed the petition by the order under appeal. Hence, this appeal.

3. The point for consideration is whether the appellant is not liable to pay the contribution demanded?

4. The main contention of Mr. Sridharan, learned counsel for the appellant, is that the appellant is not the employer of the Hamalies who handled the stocks in the various godowns, and they are also not the employees of the appellant within the meaning of Section 29 of the Act for it to pay contribution under the Act. It is his contention that the warehouse where the goods of the appellant are stored is the bailee, and appellant is the bailor of those goods and since either the stockists of the appellant who lift the stocks, or the Warehousing Corporation, would engage the hamalies and pay coolie charges to them, and since appellant pays the Warehousing Corporation the amount as demanded, appellant cannot be made liable to pay contribution under the Act for the hamalies. He contended that in any event since hamalies working in the Warehouses would work not only for the appellant but several others also, by no stretch of imagination can it be said that the hamalies are the employees of the appellant. Relying on *Henry Wolsey and Company v. Regional Director, Employees' State Insurance Corporation* 1995 (1) LLN 165, he contended that as per Section 77(1-A) of the Act claim for contribution beyond five years prior to the demand notice is barred, and since consolidated claim without details of breakup, is made, the whole demand is liable to be set aside. He contended that the Tribunal without noticing that the claim in *Transport Corporation India Limited v. Employees' State Insurance Corporation* and Anr. 1999-II-LLJ-581 (AP-DB), relates to a demand prior to introduction of Section 77(1-A) into the Act, by Act 29 of 1989, erroneously, held that no limitation for recovery of dues is prescribed by the Act. Relying on *Employees' State Insurance Corporation, Regional Office and Anr. v. Technico* and Anr. 2001-I-LLJ-365 (Gau); *Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation*, and *C.E.S.C. Limited and Others Vs. Subhash Chandra Bose and Others*, , he contended that the hamalies working at the godowns of the Warehousing Corporation can by no stretch of imagination be

said to be the employees of the appellant, and contended that since the facts in *Rajkamal Transport and Anr. v. Employees' State Insurance Corporation*, Hyderabad 1996- II-LLJ-435 relied on by the learned counsel for the respondents and the Tribunal below, are entirely different from the facts of this case the said decision has no application to this case. He contended that the observation of the Supreme Court in *M/s. Goodyear India Ltd. Vs. Regional Director, Employees State Insurance Corporation and others*, of its judgment relating to 1989 Amendment to Section 77 of the Act would be governed by the doctrine of sub silentio, as those observations are made incidentally while deciding a case relating to pre 1989 Amendment of the Act. On the doctrine of sub silentio, he relied on *Arnit Das Vs. State of Bihar*, where it was held:

"a decision not expressed, not accompanied by reasons, and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not the ratio decidendi. This is the rule of sub silentio, in the technical sense when a particular point of law was not consciously determined (See *State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another*, ".

He also relied on *Municipal Corporation of Delhi Vs. Gurnam Kaur*, where a passage in *SALMONDS JURISPRUDENCE 12th Edition* by Professor P.J. FITZGERALD, at page 153 on the concept of sub silentio was extracted. It reads:

"A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the Court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the Court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio."

5. Smt. Pushpinder Kaur appearing on behalf of the respondents strenuously contended that since the object and purpose of the Act is to ensure the welfare of the workers, appellant has to pay the contribution payable in respect of its employees and contended that the fact that the appellant is making profits by utilizing the services of the Hamalies for loading, unloading and transport of its goods establishes that hamalies are the employees of the appellant, and contended that though Hamalies are not working in the precincts of the shop of the appellant, and are working at a godown where the goods of the appellant are stored, they would still be treated as employees of the appellant because Clause (i) of Section 2(9) which defines "employee" ends with the sentence "whether such work is done by the employee in the factory of establishment or elsewhere" and contended that since the appellant did not adduce evidence to show that it had in fact paid any amount to the Warehousing Corporation, and had failed to

produce any bills showing such payment though several opportunities were given, it means that appellant itself engaged the hamalies for handling the goods belonging to it for distribution to its dealers, and contended that since a Division Bench of this Court in Transport Corporation India Limited case (supra) held that Hamalies engaged for purpose of loading and unloading would be "employees" within the meaning of the Act, the order under appeal is unassailable.

6. Before proceeding to consider the merits of the contentions raised on either side, it is necessary to state some facts, as seen from the evidence on record. P.W.I, the senior Executive Officer of the appellant, in his chief examination stated that the dealers themselves would pay the loading and unloading charges and that the appellant pays the rent for the godown and would also reimburse the dealer all the expenses like loading and unloading charges, basing on their claim. During cross-examination he stated that appellant does not engage any hamalies and that dealers themselves would engage the hamalies and that the terms and conditions of storage would be contained in the bills raised by the Warehousing Corporation and denied the suggestion that there is no stipulation between the appellant and the Warehousing Corporation that Corporation has to pay the hamali charges. R.W. 1, during cross-examination admitted that no manufacturing activity was taking place where he visited, and that it was only a Distribution office of the Fertilizers and Pesticides. The evidence of R. Ws. 1 to 3 is that verification of the account and records of the appellant revealed payment of labour charges and that appellant did not pay contribution on those labour charges. The evidence of R.W.4 is that appellant keeps its stocks in the godowns of the Warehousing Corporations at Vijayawada and handling charges and that he is not aware whether the Warehousing Corporation employs its workers for handling the stock of the appellant and pays wages to them, and that he does not know whether the Warehousing Corporation is paying contribution for the workers employed by it for handling the stock of the appellant.

7. From the evidence on record it is clear that the appellant is storing its stock in the godowns of the Warehousing Corporation or other places, and hamalies are employed only for unloading and loading and storing the goods in godown. Judicial notice can be taken of the fact that the godowns of Warehousing Corporation would be utilised by several people and hamalies who would be available in the premises of the Warehousing Corporation work for all such people. Thus hamalies available at the premises of the Warehousing Corporation or other godowns would work not only for loading and unloading the stocks of the appellant but also for others who store their stock in those godowns. Supreme Court in Employees State Insurance Corporation v. Premier Clay Products held that where a concern hires some casual coolies for loading and unloading of its goods, and where such coolies are available for work to others also, those coolies cannot be called even "casual workers" and hence no contribution is payable to the Corporation in respect of such workers. The ratio in the said decision squarely applies to the facts of this case, and in view therefore hamalies employed by the appellant, or its dealers, cannot be said "employees"

of the appellant within the meaning of Section 2(9) of the Act.

8. For appreciating the contentions raised by the learned counsel for the parties, it is necessary to extract relevant portions of Section 77 of the Act. It reads:

"77. Commencement of proceedings. -(1) The proceedings before an Employees Insurance Court shall be commenced by application.

(1-A) Every such application shall be made within a period of three years from the date on which the cause of action arose.

Explanation- For the purpose of this Sub-section-

(a) the cause of action in respect of a claim for benefit shall not be deemed to arise unless the insured person or in the case of dependants benefit, the dependants of the insured person claims or claim that benefit in accordance with the regulations made in that behalf within a period of twelve months after the claim became due or within such further period as the Employees' Insurance Court may allow on grounds which appear to it to be reasonable;

(b) the cause of action in respect of a claim by the Corporation for recovering contributions (including interest and damages) from the principal employer shall be deemed to have arisen on the date on which such claim is made by the Corporation for the first time: Provided that no claim shall be made by the Corporation after five years of the period to which the claim relates;

(c)

(2).....

((c) and (2) are omitted as unnecessary for this case).

9. Ex.P-3 notice dated February 22, 1998 relates to Rs. 17,114/- for the period February 1992 to December 1993 and Rs. 2,834/- for the period January 1994 to March 1994. The second period covered by Ex.P-3, i.e., January 1994 to March 1994 is well within the five years period from the date February 22, 1998. The first period from February 1992 to December 1993 is partly within time of 5 years from February 22, 1998 and partly beyond 5 years prior to that date, i.e., the claim from February 22, 1993 is within the period of five years and claim from February 1992 to February 22, 1993 would be beyond five years from February 22, 1998. Ex.P-4 notice dated February 22, 1998 is for Rs. 19,7737- for the period April 1990 to March 1991 and Rs. 26,005/- for the period April 1991 to January] 1992. Both those claims made in 1998 for the periods from April 1990 to January 1992 are made beyond 5 years.

10. Proviso to Clause (b) of Explanation to Sub-section (1-A) of Section 77 of the Act, extracted above, specifically lays down that Corporation cannot make a claim after five years of the period to which the claim relates. In this case for the first time respondent made the claim on February 22, 1998 in Ex.P-3 and Ex.P-4 Notices. From the details mentioned in Para 9 above it is easy to see that claim

from February 1992 to February 22, 1993 from out of the claim for Rs. 17,114/- from February 1992 to December 1993 in Ex.P-3, and the entire claim in Ex.P-4 is made beyond 5 years of the period to which the claim relates. From out of Rs. 17,114/-demanded in Ex.P-3 claim from February 22, 1993 to December 1993 would be within five years from the date of claim, i.e., February 22, 1998. Therefore, as laid down by the Madras High Court in Henry Wolsey (supra), the indivisible claim of Rs. 17,114/- from February 1992 to December 1993 made in Ex.P-3 and the entire claim covered by Ex. P-4 which are more than 5 years prior to February 22, 1983 (sic. 1998), are clearly barred by the limitation prescribed in the proviso to Explanation to Sub-section (1-A) of Section 77 of the Act, and cannot be recovered from the appellant by the respondent. Only the claim relating to Rs. 2,834/- for the period January 1994 to March 1994 covered by Ex. P-3 can be said to be within time.

11. Learned counsel for the respondents strenuously contended that since Section 77 of the Act has the heading "commencement of proceedings", and since question of the respondents commencing any proceedings under the Act does not arise, no question of limitation arises. I am not able to agree with the said contention, because headings prefixed to Sections cannot control the plain words of the provision, more so when the words used in the provision are clear and unambiguous. Only in cases of ambiguity, or doubt, can the heading or sub-heading be referred to as an aid to construe a provision, but even in such case also, it cannot be used for cutting down the application of the words used in the provision. (See *Frick India Limited v. Union of India*). By the proviso to Explanation to Sub-section (1-A) of Section 77 of the Act, incorporated in the Act by Act 29 of 1989, an embargo is placed on the Corporation for making a claim after five years of the period to which the claim relates. The intention of the Parliament probably is to arrest the Corporation reviving stale claims. As urged by the learned counsel for respondents it is no doubt true that Section 45-B of the Act lays down that contribution payable can be recovered as arrears of land revenue. But that does not mean as contended by the learned counsel for respondent that respondent at anytime can enforce the claim without reference to limitation. The phrase:

"Contribution payable under this Act" used in Section 45-B of the Act means the "contribution as determined u/s 45-B" of the Act. Sub-section (2) of Section 45-B of the Act lays down that order made under Sub-section (1) is sufficient proof of the claim u/s 75 of the Act, which relates to the matters to be decided by the Employees' Insurance Court. Sub-section (1-A) of Section 77 of the Act lays down that application before Employees' State Insurance Court (under Section 75 of the Act) has to be made within three years from the date on which the cause of action arose. Clause (b) to Explanation to Sub-section (1-A) of Section 77 of the Act says that cause of action would be deemed to have arisen on the day on which the claim was made by the Corporation. So, it is clear that the person from whom the demand is made has to move the Employees' Insurance Court within three years from the date of demand. For what period such demand

can be made by the Corporation is laid down by the proviso to Clause (b) of Explanation to Sub-section (1-A) of Section 77 of the Act.

Therefore, it is clear that the Corporation can make a claim in respect of arrears due only for a period of five years prior to the date of demand, and those arrears only can be recovered as amounts of land revenue u/s 45-B of the Act.

12. In this case the officers of the Corporation have been periodically inspecting the office of the appellant from 1985 onwards as seen from Exs.P-1 and P-2. But, for reasons best known to them, they slept over the matter for more than five years.

13. In Transport Corporation of India (supra), case, a Division Bench of this Court was considering the case of a claim by the Corporation which arose long prior to 1989 Amendment to the Act. Para 3 of the said judgment reads as under:

"the appellant herein filed petitions before Employees" Insurance Court at Hyderabad u/s 75(1) of the Employees" State Insurance Act, 1948 praying to determine the dispute between the appellant and the 1st respondent-Employees" State Insurance Corporation with regard to the applicability of the provisions of the E.S.I. Act and contribution if any payable by the appellant and consequently declare the proceedings dated July 6, 1984 initiated by the respondent-Corporation as illegal and set aside the same." (Italicisation is mine) So it has no application to the facts of this case.

14. Goodyear India (supra) relates to a demand made by the Corporation for the period January 28, 1968 to October 31, 1979 for the establishment at Bangalore, and from January 28, 1968 to August 3, 1979 for the establishment at Indore belonging to the. appellant therein. The contention of the appellant therein was that its establishments are not covered by the Act and that there is no relationship of employer and employee between it and the workmen. Observing that that controversy was covered by Kirloskar Brothers Ltd. Vs. Employees" State Insurance Corpn., , the Supreme Court negating the plea of limitation held that the appellant in that is liable to contribute the amount to the Corporation, holding that since the cause of action arose prior to October 20, 1989, i. e., date of coming into force of Act 28 of 1989, there is no bar of limitation. In that case, the Supreme Court did not consider the effect of proviso to Clause (b) of Explanation to Sub-section (1-A) of Section 77 of the Act.

15. Raj Kamal Transport Corporation (supra) also has no application to the facts of this case, because in that case the Raj Kamal Transport Corporation itself engaged the Hamalies. In para 1 of the Judgment it is observed 1996-II-LLJ-435 at p. 436:

"..... the admitted facts are that the appellants had engaged Hamalies for loading and unloading the goods undertaken by them for carriage as carriers. Though, the appellants collect the charges from the customers and pay the amount to hamalies at the piece rate for the work they do, they have got

supervision of loading and unloading by the hamalies. The hamalies are not appointed or controlled by any other Agency". (Italicisation mine)

It is common knowledge that the transport companies maintain their own godowns and would not store the goods entrusted to them for transport, in other godowns. In that case the hamalies were appointed and controlled only by the Transport Company and nobody else. In this case the goods are in the godowns of the Warehousing Corporation, which are not under the control or custody of the appellant. The appellant stocks the goods in the godowns of Warehousing Corporation and distributes the goods to its dealers. It is the specific case of the appellant that it did not employ the hamalies and that either the dealer or the Warehousing Corporation engaged them and that it reimbursed the dealer or the Warehousing Corporation of the charges paid to them. The relationship of appellant and Warehousing Corporations, as rightly contended by the learned counsel for the appellant, is that of a bailor and bailee under a non-gratuitous bailment. As per Section 158 of the Contract Act, even the ordinary expenses incurred by the bailee for the purpose of bailment should be borne by the bailor i.e., the appellant. So, the charges for unloading and loading also have to be borne by the appellant. The question whether charges to the hamalies were paid directly by the appellant or through the medium of Warehousing Corporation or the dealer, in my opinion, is wholly irrelevant because it is not the appellant that engaged the hamalies. Even assuming that the appellant had engaged those hamalies, since there is nothing on record to show that the Hamalies engaged by the appellants exclusively work, or worked, for the appellant and nobody else, and since judicial notice can be taken of the fact that the Warehousing Corporation godowns are used by several people, hamalies would also work for several others, those hamalies cannot come into the fold of definition of employee in Section 2(9) of the Act.

16. It is no doubt true that the Act is a beneficial piece of legislation for the welfare of the employees. Merely because it is beneficial legislation, appellants cannot be called upon to pay Contribution to all the hamalies who are not its "employees" within the meaning of the Act. For the Corporation to make a claim for contribution from an employer it should first establish that the persons asked to be covered by the employer are his "employees" within the meaning of Section 2(9) of the Act. To elaborate, assume that appellant received its stock by rail and stored it in the railway godown and later distributed the stocks to its dealers, by engaging railway coolies or porters as they are popularly called or known, can the appellant be asked to pay contribution to the railway porters, treating them as its "employees" u/s 2(9) of the Act because it paid charges to them. The answer without any hesitation would and should be an emphatic "No" because a casual labour, who does not exclusively work for the appellant on any particular day, and who would be employed by several, or some others also cannot be treated as an "employee" under the Act as laid down by the Supreme Court in Premier Clay Products case (supra). As held in Royal Talkies case (supra), the goal of the Act is to make the principal employer primarily liable for

the insurance of kindred kinds of employees on the premises, whether they are there in the work or are merely in connection with the work of the establishment. Merely being employed in connection with the work of the establishment, in itself, does not make a person an "employee" within the meaning of the Act.

17. Therefore, merely because appellant engaged some hamalies "in connection with" its business, it does not mean that those hamalies would become its "employees" within the meaning of the Act. The ratio in Technico case (supra) and C.E.S.C. Ltd. case (supra) also supports my view.

18. For the above reasons I hold that the claim for contribution from the appellant for the hamalies engaged for loading and unloading its goods at the godown belonging to others is unsustainable, and so the appeal is allowed, order under appeal of the Tribunal is set aside and the proceedings of the respondents in the letters of demand dated November 27, 1998 and December 11, 1998 in No.51/Q/1480-31 (D) for Rs.70,239/- are set aside.

19. Parties are directed to bear their own costs.