
(1996) 11 P&H CK 0041
In the Punjab And Haryana At Chandigarh
Case No : F.A.F.O. No. 58 of 1980

Employees' State Insurance Corporation and Another	APPELLANT
Vs	
Enkay (India) Rubber Co. (P) Ltd.	RESPONDENT

Date of Decision : 18-11-1996

Acts Referred:

Employees State Insurance Act, 1948 — Section 1(5), 2(9), 75

Citation : (1998) 3 LLJ 172 : (1997) 115 PLR 583

Hon'ble Judges : Sarojnei Saksena, J

Bench : Single Bench

Advocate : H.N. Mehtani, for the Appellant; Ashok Aggarwal and Vinod Gupta, for the Respondent

Final Decision : Allowed

Judgement

Sarojnei Saksena, J.—The employees State Insurance Corporation has filed this appeal u/s 82 of the Employees' State Insurance Act, 1948 (in short, the Act) against the impugned judgment dated December 28, 1978, whereby petitioner-respondent's petition filed u/s 75 of the Act was allowed.

2. Adumbrated facts of the case are that the petitioner-respondent is a factory covered under the Act. The respondent-appellants created a demand in respect of payment of Employers' special contribution and employees' contribution for the period w.e.f. January 28, 1968 to June 30, 1973. Petitioner-respondent averred that the demand in question is vague, cryptic and created without power. It also objected that the petitioner-respondent was not given any opportunity of being heard prior to the creation of the demand in question. It was also objected that the respondent-appellants adopted ad hoc basis for creating the said demand, which is illegal. It was also objected that the demand is time barred. Petitioner-respondent also averred that the provisions of Chapter V-A having been repealed w.e.f. July 1, 1973, respondent-appellants had no right to recover employer's special contribution even prior to the period July 1, 1973. It also objected that the demand created by the respondent-appellants in respect of the

petitioner's employees posted at Delhi Head Office is also without jurisdiction as no notification u/s 1(5) was issued by the appropriate authority and that the inspection reports submitted by the Inspector of the Corporation do not carry any presumption of truth. Hence, it filed the petition u/s 75 of the Act claiming that respondent-appellants be restrained from realising the amount mentioned in its demand notice.

3. Respondent-appellants contested the petition and denied that the impugned demands created by them are illegal or void in any manner.

4. The Insurance Court framed issues and recorded parties' evidence. It decided all the issues in petitioner's favour and restrained the respondent-appellants from realising the amount mentioned in the demand notice. However, the Insurance Court recorded a finding in favour of the Corporation that the demand created by the Regional Director cannot be said to be bad in any manner.

5. The appellant's learned counsel contended that the Insurance Court fell into an error in holding that since the aforementioned demand was created vide letter dated June 13, 1975 and the petition u/s 75 of the Act was filed on July 16, 1979; therefore, the petition was within limitation. According to him, this petition should have been filed within three years from the date of accrual of the cause of action. Appellant's learned counsel argued that this petition u/s 75 of the Act was filed on July 16, 1979, whereby the petitioner-respondent challenging the demand raised for the period from January 28, 1968 to June 30, 1973. According to the appellants learned counsel u/s 77(1)(a) of the Act, only the relief claimed in the petition for the period from June 30, 1972 to June 30, 1973 was within limitation and the demand raised for the earlier period i.e., from January 28, 1968 to May, 1972 was time barred as the petitioner-respondent could have filed this petition u/s 75 of the Act within three years from the date of accrual of the cause of action.

7. Appellants' learned counsel also contended that the Insurance Court has fallen into an error in holding that the demand created for the petitioner-respondent's staff posted at Delhi is also not legally tenable, as no notification was issued u/s 1(5) of the Act to cover the sales staff within the definition of the word "employee".

8. Appellants' learned counsel vehemently argued that the Insurance Court has wrongly held that the demand created by the respondent-appellants was time barred. He pointed out that Section 77(1)(b) came into force of October 20, 1989. Before that there was no period of limitation for the Corporation to raise such a demand. Now u/s 77(1)(b) such a demand can be raised within five years of the period to which the claim relates.

9. His last contention is that the sales staff working in the Head Office of the petitioner-respondent falls within the category of an employee u/s 2(9) of the Act as they are regularly employed and paid by the petitioner-respondent. It is not necessary that unless a notification is issued u/s 1(5) of the Act, they cannot be

treated as employees of the petitioner-respondent.

10. Petitioner-respondent's learned counsel supported the findings recorded by the Insurance Court and argued that its petition filed u/s 75 of the Act was rightly held to be within limitation as respondent-appellants created the demand by the letter dated June 13, 1975 and the petition was submitted on July 16, 1979. u/s 77(1)(a) of the Act such a petition can be filed within a period of three years from the date on which the cause of action accrued. On receiving demand notice, cause of action arose. Hence, the petition filed u/s 75 of the Act was within limitation. He also supported this finding that the respondent-appellants' demand notice for the period from January 28, 1968 to June 30, 1973 was time barred as it claimed contribution under the Act vide its letter dated June 13, 1975, and the demand was not created within three years from the date on which it fell due u/s 77(1)(a) of the Act read with Article 137 of the Limitation Act. To support this contention, he has relied on Chari and Ram Vs. Employees' State Insurance Corporation,

11. Petitioner-respondent's learned counsel also pointed out that after repeal of Chapter V-A of the Act w.e.f. July 1, 1973 the Corporation had no legal right to claim employer's special contribution vide their letter dated June 13, 1975.

12. After considering the rival contentions, in my considered view, the submissions made by the appellants' learned counsel are liable to be accepted. So far as the point of limitation is concerned, no doubt, demand notice was sent by the Corporation on June 13, 1975 for depositing the contributions from January 28, 1969 to June 30, 1973, but this letter will not give rise to cause of action for the petition to be filed u/s 75 of the Act by the petitioner-respondent. It is settled law that the factory of the establishment which came under the Act is statutorily bound to deposit the contributions under the Act from the date of commencement of its business. u/s 40 of the Act, it is the employer's primary duty to pay, not only its contribution but also the employees' contribution. The proceeding for the recovery is of the dues of contribution for the period from January 28, 1968 to June 30, 1973. Therefore, it matters little when notice was issued to the petitioner-respondent calling upon to pay the contribution. Such a notice is only a reminder to the employer to discharge his statutory obligation. For holding this view, I seek assistance from the judgment of the Apex Court in Employees State Insurance Corporation Vs. M/s. Hotel Kalpaka International, . Petitioner-respondent was under the statutory obligation to deposit the contribution under the Act for the period from January 28, 1968 to June 30, 1973 as soon as it becomes due u/s 77(1)(a) of the Act, which prescribes the period of three years from the date on which cause of action accrues. In this context, it is to be established as to when such a cause of action arises. Thus it is evident that the only prayer for the period from June 30, 1972 to June 30, 1973 was within limitation. The Insurance Court fell into an error in holding that the relief claimed for whole of the aforementioned period was within limitation.

13. So far as limitation for raising the demand for the respondent-appellant

Corporation is concerned, earlier in the Act, no such period of limitation was prescribed. Section 77(1)(b) has come into force w.e.f. October 20, 1989 by Amending Act of 29 of 1989. No doubt in Chart and Ram's case (supra) the Madras High Court has held that application for recovery of claim for contribution from the employer is to be filed within three years from the date of accrual of the right under Article 137 of the Limitation Act. But various High Courts and the Apex Court had an occasion to consider the rules framed u/s 96(1)(b) of the Act prescribing period of limitation for such an application to be filed u/s 75 of the Act by the Corporation.

14. In *United India Timber Works and Another Vs. Employees' State Insurance Corporation*, , a Full Bench of this High Court has considered the vires of Rule 17 of Punjab Employees' Insurance Court Rules, 1940. It held that "Rule 17 of the Rules framed by the State Government u/s 96(1)(b) of the E.S.I. Act fixing a period of one year as the period of limitation for an application u/s 75 of the Act is ultra vires the Act and is invalid". The Full Bench held "Considering the entire scheme of the Act before us, it is quite clear that fixation of any period of limitation for the Corporation to realise the contributions from the employer may tend seriously to obstruct the effective working and enforcement of the scheme of insurance. It appears to me (judgment was delivered by Inder Dev Dua, J.) that omission of a provision on this point in the Act itself has been with a purpose. When the Legislature inserted provision in regard to limitation under Sections 80 and 82, it could easily have also inserted a similar provision in Section 76. The purpose for leaving this matter of vital importance to the State Government to be provided in the rules, which are not required to be placed before the Parliament, as some statutes do in respect of important rules framed by the delegate, is not easy to appreciate". It was held that Section 96(1)(b) does not empower the State Government to make a rule on the subject of prescribing a period of limitation for presenting applications to the Insurance Court.

15. In *Adoni Cotton Mills Ltd v. Employees' State Insurance Corporation*, Hyderabad 1975 Lab. I.C. 1037, the Andhra Pradesh High Court also considered such a rule (Rule 42) framed by the State Government u/s 96(1)(b) of the Act and held that Section 96(1)(b) does not confer a power on the Government to prescribe rules in respect of period of limitation. The period of limitation, if at all, can be prescribed by the statute and not by the delegated authority under the Rules. Therefore, Rule 42 in so far as it prescribes a period of limitation of one year for an application for execution is ultra vires and bad.

16. In AIR 1972 1935 (SC) the Apex Court also considered Rule 17 framed by the Bombay Government prescribing limitation for filing an application u/s 75 framed u/s 96(1)(b) of the Act. The Apex Court held "the omission to provide a period of limitation under Sections 68 and 75 while providing for a limitation of claim by an employee for the payment for a limitation of claim by an employee for the payment of any benefit under the regulations shows clearly that the

legislature did not intend to fetter the claim u/s 75(2)(d). Where the legislature clearly intends to provide specifically the period of limitation in respect of claims arising thereunder it cannot be considered to have left such matters in respect of claims under some similar provisions to be provided for by the rules to be made by the Government under its delegated powers to prescribe the procedure to be followed in proceedings before such Court. What is sought to be conferred u/s 96(1)(b) is the power to make rules for regulating the procedure before the Insurance Court after an application has been filed and when it is seized of the matter. That apart Rule 17 bars the claim itself and extinguishes the right which is not within the pale of procedure....."

17. Thus, it is obvious that since no period of limitation was prescribed in the Act itself for raising such a demand by the Corporation, when State Legislature made a rule prescribing such a period of limitation, the vires of that rule was challenged in the High Court/the Apex Court and such a rule was struck down as ultra vires.

18. A Division Bench of Kerala High Court in *The E.S.I Corporation v. United Electrical Industries Limited* 1976 LIC 251 specifically considered the point whether the provisions of Article 37 apply to a petition filed by the Corporation under the Act. It is held as follows :-

"On the question of limitation, the Employees Insurance Court was clearly in error. It observed that the Court had dealt with a good number of similar cases and had passed judgments therein declaring that any demand or application made by any party after a period of three years from the date the cause of action arose was barred by limitation under Article 137 of the Indian Limitation Act. Reference is also made to the decision of the Supreme Court reported in *Bharat Barrel & Drum Mfg. Co. Ltd. v. E.S.I. Corporation*, (supra). Evidently the Insurance Court was in error in applying the provisions of the Limitation Act to an application under the Employees' State Insurance Act. It has been held by this Court in *South India Corporation (Trav.) P. Ltd. v. E.S.I. Corporation* 1974 I LLJ 466 that the period of limitation under the Indian Limitation Act is not applicable to proceedings before the Employees' Insurance Court. Apart from that, it is strange that the question of limitation is considered not with reference to any application before the Employees' Insurance Court but with reference to the claim of the Employees' State Insurance Corporation to recover otherwise than through any application before the Employees' Insurance Court. Evidently, therefore, the view as to limitation expressed in the judgment under appeal cannot be sustained....."

Hence, in my considered view, the Insurance Court fell into an error in holding that the demand created by the respondent-appellant-Corporation was time barred as it was raised after three years of the accrual of cause of action.

19. So far as repeal of Chapter V-A w.e.f. July 1, 1973 is concerned, it could not have affected demand created by the respondent-Corporation as the demand

was raised for the period from January 28, 1968 to June 30, 1973 i.e. before the repeal of this Chapter w.e.f. July 1, 1973. Notification dated March 26, 1973 Section 173(E) provides--In exercise of the powers conferred by Section 73-I of the Employees' State Insurance Act, 1948 (34 of 1948) the Central Government hereby directs that the provisions of Chapter V-A of the said Act shall cease to have effect on and from July 1, 1973. Section 6 of the General Clauses Act, 1897 provides for effect of repeal. As per the Clause (c) this repeal will not affect any obligation of liability accrued or incurred under any enactment so repealed. Hence, in my considered view, this demand could not be held to be without legal right after repeal of the Chapter V-A w.e.f. July 1, 1973.

20. Respondent-appellants" also raised demand for employees" contribution to be deposited for the sales staff of the petitioner-respondent working in their Delhi Head Office. Petitioner-respondent objected that since no notification was issued u/s 1(5) of the Act with regard to these employees, the Corporation cannot raise a demand for deposit of employees" contribution under the Act for these sales staff employees. In *Bombay Ammonia Pvt. Ltd. v. Employees' State Insurance Corporation and Ors* 1991 Lab I.C. 1893, the Delhi High Court considered this legal point and held "where it was found as a fact that the employees working at Head Office of the employer were closely connected with the functioning of the factory, geographically situated in a different city, the employees fell within the definition of "employee" u/s 2(9) as amended w.e.f. January 28, 1968 and the employer was liable for contribution and no separate notification u/s 1(5) was necessary." *Hyderabad Asbestos Cement Products Ltd. Vs. Employees Insurance Court and Another*, and 1985 I.C. 396 were relied on.

21. In this case, admittedly the sales staff employed by the petitioner-respondent are advancing the activity of the petitioner-respondent by discharging their functions of sales staff, i.e. by selling the goods of the petitioner-respondent's establishment. During arguments, it was candidly admitted by the respondent's learned counsel that Sales Staff were regularly employed and paid by the petitioner-respondent. In *Employees' State Insurance Corporation v. T.C. Vermanl* this High Court has held that "a reading of Section 2(9) of the Employees' State Insurance Act, 1948 as amended by Act 44 of 1966 (w.e.f. January 28, 1968) would show that the definition of "employees" was extended to such persons employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of the factory, and before this date the employees working in the head office were not included in the said definition. As such the employees working in the head office are liable to be included in the term "employee" and the employer is liable to pay the contribution as demanded by the Act."

22. The Apex Court in *Nagpur Electric Lights and Power Co. Ltd. Vs. Regional Director Employees State Insurance Corporation, etc.*, compared the provisions of the Factories Act, 1948, Section 2(1) and Section 2(9)(i) of the Act and

observed that "the definition of an employee in the Employees' State Insurance Act is wider than that of a worker in the Factories Act. The object of the Factories Act is to secure health, safety, welfare proper working hours, leave and other benefits for workers employed in factories. The benefit of this Act does not extend to field workers working outside the factory. The object of the Employees' State Insurance Act is to secure sickness, maternity, disablement and medical dependents' benefits to their dependents. The benefit of this Act extends inter alia to the employee mentioned in Section 2(9)(i) whether working inside the factory or establishment or elsewhere." They further held that "all workers of the disputed categories, whether they work in the factory or elsewhere, are employees within the meaning of Section 2(9)(i) of the Employees' State Insurance Act, 1948. Some of the employees are clerks, they are not engaged in manual labour, but a person doing non-manual work can be an employee within the meaning of Section 2(9)(i) if he is employed in connection with work of the factory. Some of the employees work outside the factory but their duties are connected with the work of the factory. They are, therefore, employees within the meaning of Section 2(9)(i). Some are employed in the substations. It is common case that the sub-stations are not independent factories. The sub-stations; attendants attend to work which is directly connected with the work of the factory at the main station. They are, therefore, employees within the meaning of Section 2(9)(i)."

23. A Full Bench of the Punjab and Haryana High Court in Employees' State Insurance Corporation, Chandigarh v. Oswal Woollen Mills Ltd. Miller Ganj, Ludhiana 1980 P.L.R. 656 , went to the extent of holding that "even a person casually employed in a factory or establishment is within the ambit of the definition spelled out in Section 2(9) of the Act."

24. The Bombay High Court considered the status of hawkers employed for sale of products of factory on fixed wages in American Express Bakery v. The Employees' State Insurance Corporation 1972 Lab. I.C. 1069 and held that the hawkers employed for sale of products of factory on fixed wages are employees within the Act in respect of whom the employer is liable to pay contribution u/s 39.

25. Thus, in my considered view, the sales staff employed by the petitioner-respondent on a regular basis in the head office fall within the definition of an employee as contemplated u/s 2(9) of the Act. Therefore, it was not necessary for the Corporation to issue any notification for this sales staff of the petitioner-respondent u/s 1(5) of the Act. The petitioner-respondent is liable to deposit the employees' contribution for their sales staff posted at Delhi in their Head Office under the provisions of this Act. The Insurance Court fell into an error in deciding all these legal issues against the Corporation.

26. Accordingly, the appeal is hereby allowed. The impugned judgment is set aside.