(1987) 04 BOM CK 0008

In the Bombay High Court

Case No : L. P. A. No. 14 of l985

Employees State Insurance Corporation APPELLANT

Vs

Apex Engineering Pvt. Ltd. RESPONDENT

Date of Decision : 20-04-1987

Acts Referred:

Companies Act, 1956 — Section 292
Employees State Insurance Act, 1948 — Section 1, 1(4), 2(12), 2(13), 2(14A)
Factories Act, 1948 — Section 2(a)
Income Tax Act, 1961 — Section 7

Citation : (1990) 2 ACC 270

Hon'ble Judges : W. M. Sambre, J;H. W. Dhabe, J

Bench : Division Bench

Advocate : A.V. Holey, for the Appellant; V.R. Thakur, for the Respondent

Final Decision : Dismissed

Judgement

H.W. Dhabe, J.—This is a letters patent appeal preferred by the Employees State Insurance Corporation against the judgment of the learned Single Judge of this Court holding that the Managing Director of the respondent Company is not an ''employee'' within the meaning of the definition of the said expression given in section 2(9) of the Employees'' State Insurance Act. 1948 (for short the ESI Act).

Briefly the facts are that by orders dated 23-5-1974 and 1-7-1974, the appellant Corporation made the provisions of the ESI Act applicable to the respondent Company on the ground that it had engaged 20 employees in its Company and, as such, by virtue of sub section (4) of section 1 of the ESI Act, the provisions of the said Act were applicable to the said Company. The respondent Company made an application under sections 75 and 76 of the ESI Act before the Employee''s Insurance Court, Nagpur, for decision on the dispute whether the respondent Company is a ''factory'' within the meaning of section 2(12) of the ESI Act and whether its Managing Director is an ''employee'' within the meaning of section 2(9) of the said Act. The appellant Corporation filed its written statement in the case opposing the claim of the respondent Company. The parties led evidence before the Employees'' Insurance Court.

2. The learned Judge of the Employees'' Insurance Court on the basis of the evidence on record held that there were only 19 employees in the factory of the respondent Company besides its Managing Director and, therefore, the only question which necessitated consideration was whether its Managing Director was an ''employee'' within the meaning of section 2(9) of the ESI Act. As regards the said question, the learned Judge of the Employees'' Insurance Court held that looking to the nature of the powers and duties conferred upon the Managing Director of the respondent Company, he was not an employee within the meaning of section 2(9) of the ESI Act. The appellant Corporation preferred an appeal in this Court against the aforesaid judgment of the learned Judge of the Employees'' Insurance Court. The learned Single Judge of this Court, who heard the appeal affirmed the view taken by the learned Judge of the Employees'' Insurance Court. The appellant Corporation has, therefore, preferred the instant Letters Patent Appeal in this Court.

3. The learned counsel appearing for the appellant Corporation has urged before us that the Managing Director in the instant case has a dual capacity - one as a Director and another as a Managing Director. The submission is that although in his capacity as a Director of the respondent Company he may not be an employee within the meaning of section 2(9) of the ESI Act, in his capacity as a Managing Director, he would be an employee within the meaning of the said definition. In support of the above submissions, heavy reliance is placed upon a Division Bench judgment of the Karnataka High Court in the case of Regional Director, Employees'' State Insurance Corporation vs. M/s. Margarine and Refined Oils Co. (P.) Ltd., Banglore (1934 LAB I. C. 344). Reliance is also placed on behalf of the appellant Corporation upon a judgment of the Supreme Court in the case of Ram Pershad Vs. The Commissioner of Income Tax, New Delhi, arising out of the proceedings under the income tax Act.

4. In appreciating the contention raised before us, it would be worthwhile to notice some of the relevant provisions of the ESI Act. Section 1(4) provides that the said Act shall, in the first instance apply to all the factories other than seasonal factories. The definition of the expression "factory" in section 2(12) above that factory means any premises including the precincts thereof wherein twenty or more persons are employed or were employed for wages on any day of the preceding twelve months..........".

5. The definition of the expression ''employee'' is contained in section 2(9) of the ESI Act. The said definition is reproduced below for ready reference:

"(9) "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and-

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or

(ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;

(and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, departmental or branch thereof with the purchase of raw materials for, or the distribution or sale of the products of the factory or establishment but does not include-

(a) any member of (the Indian) naval, military or air force; or

(b) any person so employed whose wages (excluding remuneration for service work) exceed one thousand and six hundred rupees a month:

Provided that an employee whose wages (including remuneration for overtime work) exceed one thousand and six hundred rupees a month at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that Period;).

6. The main part of the definition of the expression "employee" shows that it means any person employed for wages in or in connection with the work of a factory or establishment to which the ESI Act applies. It is material to notice that in the definition of the word ''employee'' unlike the other industrial enactments, the managerial staff is not expressly included and from that point of view, the definition of the expression ''employee'' is slightly wider than the definition of the said expression under the Industrial Laws.

7. Although the word ''employer'' is not defined, the expression ''principal employer'' is defined in section 2(17) of the ESI Act, which definition is also reproduced below for ready reference.

"Principal employer" means -

(i) in a factory, 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), the person so named:

(ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the head of the Department;

(iii) in any other establishment, any person responsible for the supervision and control of the Establishment:

The material part of the above definition in clause (1) shows that in the case of a factory the owner or occupier of the factory, the managing agent of such owner or employer, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under the Factory Act, 1948, the person so named are within the definition of the expression "Principal Employer".

8. Although the word ''employer'' is not defined it would be clear that it would have the same connotation as the expression ''principal employer'' defined in section 2(17) of the ESI Act. However, there is another expression used in the ESI Act viz. the ''immediate employer'' which expression is defined in section 2(13) of the ESI Act. The purpose of providing the said definition is to bring the employees of the contractor engaged by the principal employer within the purview of the. ESI Act. The ''managing agent'', who is included within the definition of the expression ''principal employer'' is defined in section 2(14A) of the Act. According to the said definition the ''managing agent'' means any person appointed or acting as the representative of another person for the purpose of carrying on such other person''s trade or business; but does not include an individual manager subordinate to an employer.

9. It is clear from the definition of the word ''employee'' that it means any person employed for wages and the expression "wages" is defined in section 2(22) of the ESI Act. The relevant part of the said definition reads as under:.

wages'' means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied were fulfilled........"

It may also be seen that by virtue of the definition of clause 2(24) the words and expressions used but not defined in the ESI Act have the same meaning which is assigned to them in the Industrial Disputes Act, 1947, if they are defined in the said Act.

10. There are certain obligations cast under the ESI Act upon the principal employer (e.g. see section 68) and in case the principal employer fails to fulfil the said obligations, the ESI Corporation can proceed to take such action against him as specified therein. It is in the light of the above scheme of the ESI Act that it is necessary to consider the question whether the Managing Director of the respondent Company is an employee within the definition of the expression ''employee'' u/s 2(9) of the ESI Act.

11. It is no doubt true that the decision of the Karnataka High Court in Regional Director, Employees'' State Insurance Corporation vs. M/s. Margarine and Refined Oils Co. (P.) Ltd., cited supra, supports the contention raised on behalf of the appellant Corporation. It is. however, clear from the said judgment that the effect of the definition of the expression ''principal employer'' has not been

considered in the said judgment. Similarly, the decision of the Supreme Court in the case of Regional Director, Employees State Insurance Corporation, Trichur vs. Ramanuja Match Industries (AIR 1985 SC 276) in regard to the case of Managing Partner was not then rendered and the effect of that judgment could not. therefore, be considered by the Karnataka High Court. In our view, in considering the question raised before us, the view taken by the Supreme Court in the case cited supra in regard to a Managing Partner will have to be taken into consideration.

12. The principal submission in the instant case is that the Managing Director has a dual capacity and, therefore, in his capacity as a Managing Director he should be held to be an employee within the meaning of section 2(9) of the ESI Act. It is held by the Supreme Court in the above case that a partner who belongs to the class of employer cannot rank as an employee also on the ground that he works on wages also in the partnership business. It is further held in the said case that it may be that a partner is being paid some remuneration for any special attention which he devotes but that would not involve any change of status and bring him within the definition of the expression "employee" under the ESI Act.

12-A. In para 7 of the judgment, cited supra, the Supreme Court has approved the view of Lord Justice Mathew in the case of Ellis vs. Joseph Ellis and Co. (1905) I KB 324 that the same person can occupy the position of both master and servant or employer and employee is a legal impossibility. The observations of Lord Justice Cozcns-Hardy in the above case of Ellis vs. Joseph Ellis and Co. are also worthy of notice. They are as follows:

"All that our decision in this case amounts to, I think, is that the Act only applies where there is on one side an employer, and in the other side a workman, who are different persons."

(Emphasis supplied).

It is thus clear that the theory of dual capacity is not accepted by the Supreme Court in the Judgment cited supra.

13. The learned counsel for the appellant Corporation has, however, pressed into service the judgment of the Supreme Court in the case of Shri Ram Prasad, cited supra, to show that a Managing Director also can be an employee in the company. The question in the said case was whether the remuneration paid to the Managing Director was salary within the meaning of section 7 of the income tax Act and the said question was answered in the affirmative in the said case. However, in our view the question whether the Managing Director is an employee within the meaning of the ESI Act or not has to be decided in the light of the scheme of the said Act.

14. As pointed out above, the principle of dual capacity is inconsistent with the scheme of the ESI Act. The reason why we say so is because the Managing Director in a Company would, by reason of his status, and duties fall within the

definition of the expression ''principal Employer'' given in section 2(17) of the ESI Act. He may also satisfy the requirement of the definition of the ''Managing Agent'' in section 2(14-A) of the said Act. As already referred to. the definition of the expression "principal employer" shows that the word "occupier" used therein by virtue of the definition in section 2(15) of the ESI Act has the same meaning as is given to it in the Factories Act. u/s 2(a) of the Factories Act, the "Occupier" means a person who has the ultimate control over the affairs of the factory, and where the said affairs are entrusted to a managing agent, such agent is also deemed to be the occupier of the factory. It is in the light of the definitions of the above expressions that it is necessary to examine the factual position in the instant case to determine whether the Managing Director of the respondent company is an employee within the meaning of section 2(9) of the ESI Act.

15. The managing director in the instant case was appointed by the Board of Directors of the respondent Company by resolution No. 2 in its meeting held on 9-9-1969. The said Managing Director was appointed subject to clause 94 of the Articles of Association of the respondent Company. He was given the remuneration of Rs. 12,000/- per annum excluding the other amenities which the Company might provide him from time to time. As regards the powers to be exercised by him, it is clear from the said resolution that he was delegated the powers of the Board of Directors under sub-clauses (c)(d) and (e) of section 292 of the Companies Act. Accordingly, he was authorised and empowered to borrow money not exceeding Rs. 10,00.000/-at any time on or without such securities as he deems fit. He was also authorised to invest a sum not exceeding Rs. 10.00.000/- in aggregate in either movable or immovable assets as may be necessary to conduct the business of the Company. He was further empowered to lend a sum of not exceeding Rs 1.000/- without any security to any person at a time, Rs. 10,000/- on security to any person at a time and the aggregate of such total amount (sic) by him has not to exceed Rs. 50,000/- at any time. Besides the above owners he was allowed to exercise all the powers exercisable by a Director under the supervision and control of the Board of Directors.

16. Perusal of clause 94 of the Articles of Association would show that the First Managing Director was to be elected by the Board of Directors on such remuneration and terms as it thought fit and he was to hold the often until the immediate next General Meeting of the Board. Clause 85 of Articles of Association of the respondent Company deals with the appointment of the Managing Director and clause 96 deals with his powers and duties. It is clear from clause 96 that any of the powers of the Directors can be entrusted to the Managing Director by the Directors. Clause 93 of the Articles of Association provides that unless otherwise decided by the Board, the Managing Director in the absence of the appointment of a secretary of the Company, shall duly comply with the provisions of the statute, and particularly the provisions as to registration and keeping records of mortgages and charges, maintenance of register of Members and sending to the Registrar of Companies an annual list of

members and summary notice as to increase of capital, special resolutions and other returns and particulars required to be submitted. However, as regards clause 93, there is no evidence to show whether there was Secretary appointed in the respondent Company or not. The said provision, therefore, cannot be taken into consideration in this case to determine the duties performed by the Managing Director of the respondent Company. Although the definition of the expression ''Managing Director'' given in clause (l)(f) of the Articles of Association shows that any person can be appointed as a Managing Director in the respondent Company, the appointment is from amongst the Directors of the Company. The resolution of appointment of the Managing Director referred to above shows that the Managing Director can exercise the powers of the Directors as per the said resolution. The other powers referred to therein are the powers of the Board of Directors u/s 292 of the Companies Act, which are already referred to.

17. All the above powers and duties, therefore, show that the Managing Director belongs to the class of the "principal employer" as defined in section 2(17) of the ESI Act and not to the class of "employees''" as defined in section 2(9) of the said Act. A person who is an employer within the meaning of the said Act cannot at the same time be treated as an employee within the meaning of the said Act as held by the Supreme Court in the case of Regional Director, Employees'' State Insurance Corporation, Trichur vs. Ramanuja Match Industries, cited supra. The judgment of the Supreme Court in Shri Ram Prasad vs. Commissioner of income tax, New Delhi, cited supra, is not therefore, of any assistance to the appellant Corporation as far as the scheme of the ESI Act is concerned. The view taken by the learned courts below, therefore, deserves to be affirmed.

In the result, the instant appeal fails and is dismissed with costs.

