
(1994) 08 BOM CK 0045
In the Bombay High Court
Case No : First Appeal No. 690 of 1990

Employees State Insurance Corporation	APPELLANT
Vs	
Hindustan Cocoa Products Ltd.	RESPONDENT

Date of Decision : 12-08-1994

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(22), 2(9), 40, 41, 45A

Citation : (1995) 1 BomCR 403 : (1994) 96 BOMLR 193 : (1995) 70 FLR 233 : (1999) 3 LLJ 183 : (1995) 1 MhLj 497

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Judgement

D.R. Dhanuka, J.—The Employees" State Insurance Corporation has preferred this appeal u/s 82(2) of Employees" State Insurance Act 1948, against Order dated 8th December 1989, passed by Employees" Insurance Court, Bombay in Application (ESI) No. 91 of 1986. By the impugned Order under appeal, it was held that the workers engaged by the contractors M/s. B. E. Billimoria & Co. Pvt. Ltd. for construction of residential building for use of the officers of the Respondent in the appeal were not "employees" within meaning of Section 2(9) of the Act and the amounts paid to them by the Respondent company to the contractor would not be "wages" within meaning of Section 2(22) of the Act. By the said Order it was also declared that the Respondent was not liable to pay any amount of contribution on the payments made to these workers engaged through the contractors M/s. B. E. Billimoria & Co. Pvt. Ltd.

2. The Respondent is a well known Public Limited Company incorporated under the Companies Act, having its factory at Thane, manufacturing chocolates and toffees. The Respondent has a registered officer at Cadbury House, 19, Bhulabhai Desai Road, Bombay. At the material time about 190 workers/persons were employed at the registered office of the company. The factory of the respondent is duly covered under the provisions of the Employees State Insurance Act 1948 and contributions are paid to the appellant in respect of the employees working

on the factory as well as at the registered office whose monthly wages do not exceed the prescribed limit.

3. On or about 12th August 1986, The respondents preferred the above referred application before the Employees' Insurance Court at Bombay inter alia setting out facts in para 4 thereof and other connected paras of the application. In para 4 of the said application, the respondents stated that it had a residential building in the compound of its registered office which was used for housing, the managing director of the respondent. In the said para of the application it was further stated that the said residential building situated in the compound of the registered office of the company was demolished and in its place 8 storeyed building was constructed for use of the senior executives of the respondent herein. A contract for construction of 8 storeyed building in the compound of registered office of the respondent situate at Mahalaxmi was awarded to M/s. B. E. Billimoria & Co. Pvt. Ltd., the contractors, sometime in the month of September 1985. The contractors employed several employees for carrying out the construction work. The construction work was completed. The respondent addressed a letter to the appellant on 18th December 1985 enquiring as to whether the employees employed by the contractors were coverable under the provisions of the Act. By letter dated 13th January 1986, the Assistant Regional Director of the appellant informed the Respondent that persons employed directly or through contractors for construction of residential buildings were covered under the provisions of the Act. Correspondence ensued. Before any order could be passed by the appellants as contemplated u/s 45A of the Act, the respondent moved the Employees' Insurance Court for a declaration that the employees employed by the said contractors were not the employees under the provisions of the Employees State Insurance Act and that the respondent company was not required to pay any contribution in respect of these employees. The respondent also sought an injunction against the appellants from initiating any proceedings for recovery of contribution in respect of these employees. It was the case of the respondents in the said application that the employees employed by the contractors were not doing any work connected with the work of the factory. It was submitted that these employees were therefore, not coverable under the provisions of the Act. The appellants filed a written statement in the said proceeding contending inter alia that the employees employed by the respondent through the contractors for construction of residential building meant for the staff were "employees" as defined under sections 2(9)(II) and 2(9)(III) of the Employees' State Insurance Act. The Respondent also contended that the respondent being the principal employer were liable and responsible to pay contribution in respect of the said employees as provided in section 40 of the Act.

4. No oral evidence was led by the parties at the trial of the said proceeding at the trial court.

5. After considering the documentary evidence led at the hearing of the said

application, the trial court held that the workers engaged/employed through the contractors M/s. B. E. Billimoria & Co. Pvt. Ltd. for construction of residential building for the benefit of the officers of the respondent were not "employees" within meaning of Section 2(9) of the Act and the amounts paid to these workers could not be treated as wages within meaning of Section 2(22) of the Act. The trial court held that the respondent was not liable to pay contribution on the payment made to the workers of the contractors M/s. B. E. Billimoria & Co. Pvt. Ltd.

6. This appeal involves substantial question of law as to the interpretation of the provisions of law contained in Section 2(9) of the Employees' State Insurance Act 1948 and also the interpretation and application of the ratio of the judgments of the Hon'ble Supreme Court in the case of *The Regional Director, Employees' State Insurance Corporation, Madras v. South India Flour Mills (P) Ltd.* and in the case of *Royal Talkies, Hyderabad & Ors. V. Employees' State Insurance Corporation* through its Regional Director, Hill Fort Road, Hyderabad reported in (1986) 53 FLR 178 and (1978) LIC 1245, respectively.

7. The first question required to be considered is as to whether construction of residential building for the Senior Executives of the respondent has some nexus with the work of the factory of the respondent? In case of *South India Flour Mills (P) Ltd.*, the Hon'ble Supreme Court held that the work in question need not always have some direct connection with the manufacturing process that is carried in the factory. In the case of *Royal Talkies*, the question before the Hon'ble Supreme Court was as to whether employees to cycle stand and canteen run in a cinema theatre by contractors were covered by definition of expression "employees" and as to whether the cinema owner was liable as principal employer for their contribution? Krishna Iyer, J. speaking for the Apex court held that "It is enough if the employee does some work which is ancillary or incidental or has relevance to or link with the object of the establishment". The question to be asked is not whether without that amenity or facility the establishment cannot be carried on but whether with such amenity or facility even peripheral it may be, has not a link with the establishment? Applying the said test the Hon'ble Supreme Court held in the case of *Royal Talkies, Hyderabad*, that the Cinema owner was liable to pay contribution in respect of the employees of the contractors. If this test is to be applied as it ought to be applied in this case, can it be said that the work of construction of residential building situated in the compound of the registered office of the company for the Senior Executives of the company has no link with the work of the factory. In my opinion it is a mere matter of common sense that the construction of residential building for the staff of the registered office has necessary linkage with the work of the factory. It is true that the factory is situated at the distance of about 35 kilometers from the registered office of the company situate at Mahalaxmi in the compound of which the residential building for the staff is constructed. It makes no difference, however, to the question required to be answered with reference to the test laid down in the abovereferred Supreme Court Cases. There need not be direct

connection between the manufacturing process carried on in the factory and the construction work of residential building for the Senior Executives of the company who must be looking after also the work of the factory directly or indirectly.

8. Section 2(9) of the Act provides extended definition of the expression "employees" for purpose of the Employees' State Insurance Act 1948. Section 2(9)(ii) of the Act clearly provides that the contractors' employees are also covered by the definition of the expression "employee" provided the conditions prescribed by the said section for applicability thereof are satisfied. Section 40 of the Act provides that "the principal employer shall be bound to pay amount of contribution to the Corporation in the first instance. " Section 41 of the said Act provides that the principal employer who has paid contribution in respect of the employees employed by or through an immediate employer shall be entitled to recover the amount of contribution from the immediate employer. It is, therefore, required to be seen as to what are the prescribed conditions for applicability of section 2(9)(ii) of the Act. If the work in question can be considered as "ordinary part of the work of the factory or establishment" or part of the work which is preliminary to the work carried on in or incidental to the purpose of factory or establishment, the contractors employees or the employees employed by or through the contractor shall be treated as covered under the said Act subject to one more condition to which I shall make reference little later. In my opinion the work of constructing residential building for the Senior Executive of the company is a work incidental to the purpose of the factory. It is desirable, though not absolutely necessary that service quarters or service accommodation should be provided for residence of the Senior Executives or other members of the staff. Such a provision cannot be considered as unrelated to the purpose of the factory. In my opinion, this is the clearest possible case where the necessary link between the work in question and the purpose of the factory covered under the Act is established.

9. I shall now refer to one more requirement of Section 2(9)(ii) of the Act on which emphasis is led by the learned counsel for the respondent. The learned counsel for the respondent submits that the contractors employees cannot be automatically treated as employees of the principal employer and the court is required to consider as to whether the work in question was carried by or under the supervision of the principal employer. The learned counsel for the respondent relies on the judgment of the Hon'ble Supreme Court in the case of Calcutta Electric Supply Co. Ltd. v. Subhash Chandra Bose & Ors. reported in (1992) LLR 81. The question as to whether the principal employer had supervised the construction work of residential building or not is basically a question of fact. The relevant facts were within the exclusive knowledge of the respondent in this appeal. It was nowhere contended in the application before the trial court that the respondents had not supervised the said work. No evidence was led in this behalf. No arguments were made in this behalf before the trial court. The learned counsel for the respondent submits that it was for the appellants to lead the

necessary evidence and prove that the respondent had supervised the work in question by themselves or through their authorised agent. Since this contention is being raised for the first time at the hearing of this appeal and does not appear to have been raised before the trial court. I have not permitted the learned counsel for the respondent to raise this question at the hearing of the appeal. In all probability, the respondents or its officers might have supervised the construction work of residential building situated in the compound of the registered office and meant for Senior Executives of the respondent. It is not possible to examine this factual controversy in this appeal or allow the appellant to raise this controversy at this late stage. Parties went to trial on the limited question i.e. as to whether the work in question had some nexus with the work of the factory.

10. The learned counsel for the appellant is right in submitting that the trial court has not properly interpreted the provisions of law contained in section 2(9) of the Act or the ratio of judgment of the Hon''ble Supreme Court including in the case of South India Flour Mill referred to hereinabove. The Trial court has observed that the expression "work of the factory" must be understood in the sense of any work necessary for extension of the factory or establishment or for carrying out or for increasing the work of the factory or establishment. In my opinion the view taken by the trial court is very narrow and it runs counter to the ratio of the judgment of the Hon''ble Supreme Court and indicates against the ratio of judgment of the Hon''ble Supreme Court in the case of Royal Talkies, Hyderabad case. All that is required to be seen is as to whether there is some link between the work in question and the work of the factory or establishment covered under the Act. The Trial court has applied an erroneous test and has erroneously held that the construction of residential building for the staff could be considered as work connected with or incidental to the work of the factory. I have no hesitation on over-ruling reasoning reasoning and conclusion of the trial court on this aspect.

11. In the result the appeal is allowed. The order under appeal passed by the trial court being Order dated 8th December 1989, passed in application (ESI) No. 91 of 1986 is set aside. The said application is dismissed.

12. The learned counsel for the respondent seeks liberty to urge a contention in further proceedings to the effect that the respondent had not carried on any supervision by themselves or through their authorised agents in relation to construction of residential building referred to hereinabove. It is not possible to grant any such liberty to the respondent. The orders of the court must acquire finality subject to the right of the respondent to carry the matter higher if so, allowed.

13. The appellant shall be at liberty to raise demand for the amount of contribution payable by the respondent as contemplated in section 45A of the Act. The appellant shall give reasonable opportunity to the respondent in respect of computation of the amount payable. The respondent shall produce the

necessary record before the appellant. The inquiry shall be restricted only to the computation of the amount payable. The respondent shall pay the amount of contribution so ascertained to the appellant within eight week from service of the notice of demand after ascertainment of the amount as aforesaid.

14. Having regard to the facts and circumstances of the case there shall be no order as to costs.

15. Issue of certified copy is expedited.