

(1980) 03 KL CK 0004
In the High Court Of Kerala
Case No : M.F.A. No. 315 of 1978

Employees" State Insurance Corporation	APPELLANT
Vs	
M.C. Punnoose	RESPONDENT

Date of Decision : 19-03-1980

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(12), 2(9), 38, 39, 42

Citation : (1980) 03 KL CK 0004

Hon'ble Judges : Balakrishna Eradi, C.J;Narendran, J

Bench : Division Bench

Advocate : C. Sankaran Nair, for the Appellant; No appearance, for the Respondent

Final Decision : Allowed

Judgement

Narendran, J.—Questions of considerable importance in the law of The Employees" State Insurance arise for consideration in this appeal by the Employees" State Insurance Corporation against the decision of the Employees" Insurance Court, Alleppey. The questions are: (1) Who is a "casual worker" who will not be an employee as defined in Section 2(9) of the Employees" State Insurance Act, 1948, for short the Employees" State Insurance Act?; (2) Simply because a workman is paid daily wages will he cease to be an employee?; and (3) If as per the accounts kept by the employer there are sufficient number of employees to make the establishment a factory as defined in Section 2(12) of the Employees" State Insurance Act, can the establishment escape coverage simply because as per the wages register kept in the establishment the number of employees is below twenty, the number required to make the establishment covered under the Employees" State Insurance Act.

2. The Respondent, the Managing Director, Udaya Pictures (P) Ltd., a company running a film studio by jame "Udaya Studio", filed an application u/s 75(g) of the Employees" State Insurance Act, 1948 read with Sections 76 and 77 before the Employees" Insurance Court, Alleppey for a declaration that the Employees"

State Insurance Act and the scheme are not applicable to it as "it employs only 9 employees". It is stated in the application that on 10th May 1976 the opposite party (the Appellant here) directed its local manager to verify the general ledger maintained by the applicant. Thereafter, by letter No. 54-6333.90 (Ext. P-9) the opposite party informed the applicant that as per their Inspector's report dated 15th January 1976 the Udaya Studio has been covered from 1st December 1975. The applicant sent a prompt reply that the Udaya Studio will not be covered as they employ only 9 workers. But the opposite party by letter dated 22nd June 1976 directed the applicant to comply with the provisions of the Employees' State Insurance Act. Ultimately, by letter dated 23rd September 1976 the local manager of the opposite party threatened to take penal action against the applicant u/s 85 of the Employees' State Insurance Act. The documents produced along with the application included the attendance register from February 1976 (Ext. P-1) and wage register from January 1976 (Ext. P-2) of the establishment. The opposite party, the Regional Director, Employees' State Insurance Corporation filed written objections stating that in the survey conducted by the Insurance Inspector on 15th January 1976 it was found out that the applicant employed 22 persons for wages in December 1975 as per the "wages records" produced by the applicant and the applicant himself authenticated this on part II of the survey report Ext. D-3 and hence the contention that only 9 persons were employed is contrary to facts. It is further stated that the applicant's establishment was covered under the Employees' State Insurance Act from 1st December 1975 and hence the application has only to be dismissed.

3. When the case came up for evidence, in pursuance of a petition filed by the opposite party-corporation, the applicant produced certain records which included the cash book (Ext. P-5) and the ledger (Ext. P-6) of the applicant for the year 1975. The wages register for the year 1975 (Ext. P-4) and the muster roll for the year 1975 (Ext. P-3) which were not produced along with the application must have been produced at this stage. Before the court below the applicant was examined as P.W. 1 and Exts. P-1 to P-13 were marked on the applicant's side while on the side of the opposite part-corporation. D.Ws. 1 to 4 were examined and Exts. D-1 to D-9 were marked. The court below rejected the case of the corporation that Ext. P-4 is not the wage register maintained in the applicant's establishment in the year 1975 and which was produced before D.W. 1 Inspector of the Corporation on 15th January 1976 when he visited the establishment for the survey, and held that it was the wages register regularly maintained by the applicant and which was produced before D.W. 1. The Court also accepted the applicant's case that P.W. 1, the applicant, signed Ext. D-3 survey report when the columns in it were yet to be filled up. Accordingly, the court held that the number of employees in the applicant's establishment were only 9 during the relevant period and hence it could not be considered to have been covered under the Employees' State Insurance Act at the relevant time. The court also gave a declaration that the establishment was not liable to pay the

contribution claimed by the opposite party-corporation. It is the above judgment of the Employees' State Insurance Court that has been challenged by the Corporation in this Miscellaneous First Appeal.

4. The applicant as P.W. 1 deposed: The studio has 9 employees. Ext. P-4 is the Wages Register from 1975 January onwards. All records were shown to the Employees' State Insurance Inspector who came for the survey on 15th January 1976. I convinced him that there were only 9 employees. The details were not entered in the survey report (Ext. D-3) when I signed the same. Power is not used in the studio. I do not remember whether the Udaya Pictures produced any picture in 1975 and 1976. Salary might have been paid to temporary workers in 1975. Bonus was paid to all the workers in 1975. The expenses of the pictures produced in the studio will be entered in Ext. P-6 ledger. The Inspector of the Corporation who conducted the survey of the establishment on 15th January 1976 as D.W. 1 deposed: In column 7 in Ext. D-3 report the number of employees every month was noted on the basis of the Wages Register produced by P.W. 1. I put my initials in that Wages Register. Ext. P-4 is not that Wages Register. The Wages Register was the only record shown to me. P.W. 1 signed Ext. D-3 only after it was filled up by me. I told P.W. 1 that the establishment was covered under the Employees' State Insurance Act as there were 22 employees in December 1975. Ananthakrishnan, who was the accountant in the applicant's establishment, as D.W. 2 deposed: I wrote Ext. P-6 the general ledger for the year 1975. Ext. P-5 is not the cash book for 1975 which I wrote. The salary register for the year 1975 contained 22 names. Ext. P-4 is not the salary register for the year 1975. Over and above the staff there were about 27 persons working in the establishment who were paid daily wages on taking vouchers. Power is used in the studio. Among the employees there are operators, photographers, etc. Udaya Pictures produced pictures in 1975. Bonus was paid to the employees in 1975. There were 49 members in the Udaya Studio Employees' Union. D.W. 4, Thundiyil Verghese, who was the District Secretary of the Indian National Trade Union Congress, Alleppey deposed: In the Udaya Studio Employees' Union 17 members of staff and 20 odd daily paid workers were members. The daily paid workers are doing work connected with film production.

5. According to P.W. 1, the applicant, Ext. P-4 is the Wages Register for the year 1975. But the definite case of D.W. 1, Inspector, is that Ext. P-4 is not the Wages Register produced before him on 15th January 1976, the date on which he conducted the survey. According to D.W. 1, he put his initials on the Wages Register produced before him. Ext. P-4 does not have the initials of any officer of any department. Ext. P-6 is the ledger for the year 1975. As per Ext. P-6, salary and allowances were paid to certain persons whose names do not find a place in Ext. P-4. As per Ext. P-6, D.W. 2, Ananthakrishnan, was paid salary and allowances from January, 1975 onwards, but as per Ext. P-4, he was paid salary only for December, 1975. The name of Ayyappan who was paid salary and allowances for various months from January, 1975 onwards (Ext. P-6, page 70) does not appear in Ext. P-4 Wages Register. Similarly, salary and allowances are

seen paid to N.K. Anandh (Ext. P-6, page 85), Baby, driver (Ext. P-6, page 66), P.K. Kutty (Ext. P-6, pages 67 and 179), K.K. Narayanan (Ext. P-6, pages 24 and 254), K.P. Philipose (Ext. P-6, page 91), Philip Vendrie (Ext. P-6, page 95), T.K. Sarangapani (Ext. P-6, page 73), Salam, driver (Ext. P-6, page 95), M.J. Sebastian (Ext. P-6, page 71), K.K. Thankappan (Ext. P-6, page 88) and K. Velappan Nair (Ext. P-6, page 76). The names of the above persons who were paid salary and allowances for various months in 1975 do not find a place in Ext. P-4 Wages Register. The above names find a place in Ext. P-6 under the head "salary and allowances" (Pages 119 to 121). Under the head "Production Expenses" (Ext. P-6, pages 180 to 182 and 247 to 250) payments are seen made a number of times spread over the whole of the year, 1975 to J.J. Miranda, M.J. Williams, S.R. Balan, Nadesan, Kochu Velu, K.K. Mani, Gopi, Annan, Pappunni and a few others. The evidence is that these persons were set workers. Under the heads "Special D.A." (Ext. P-6, pages 109 to 112) and "Special T.A." (Ext. P-6, pages 116 to 118 and 123) payments are seen made to the above persons along with persons whose names find a place in Ext. P-4 Wages Register. Pages 291 and 127 of Ext. P-6 contain the bonus account. It is seen, in December 1975 bonus is seen paid to 40 persons. These include the persons who received salary and allowances and who received their wages not seen debited under the head "salary and allowances". J.J. Miranda and 8 others mentioned above are also seen paid bonus. J.J. Miranda is seen paid dearness allowance also (Ext. P-6, page 125). Ext. D-10 is the award of the Industrial Tribunal, Alleppey. Term No. 1 of the settlement given as annexure to the award is: "Dismissed workers Naushad and Stanly shall leave the services of the management on payment of Rs. 1,250 each in full and final settlement of all their claims." It is seen from Ext. D-1 (page 291 of Ext. P-6) that Naushad and Stanly were also paid bonus in December 1975. From Ext. P-6 (page 193) it is seen that a total amount of Rs. 13,107.69 was spent on current charges in 1975. It is also seen from Ext. P-6, amounts were spent for the purchase or repair of lab equipments, projector, sound equipments, generator, etc. Cash is seen also paid for dubbing (Ext. P-6, page 256).

6. In *Short v. Henderson Ltd.* 1946 (115) L.J.R. 41 Lord Thankerton has recapitulated the four indicia of a contract of service as derived by the Lord Justice Clerk in *Park v. Wilsons and Clyde Coal Co. Ltd.* AIR 1938 S.C. 121, 133 as follows:

These are (a) the master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the method of doing the work, and (d) the master's right of suspension or dismissal. The learned Judge adds that a contract of service may still exist if some of these elements are absent altogether, or present only in an unusual form, and that the principal requirement of a contract of service is the right of the master in some reasonable sense to control the method of doing the work, and that this factor of superintendence and control has frequently been treated as critical decisive of the legal quality of the relationship. (page 47).

In *Gould v. Minister of National Insurance* (1951) 1 K.B. 731 Ormerod J. referred to Park's case and said:

He goes on to say that the principal requirement of a contract of service is the right of the master in some reasonable sense to control the method of doing the work, and that this factor of superintendence and control has frequently been treated as critical and decisive of the legal quality of the relationship. (page 734).

In *Amalgamated Engineering Union v. Minister of Pensions and National Insurance* (1963) 1 W.L.R. 441 it is held:

I take the view, therefore, that if the contract does provide for employment it is to be treated as being a contract which may be a contract of service if the duties of the employee are properly to be regarded as those which are commonly described as the duties of a contract of service. (page 452)

In the above case it is further held:

The nature of the control which is required in order to bring the employment within the scope of a contract of service varies almost infinitely with the general nature of the duties involved. If, for example, one finds that the contract, whether a written contract or an oral contract, has laid down in considerable detail what the duties are which are to be performed, and that the employer, i.e., the union or the branch, has the right to dispense with the services of the employee if it is not satisfied with the manner in which he carries them out, the actual absence of any express provision as to the right of the employer to control the manner of carrying out the work may be of very much less importance than it would be in other cases. Here I think, having regard to the details in which the sick steward's duties are defined in Rule 8, Clauses 4 and 5, it is a case where the control of the employer is sufficiently extensive to bring the case within the category of contract of service rather than contract for services. (pages 453 and 454)

In *Cassidy v. Ministry of Health* 1951 2 K.B. 343 Somerwell, L.J. has said:

It is often easy to recognize a contract of service when you see it, but difficult to say wherein the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man and a newspaper contributor are employed under a contract for services. One feature which seem to run through the instances is that, under a contract of service, a man is employed as part of the business; and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only necessary to it.

In *Simmons v. Health Laundry Co.* 1910 1 K.B. 543 it is said:

In my opinion it is impossible to lay down any rule of law distinguishing the one from the other. It is a question of fact to be decided by all the circumstances of

the case. The greater the amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the grounds for holding it to be a contract of service, and similarly the greater the degree of independence of such control the greater the probability that the services rendered are of the nature of professional services and that the contract is not one of service.

In *Kandaswami W.F. and Co. v. Regional Director* 1969 Lab. I.C. 362 following the decision of the Supreme Court in *Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra*, a learned Judge of the Madras High Court held:

There, therefore, in a handloom as well as powerloom factory the master had a voice in the selection of the goods to be manufactured as well as its quality and had also provided that the work should be done in his own premises by the workers it was a contract of service and not a contract for service and the provisions of Employees State Insurance Act were attracted, even though they might be paid at a piece rate basis.

In *E.S.I., Corporation v. Gnanambikai Mills* 1974 Lab. I.C. 798 a Division Bench of the Madras High Court held that casual employees are not within the purview of the Employees State Insurance Act. But the above decision was dissented from by a Division Bench of the Andhra Pradesh High Court in *Andhra Pradesh State Electricity Board Vs. Employees' State Insurance Corporation*, . The Division Bench held:

The entire argument that the Act excludes payment of contribution in respect of casual labourers collapses in view of Clause 4 of Section 39 and Clause 3 of Section 42. Clause 4 of Section 39 provides that the contribution payable in respect of each week shall ordinarily fall due on the last day of the week and where an employee is employed for part of the week, the contribution shall fall due on such days as may be specified in the regulations. This clause, therefore, makes it abundantly clear that first limb of the provision deals with the payment of contribution in respect of a regular labourer while the second limb deals with the casual labourer who is employed even for part of the week. It makes it further clear that in the case of a regular labourer, the contribution payable in respect of each week shall ordinarily fall due on the last day of the week and in respect of the casual labourer, the contribution shall fall due on such day as may be specified in the regulations. (pages 56 and 57)

The Andhra Pradesh High Court's decision was followed by a Division Bench of the Karnataka High Court in *Regional Director, E.S.I.C. v. D.C. Mills* (1977) 2 L.L.J. 404 where the Court held that the Employees State Insurance Act covers casual employees also. In *E.S.I. Corporation v. The Ayurvedic Industrial Co-operative Pharmacy, Puthur* M.F.A. No. 139 of 1977 a Division Bench of this Court has held:

There may be engagements which may not amount to service and so long as it is not service by one under another there is no question of a relationship calling for

coverage under the Act. This does not mean that the service must be under the person who is called upon to effect coverage under the Act. But the person whose coverage is called for must be a person who is kept in the service of another or in other words who is employed by another.

In *Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation*, it is said:

Secondly to decide the meaning of a welfare measure a feeling for the soul of the measure is a surer guide than meticulous dissection with lexical tools alone. (page 1479)

In the above decision it is further said:

The benefits belong to the employees and are intended to embrace as extensive a circle as is feasible. In short the social orientation, protective purpose and human coverage of the Act are important Considerations in the statutory construction, more weighty than more logomachy or gramatical nicety.

7. Section 2(9) of the Employees State Insurance Act, 1948 reads:

2(9) "employee" means any persons employed for wages in or in connection with the work of a factory or establishment to which this Act applies and--

(i)....

(ii)....

(iii)....

and includes any person 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 or establishment; but does not include--

....

Section 2(12) of the Employees State Insurance Act reads:

2(12) "factory" means and 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 (35 of 1952), or a railway running shed;

....

Section 38 of the Employees State Insurance Act reads:

38. All employees to be insured.--Subject to the provisions of the Act, all the employees in factories or establishments to which this Act applies shall be

insured in the manner provided by this Act.

8. Work can be got done by another in more ways than one. Broadly speaking, it can be by employment or by engagement. This depends mainly on the nature of the work and the time that will be required to do it. Naturally, the rights and liabilities of the person who does the work and the person who gets the work done also will be different. There will be cases where only an engagement is possible and no employment is necessary. For instance, when you shift your residence you have to transport your household articles. A vehicle is hired. The loading and unloading work is got done by some headload workers. When the work is over they are paid and out they go. You have no liability as far as they are concerned and they have no rights to insist. The same day or the next day they will be working for somebody else. They cannot insist that you should call them alone when you shift your residence again. You cannot also demand that the same set of workmen should do the work for you. This is because you only engaged them for the specific work. In other words, between the workmen and you there was only a contract for service. They are casual workers, nobody's workmen. On the other hand, when you run an industry you will require people to do office work. You will require people to work in the production units. What is usually done is you find out suitable hands and take them for the work. They do the work under you. They are paid, in the normal course, monthly salary and allowances. Where by the nature of the work their services are not required throughout the month or throughout the year they work whenever there is work for them. When there is work you call them for work. Wages may be paid daily. Payment may be on piece work basis. But they are not casual workers. They are your workmen. You exercise some sort of a control as to how they should do the work. They have a right to continue to do the work for you till their services are legally and validly dispensed with. Your liability is not only to pay them their wages. They will be entitled to bonus and other benefits. They will also be under your disciplinary control. This is because they are employed by you. This is because there is a contract of service between you and them. This is also because they are not working on a contract for service. This distinction between employment and engagement cannot be lost sight of in considering the question whether an establishment is covered under the Employees State Insurance Act.

9. In this case, the contention of the applicant Respondent that he had only 9 employees and hence his establishment was not liable to be covered under the Employees State Insurance Act. He has no case that in 1975 he dispensed with the services of any of his employees. From the details in Exe. P-6 ledger given in para 5 above, it is clear that the applicant was paying salary and allowances for 12 workmen whose names do not find a place in Ext. P-4 Wages Register. 6 out of the above 12 workmen were paid bonus in December, 1975 along with the 8 persons whose names find a place in Ext. P-4. Among the 6 who were not paid bonus, P.K. Kutty and K. Velappan Nair are seen paid salary and allowances upto and inclusive of December, 1975. K.K. Thankappan is also seen paid his salary upto and inclusive of December, 1975. M.K. Ananth is seen paid salary and

provident fund contribution upto and inclusive of October, 1975. The remaining two, namely, Philip Vendrie and M.J. Sebastian are seen paid salary for May 1975 and April 1975 respectively. Naushad and Stanley are two workmen who were also paid bonus in December 1975 (Ext. P-6, page 291). As per Ext. D-10 award dated 1st August 1977 they "left the service" of the applicant's establishment receiving a compensation of Rs. 1,250 each. So, in December, 1975 they must have been in the services of the applicant's establishment. The set workers J.J. Miranda and 8 others were also paid bonus in December 1975. Even though the set workers were not paid salary on monthly basis, they are seen paid special D.A. and special T.A. Thus even if Philip Vendrie and M.J. Sebastian are left out, there were more than 20 workmen working in the applicant's establishment in December 1975. By no stretch of imagination it can be said that any of these workmen was not an employee of the applicant's establishment. According to the applicant, the 8 workmen whose names find a place in Ext. P-4 wages Register were employees. Then the same status cannot be denied to the 12 others who were also paid monthly salary and allowances. The same status the set workers J.J. Miranda and 8 others can claim. They were also paid bonus in December 1975. The fact that they were paid daily wages cannot be a reason to deny them the status of employees. They are persons who were regularly given work in the establishment. They are not persons who were casually engaged for some work.

10. As per Ext. P-4 Wages Register, only 8 workmen were paid salary in December 1975. It is true that the Wages Register maintained in an establishment should contain the names of all persons employed there and who are paid wages. But this does not mean that the question whether the establishment is covered under the Employees State Insurance Act, has to be decided solely on the basis of the Wages Register. On the other hand, the question of coverage has to be decided on the basis of the number of employees actually working in the establishment. No doubt, the other condition insisted by Section 2(12) of the Employees State Insurance Act, viz., manufacturing process carried on with the aid of power, should also be satisfied. So, if as per the accounts maintained in the establishment 20 or more persons are employed for wages, then the establishment is covered under the Employees State Insurance Act. In such a case, tables cannot be turned on the Corporation by brandishing a Wages Register which contains only names of employees less than twenty in number. Such a Wages Register being one which does not reflect the real and correct position of the employment strength of the establishment has only to be ignored. In this case as per Ext. P-6 ledger, wages were paid to more than 20 employees in December 1975. As per Ext. P-3 survey report, more than 20 employees were there in December 1975. There is no reason why the evidence of D.W.1 that Ext. P-4 was not the Wages Register produced before him on 15th January 1976 should be ignored. It is not also possible to accept the case of the applicant that he signed Ext. D-3 in a haste and when he signed the same it was not filled up. About the genuineness of Ext. P-4 we are not saying anything

more. It is interesting to note that Ext. P-5 cash book and Ext. P-6 ledger cannot go together. Both were produced by the applicant. The evidence of D. W. 2, the accountant, is relevant in this connection. We have already referred in para, 5 above to the current consumption and the other expenditure incurred by the establishment which give a clear indication that a manufacturing process was being carried on in the establishment with the aid of power.

11. From the evidence adduced in this case it is clear that the applicant's establishment was liable for coverage under the Employees' State Insurance Act, from 1st December 1975. The applicant is bound to make the remittances insisted by the Employees' State Insurance Act, for the required period. The Employees' Insurance Court lost sight of the distinction between employment and engagement. It reached its conclusions on materials which ought to have been discarded as unsafe to be relied on. It ignored reliable evidence brought out in the case. It is not easy to imagine that a person who was paid salary and allowances and for whom provident fund contribution was given is not an employee of the establishment. If he is not, who else will be an employee as defined in Section 2(9) of the Employees' State Insurance Act ?

12. In the result, we set aside the judgment of the Employees' Insurance Court and allow the appeal filed by the Corporation. Insurance Case No. 58 of 1976 will stand dismissed. Before quantifying the amounts to be remitted it is only proper that the Corporation gives the establishment a reasonable opportunity of being heard. The parties are to suffer their costs in the appeal.