
(2008) 10 GUJ CK 0044
In the Gujarat High Court
Case No : F.A. No. 3349 of 2008

Employees" State Insurance Corporation	APPELLANT
Vs	
Park Fishnet Pvt. Ltd.	RESPONDENT

Date of Decision : 14-10-2008

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(12)
Factories Act, 1948 — Section 2

Citation : (2008) 119 FLR 1115 : (2009) 1 LLJ 779

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : Sachin D. Vasavada, No. 1, for the Appellant; Prabhakar Upadhyay, for the Respondent

Final Decision : Dismissed

Judgement

H.K. Rathod, J.—Heard learned advocate Mr. Sachin D. Vasavada for appellant Employees State Insurance Corporation, learned advocate Mr. Prabhakar Upadhyay for respondent.

2. In this appeal, notice was issued by this Court on August 8, 2008 in view of production of Exhibit 23 on record. In this appeal, appellant corporation has challenged order passed by ESI Court, Ahmedabad in ESI Application No. 35 of 2002 dated May 30, 2008 wherein ESI Court has allowed application against Corporation while declaring that notice issued by appellant corporation to respondent establishment dated November 6, 2001 is unjust, illegal and contrary to provisions of law and it was also declared that the respondent establishment has made contribution as per law with effect from period on which Act become applicable and for the: period prior to that, no contribution is payable by it.

3. Learned advocate Mr. Vasavada for appellant raised contention that ESI Act is made applicable on March 1, 2001 while issuing notification supplying Code 37/23123/24 to respondent establishment. Short question raised before this Court is that whether ESI Corporation is empowered to call for certain-details

about number of employees working on particular date from respondent establishment under the provisions of ESI Act or not. Submission made by learned advocate Mr. Vasavada is that on the date on which notification was issued by ESI Corporation, ESI Act was made applicable to a particular establishment and, therefore, ESI Corporation is empowered to call upon establishment to produce registers and other relevant record of previous year. Learned advocate Mr. Vasavada for appellant has relied upon definition of term "factory" given in ESI Corporation Act Section 2(12). Therefore, Section 2(12) of ESI Corporation Act is quoted as under:

2(12) "factory" means any premises including the premises thereof-

(a) whereon ten 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, or

(b) 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 without 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;

4. While relying on aforesaid definition of term "factory" as per Section 2(12) of ESI Act, 1948, he submitted that if ten 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, then, ESI Corporation is entitled to call for record from establishment of previous year from the date on which notification is applied. According to my opinion, ESI Corporation is not entitled to call for record from such establishment for previous year from the date on which notification is applied. Simple reason is that the question whether particular establishment is covered by the definition of "factory" or not is required to be decided by Factory Inspector under the provisions of the Factories Act. For that, Factory Inspector is authorized to inquire it and then to find out from record of establishment. Definition of "factory" given u/s 2(12) of the ESI Act and definition of "factory" u/s 2(m) of the Factories Act are verbatim same and, therefore, Section 2(m) of Factories Act is quoted as under:

2(m) "factory" means any premises including premises thereof-

(a) whereon ten 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, or

(b) 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 without 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 (XXXV of 1952)], or [a mobile unit belonging to the armed forces of the Union, a railway running shed or a hotel restaurant or eating place];

5. In view of definition of "factory" as per Section 2(12) of the ESI Act, 1948 and Section 2(m) of the Factories Act, 1948, if ten 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, then, such establishment is considered to be factory but for that, in ESI Act, there is no separate provision available authorizing ESI Inspector to inquire whether ten or more persons were working or not in previous year preceding twelve months from the date of application of notification. For such inquiry, there is no provision made under the ESI Act empowering ESI Inspector to make such inquiry from concerned establishment. Apart from that legal aspect, in this case, records were supplied by respondent establishment to ESI Corporation and from such record, it has been established as referred to by ESI Court at page 12 para 8.3 that inspection report dated June 15, 2001 Exhibit 20 specifically makes it clear that establishment has engaged 8 workmen as per pay register and muster roll. As considered by ESI Court, along with inspection report, in observation slip, strength of workmen from March, 2000 to June, 2004 has been mentioned which has been verified by inspector. In that also, it has been verified by inspector that eight persons were working out of whom, 7 were male and one was female. Therefore, considering this report submitted by inspector after inspecting establishment, it was proved that at the relevant time, in respondent establishment, there were only eight workmen working and not 10 or beyond ten as per definition of "factory".

6. The ESI Court has considered submissions from both sides and framed issues vide Exhibit 9. The ESI Court has also considered the relevant documents produced by both the parties referred in para 5.1 and 5.2. Before ESI Court, Inspection Report dated June 15, 2001 was produced vide Exhibit 20. In said report, only 8 workmen are working is proved from pay register and muster roll (Presence Register). Respondent establishment is situated in Notified Area at Gandhinagar where Act made applicable with effect from February 6, 2001. Thereafter, appellant-ESI Corporation can examine relevant records to verify how many workmen are working in establishment. But for period prior to notification when ESI Act was not applicable, appellant ESI Corporation is not empowered to scrutinize record of establishment and on that basis, ESI Corporation is not entitled to demand contribution. In this matter, appellant ESI Corporation has demanded contribution for the period prior to date of application of Act. That is wrong, meaning thereby, ESI Act cannot be made applicable retrospectively, means, for the period prior to date of notification. That view has been taken by Hon'ble Apex Court in 2007 2 SCC 118 as rightly considered by ESI Court. Thereafter, ESI Court has rightly come to conclusion that ESI Act made applicable from the date on which notification was issued. For prior period, ESI

Corporation cannot make fishy inquiry in respondent establishment and cannot demand contribution from retrospective date. For that, in ESI Act, there is no power which would authorize Corporation to demand documents from respondent establishment and visit it and collect record and then apply Act retrospectively. To visit at any time in establishment whether 10 or more workmen are working or not. The factory Inspector is authorized under provisions of Factories Act, 1948 but ESI Inspector is not authorized under ESI Act to demand documents for prior period or preceding 12 months from date of notification.

7. Learned advocate Mr. Sachin Vasavada has not been able to point out any provision which would empower ESI Corporation to demand record from establishment preceding twelve months from date of notification issued by corporation, therefore, in absence of power, definition of "factory" given in Section 2(12) cannot be utilized as handle to have power to demand documents from establishment preceding twelve months from date of notification, therefore, view taken by ESI Court is perfectly justified.

8. Therefore, according to my opinion, contention raised by learned advocate Mr. Vasavada cannot be accepted in view of inspection report which has been considered by ESI Court. ESI Court has rightly examined issue. For that, ESI Court has not committed any error in deciding issue raised by respondent establishment.

9 Therefore, according to my opinion, ESI Court has not committed any error requiring interference of this Court, therefore, there is no substance in this appeal. Therefore, this appeal is liable to be dismissed.

10. In result, this appeal is dismissed.