(1975) 08 BOM CK 0013

In the Bombay High Court

Case No : Appeal No. 270 of 1975

Employees'' State Insurance Corporation	APPELLANT
Vs	
Shalimar Tar Products (1935) Limited	RESPONDENT

Date of Decision : 13-08-1975

Acts Referred:

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

Citation : (1976) 78 BOMLR 376 : (1976) 1 LLJ 330 : (1976) MhLj 14

Hon'ble Judges : B.N. Deshmukh, J;B.M. Sapre, J

Bench : Division Bench

Judgement

Sapre, J.—This appeal raises a short but an interesting question of law under the Employees'' State Insurance Act, 1948 (briefly E.S.I. Act). That question is whether the persons employed by the respondent-company on their site contract jobs outside the factory premises are "employees" as defined in the E.S.I. Act.

2. The material facts are not in dispute and may be stated briefly as under :

3. The respondents Shalimar Tar Products (1935) Ltd., 16, Bank Street. Bombay 1, are a public limited company incorporated under the Indian Companies Act. Its registered office is at Calcutta. It has a branch office at Bombay. The company was carrying on water-proofing business since 1940. It has a factory at Bhandup, which came into existence in August, 1961. The factory produces as many as 32 articles or products. The office of the company at Bombay is separately registered under the Bombay Shops and Establishments Act. The company undertakes water-proofing contracts in which it utilises some of the articles or products produced by the factory. For the water-proofing work, the company employs mysteries ,supervisors and casual labourers. The short question is whether these workers are "employees" as defined in the E.S.I. Act. The Employees'' Insurance Court, Bombay, has held that those workers are not "employees" as define in the E.S.I. Act. The question in this appeal is about the correctness of that view.

4. The term "employee" has been defined in S. 2(9) of the E.S.I. Act. That definition is as under :

"2(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 principle 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 principle 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 principle employer by the person with whom the person whose services are so 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, 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 -

.. .."

According to the appellants (The Employees'' State Insurance Corporation), the workers who are employed by the company on water-proofing contracts outside the factory fall within the definition of "employee". Although they do not fall under the direct definition of the word "employee" as mentioned in clauses (i)(ii) and (iii) of sub-s. (9) of S. 2, they do fall under the inclusive definition which says : "''employee'' includes any person employed for wages on any work connected with ..... the distribution or sale of the products of, the factory." It is an admitted fact that the company undertakes water-proofing contracts from third persons. In those contracts, mysteries ,supervisors and casual labourers are employed. They are shown on the pay-roll of the company and are paid wages by the company. For the work of water-proofing, some products manufactured or produced by the factory are used. In the undertaking by the company of the work of water-proofing the articles produced by the factory are utilised or consumed which, in effect, amounts to the products of the factory being distributed or sold and, therefore, the workers employed by the company for wages on the work connected with the distribution or sale of the products of the factory fall within the inclusive definition of the word "employee" given in sub-s. (9) of S. 2 of the E.S.I. Act.

5. We have on record the affidavit of J. B. Tamhane, the Divisional Accountant of the respondent-company, for certain facts which do not seem to have been

controverted. These facts are that the company was carrying on the business of water-proofing since about 1940 in Bombay and at that time, the required materials for the purpose of carrying out the jobs of water-proofing were brought from outside. This position continued till August, 1961. It was in August, 1961 that the company started a factory for manufacturing various items, like roofing felt, Bitumuls (Bitumen) Products compounds, emulsions, etc. The factory produces as many as 32 products, but only six out of these are required for water-proofing contracts. These constitute only 13 per cent of the total production of the factory. It is also the statement of Tamhane that not all water-proofing material manufactured by the factory is utilised for the water-proofing contracts undertaken by the company and a portion of the water-proofing materials produced by the factory is sold outside. It is also his statement that besides the six items which are produced by the factory, some other items are also required for carrying out the water proofing contracts and these materials, which are not produced by the factory, are purchased from outside in bulk. It is in the background of these facts that we have to decide whether the mysteries ,supervisors and casual labourers whom the company engaged for wages for its water-proofing contracts outside the factory can be said to be persons employed on any work connected with the distribution or sale of the products of the factory. In our view, they do not fall within the inclusive definition as mentioned above. These persons as employed, although for wages, mainly for carrying out the water-proofing contracts and they cannot be said to be employed for the work of distribution or sale of the products of the factory. It is only incidentally that for carrying out the contracts of water-proofing work they utilise some of the products manufactured by the factory and in this way, a part of the products of the factory is distributed or can be said to be sold in the process of carrying out the water-proofing contracts. But that cannot mean that they are persons employed for the work connected with the distribution or sale of the products of the factory.

6. Mr. Jayakar for the appellants has invited our attention to the dictionary meaning of the word "distribution," which word occurs in the inclusive definition referred to above and that meaning is "apportionments." According to Mr. Jayakar, a portion of the products of the factory is apportioned for the water-proofing contracts under-taken by the company and, therefore, the persons employed on the work of carrying out the water-proofing contracts would fall within the inclusive definition of the word "employee" given in sub-s. (9) of S. 2. We are, however, confining ourselves to the facts of this case only. The company, as already noted, was carrying on business of water-proofing since about 1940 in Bombay and, at that time, they were purchasing the required materials from outside. That continued till August, 1961. In August, 1961, the company started a factory for manufacturing certain products which included articles required for water-proofing. But they manufactured many more articles and only six out of the 32 articles produced by them were required for water-proofing work. This represented only 13 per cent of the total production undertaken by the factory.

Even then all the material required for water-proofing which was produced by the factory was not utilised by the company for water-proofing contracts and a portion of the material produced by the factory was sold outside. Even for carrying out the water-proofing contracts, besides the six articles produced by the company, other articles were required and they were purchased from outside. On these facts, it cannot be said that the persons employed in the work of water-proofing contracts were so employed on a work connected with the distribution (or apportionment) of the products of the factory.

7. It may be noted that the inclusive definition of "employee" in sub-s. (9) of S. 2 was introduced by S. 2 of Act No. XLVI of 1966 with effect from June 17, 1967. Prior to that, the definition of "employee" was confined to cls. (i), (ii) and (iii) of sub-s. (9) of S. 2. Before the inclusive definition was inserted by Act No. XLVI of 1966, a question arose before a Division Bench of this Court in Employees'' State Insurance Corporation v. C. H. Raman, 1957 I L.L.J. 267, that where the work of the factory was production of finished articles and it was not its work to sell the products of the factory could it be said that the work of selling the products of the factory was incidental to or connected with the work of the factory so as to bring the persons engaged in the administrative wing of the factory where the finished products were sold within the definition of "employee" in S. 2(9) of the E.S.I. Act. It was held in that case that before a person can be said to be an "employee" within the meaning of S. 2(9) of the Act, it has to be shown that he has been employed on any work of, or incidental or preliminary to, or connected with the work of the factory. Where it is admitted that the work of the factory ends with production of finished articles and it was not its work to sell the products of the factory, it cannot be held that the work of selling the products of the factory is incidental to, or connected with the work of the factory. Where the factory and the administrative office maintain two separate musters, wage-rolls and two separate accounts and the person concerned is employed in the administrative office and his work consists mainly of taking down dictation from the manager and other offices and typing letters, it must be held that such a person is not an "employee" within the meaning of the Act. It appears that the Legislature wanted to give benefit of the E.S.I. Act also to persons employed for wages on a work connected with the administration of a factory and, therefore, by Act No. XLVI of 1966, the inclusive definition, as mentioned above, was inserted. The result of this insertion is that the definition of "employee" now includes any person employed for wages on any work connected with the administration of a factory or an establishment or any part, department or branch thereof as also with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment. We have, however, shown on the facts of the present case that the persons employed by the respondent-company for wages on its work of water-proofing contracts cannot fall even within the inclusive definition of "employee" given in S. 2(9), as they cannot be said to be persons employed on work connected with the distribution or sale of the products of the factory. In this view of the matter, the view taken

by the Employees'' Insurance Court is correct and this appeal must fail.

8. In the result, we dismiss the appeal with costs.

9. At this stage, the learned counsel for the appellants asks for leave to appeal to Supreme Court. Since the point involved is of all India importance and may cover case of similar type, we grant the leave under Art. 133(1)(a) and (b).