

(1997) 12 KAR CK 0039
In the Karnataka High Court
Case No : M.F.A. No. 2094 of 1988

Employees" State Insurance Corporation	APPELLANT
Vs	
T. Shankar Singh T. Byali	RESPONDENT

Date of Decision : 12-12-1997

Acts Referred:

Employees State Insurance Act, 1948 — Section 40, 82 (2)

Citation : (1998) 2 ACC 252 : (1998) 79 FLR 524 : (1999) 1 LLJ 687

Hon'ble Judges : Harinath Tilhari, J

Bench : Single Bench

Judgement

Hari Nath Tilhari, J.—Heard learned counsel appearing for the appellant, namely, Smt. Geetha Devi, holding brief for Sri M. Papanna and Sri B. Chidananda, holding brief for Sri S. P. Kulkarni, counsel for the respondent.

2. This appeal arises u/s 82(2) of the Employees" State Insurance Act, 1948, from the judgment and order dated June 3, 1988, given by the Employees" Insurance Court, Hubli, in E.S.I. Application No.32 of 1987, filed by the present respondent - Shankar Singh, H & F Contractor, Hubli, u/s 75 of the Employees" State Insurance Act, 1948, for setting aside the order dated November 2, 1987, and praying in the application that it should be held that the provisions of the Act and the Rules and Regulation thereunder do not apply and did not apply to the applicant, that is, the present respondent, in the appeal. According to the applicant's case, he is a contractor registered under the Contract Labour (Regulation and Abolition) Act and has got the valid licence issued by the licensing authority, that is, the Assistant Labour Commissioner (Central), Mangalore. The applicant-respondent's case has been that he has been exclusively carrying on the business of contract of loading and unloading at the premises of the principal employer, Food Corporation of India at Badag-Betageri. The applicant had further asserted in his application that the applicant does not do any other work of principal employer. But it is definite that he had been carrying on work of contract of providing homilies for the purpose of loading and

unloading of the food grains.

3. The claimant had been served with a notice by the Inspector of the Employees' State Insurance under the Act. According to the applicant's case, the Inspector inspected the premises on July 15, 1987, particularly in the absence of the applicant and thereafter issued a letter dated August 17, 1987, enclosing Form No. O-1, directing the applicant to comply with the same. In reply to the letter dated August 17, 1987, the applicant, that is, the present respondent, submitted a reply, vide letter dated September 14, 1987, and asserted that the Act was not applicable to him and he was not liable to pay anything towards the contribution to the fund. The case of the applicant-respondent has been that the Director of the Employees' State Insurance Corporation, vide letter dated November 2, 1987, directed the applicant to comply with the provisions of the Employees' State Insurance Act, by remittance of the contribution by showing the contribution cards and filing the returns. The case of the present respondent, namely, the applicant, has been that the Food Corporation of India is the principal employer and the applicant is not covered by the Employees' State Insurance Act. It had further been mentioned that the Food Corporation of India, according to the applicant, is also not covered by the provisions of the Employees' State Insurance Act and the provisions are not applicable to the applicant and as the principal employer is not covered by the Employees' State Insurance Act, the provisions of this Act of 1948 cannot be made applicant-respondent and no notice could be issued demanding the deposit of contribution or remittances of contribution, etc. The applicant-respondent further asserted that he is not carrying on any manufacturing process and he is not running any establishment as specified in para 3 of the Schedule. It has been asserted in the application that the applicant-respondent did not come under the establishments as hotels, restaurants, shops, cinemas, etc. It has further been stated in para 11 that the Food Corporation of India, which may be said to be the principal employer, is an establishment to which the provisions of the Act are not applicable and even if the provisions of the Act are applicable, it is the liability of the principal employer only. In para 11, it has been stated that the Food Corporation of India, Hubli, who is the principal employer to the applicant is not covered by the Employees' State Insurance Act. This is one of the principal stand taken in the application that the Employees' State Insurance Act does not apply to the Food Corporation of India, as mentioned in para 3 of the letter dated August 17, 1987, the applicant cannot be made liable to remit the contribution.

4. On behalf of the Employees' State Insurance Corporation, the objection was filed to the application made by the present respondent. The case in defence taken by the Regional Director of the Employees' State Insurance Corporation, has been that the applicant has been registered as a contractor under the Contractor Labour (Regulation and Abolition) Act. He has got a licence and he is dealing with the loading and unloading at the premises of the principal employer, Food Corporation of India. It is the case of the applicant-respondent that the applicant is not an establishment, but at the time of inspection, the Inspector

found in the course of inspection on July 15, 1987, that the applicant had employed 37 employees, therefore, it did constitute establishment and, therefore, it was covered under the Employees' State Insurance Act and, therefore, had been liable to comply with the provisions of the Act. In paragraph 4, it has been stated that the Food Corporation of India, being a Government of India undertaking, is not covered under the provisions of the Employees' State Insurance Act, but that cannot be the ground for the applicant to escape the liability. This had been asserted by the Employees' State Insurance Corporation, as, according to them, the applicant was doing business having got a contract under the Contract Labour (Regulation and Abolition) Act and so it was covered by notification dated February 24, 1986.

5. On this basis, the respondent-Corporation asserted that the respondent was liable to comply with the provisions of the Employees' State Insurance Act.

In support of these contentions, the applicant appeared in the witness box before the Insurance Court as A.W. - 1 and the Inspector was examined as R.W. - 1. The Inspector's report had also been filed and it is on record. The Employees' Insurance Court, Hubli, by its order dated June 3, 1988, allowed the application, taking the view that the Food Corporation of India is the principal employer of the applicant. It further took the view that the applicant was not the immediate employer and as such it was not liable. Apart from that it had opined that the establishment of the applicant cannot be called, according to the Employees' Insurance Court, to be a shop or establishment, where services are sold for any persons who ask on payment basis and so it opined that the Act did not apply and the applicant-respondent was not liable to make remittance and it set aside the order dated November 2, 1987, passed by the Director, requiring the respondent-applicant to comply.

6. Feeling aggrieved from the judgment and award of the Employees' Insurance Court, Hubli, the Employees' State Insurance Corporation through its Regional Director, Bangalore, has come up in appeal.

7. The scope and jurisdiction of this Court in appeals u/s 82 of the Employees' State Insurance Act is confined to substantial question of law, as per Section 82(2) of the Employees' State Insurance Act, 1948. Section 82(1) and (2) read :

"82. Appeal - (1) Save as expressly provided in this Section, no appeal shall lie from an order of an Employees' Insurance Court.

(2) An appeal shall lie to the High Court from an order of an Employees' Insurance Court if it involves a substantial question of law."

8. I have heard learned counsel for the appellant and on behalf of the appellant it has been contended by Smt. Geetha Devi that the liability to remit the contribution u/s 40 of the Act no doubt is of the principal employer, where the employee is employed by him directly or through the immediate employer, to pay and to deposit the employer's contribution, as well as the employees'

contribution. Learned counsel contended that when the Insurance Court had recorded the finding that the applicant is not liable and is not an establishment covered by the Act and the Act was not applicable, it committed a jurisdictional error. Learned counsel further contended when it held that the establishment of the applicant is not shop where service is rendered for consideration to be paid, it committed an error of law which resulted in erroneous decision. The Insurance Court held (sic) that the respondent's establishment was not shop and the Act was not applicable and set aside the impugned order. Learned counsel submitted that it is an error that raises substantial question of law to be considered. Learned counsel further contended that it is an admitted position between the parties that the Food Corporation of India is an establishment under the complete control of the Government and the Employees' State Insurance Act does not apply to the Food Corporation of India. Learned counsel contended that on the premises of this very admitted position between the parties as per their pleadings, the question for consideration arises is whether the establishment of the respondent could be said to be a principal employer or the immediate employer. Learned counsel further submitted that the question whether the applicant had employed more than 20 persons as per the notification of the Government, has not also been considered by the Insurance Court. Counsel for the appellant submitted that the Insurance Court should have recorded a finding on that question, keeping in view the evidence on record of the Inspector coupled with the circumstantial evidence and the adverse presumption arising from the failure of the respondent to produce the muster-roll and attendance register and the payment register, etc., maintained by the respondent, that there were 36 persons working under the respondent and so the Act was applicable, and that the Insurance Court illegally set aside the order dated November 2, 1987.

9. These contentions of learned counsel for the appellant have hotly been contested by Sri. Chidananda, appearing for the respondent. Sri Chidananda submitted that the respondent has been working as a contractor to supply labour. The respondent supplied the labour to the Food Corporation of India for the purpose of loading and unloading, etc. Learned counsel submitted that only 13 to 16 employees were working and used to be supplied. Really the burden was on the Employees' State Insurance Corporation to have established that more than 20 persons were working with the respondent. Learned counsel contended that the oral evidence of the Inspector was not by itself sufficient, unless he had given the list with complete details, of those employees. Learned counsel further contended that when the principal employer, the Food Corporation of India, was exempted from the application of the Act, no liability could be fastened on the applicant. Learned counsel further contended that the respondent-applicant is only doing the job of supplying the labour to the Food Corporation of India and it cannot be said to be an establishment or shop and if at all there was any liability on any person to pay the contribution to the fund, it was the Food Corporation of India, the principal employer, and not the applicant-respondent. It is contended

that no manufacturing process used to be conducted by the applicant so the Act did not apply. Learned counsel further contended that really the appeal is concluded by pure finding of the fact that it is not establishment and does not raise any substantial question of law.

10. I have applied my mind to the contentions made by learned counsel for the parties. The question is whether the Act is and was applicable to the present case and on the respondent, is a question of law. So far as the first question of law is concerned, it may be mentioned here that in view of the notification issued by the Government under sub-section (5) of Section 1 of the Employees' State Insurance Act, 1948 (Act 34 of 1948), hotels, restaurants, shops, road motor transport establishments, cinemas, including the preview theatres, as mentioned in para 3 of the notification, if those establishments are having 20 or more persons on their establishment, the Act had been made applicable to those establishments as well. To consider the question whether the Act did apply or not, the Insurance Court had to consider this legal question, whether the applicant's body did come within the purview of any of these establishments referred to in para 3; whether it can be said to be a shop or not; and whether it did employ 20 or more persons. Without considering these questions, the Insurance Court could not hold whether the Act did apply or not.

11. So far as the bodies or establishments or contractors which do supply the labourers or the workers on payment of money are concerned and what is shop has been considered by their Lordships of the Supreme Court in the case of *Hindu Jea Band, Jaipur Vs. Regional Director, Employees' State Insurance Corporation, Jaipur*, . Their Lordships observed in para 3 as under at page 504 :

"We do not agree with the narrow construction placed by the petitioner on the expression "shop" which appears in the notification issued u/s 1(5) of the Act which is a beneficent legislation. The word "shop" has not been defined in the Act. A shop is no doubt an establishment (other than a factory) to which the Act can be extended u/s 1(5) of the Act provided other requirements are satisfied. In Collins English Dictionary the meaning of the word "shop" is given thus :

"(i) a place especially a small building for the retail sale of goods and services; and

(ii) a place for the performance of a specified type of work; "workshop".

It is obvious from the above meaning that a place where services are sold on retail basis is also a shop. It is not disputed that the petitioner has been making available on payment of the stipulated price the services of the members of the group of musicians employed by it on wages. We, therefore, hold that the place where the petitioner has been carrying on business is a shop to which the Act is applicable by virtue of the notification referred to above."

12. In the present case, the admitted position is that the applicant has got good number of homilies or workers. The applicant takes the contract to get the work

done, according to their own case of the Food Corporation of India, of loading and unloading through the persons who are under their control. They rendered services of their homilies, who are under them, i.e., the respondent, on payment of amount that is made to the applicant, i.e., the present respondent. There is no dispute about it. In its own statement, D.W. - 1 has stated "I am doing the contract of loading and unloading of goods of the Food Corporation of India from the railway station to godown to the railway station. I have obtained licence under the Contract Labour (Regulation and Abolition) Act. About 13 to 16 workers are serving in my said business. Barring the work of loading and unloading of the Food Corporation of India, I do not undertake any other work. In cross-examination, he has stated there is a written agreement evidencing the contract of loading and unloading entrusted by the Food Corporation of India. "I have not produced it. I am not going to produce it. I am paying hamali of 13 to 16 employees engaged by me. I have maintained the muster-roll, that is, hazari of homilies, engaged by me. I have not produced it nor producing it. It is false to say that I have engaged 36 employees". A perusal of his statement per se reveals that he is doing the work of contract under the provisions of the Contract Labour (Regulation and Abolition) Act. He has got a licence. He has employed persons-homilies who are working with him and serving in his business are being paid by him. He maintained the register of attendance, but the same has not been produced. From this evidence, it comes out, firstly, that he is doing the business of retail sale of service on payment of money. In my opinion, the Insurance Court was not justified in taking the view that this cannot be taken to be a shop. The business of the appellant can be said to be a shop in view of the Supreme Court decision referred to above in *Hindu Jea Band v. Employees' State Insurance Corporation*, (supra).

13. The next question that crops up which has not been decided and has been left undecided by the Insurance Court is what was the number of persons who were working under the claimant. The claimant's evidence is that he has engaged 16 persons, while the Inspector's report is that on the date of inspection he had found 36 persons working and attendance and wage registers were produced before him on September 16, 1987. Learned counsel submitted that no list has been submitted. List might not have been produced, but the evidence of R.W. - 1 finds support from the circumstantial evidence. R.W. - 1 has stated on oath that 36 persons were working on the date of inspection. It was for the applicant-respondent also to prove his case before the Insurance Court that the report was incorrect. It has come in the evidence of D.W. - 1 himself that he has been maintaining the register of attendance or the muster-roll and he used to make payment to those who were serving in his business. It has also been admitted by counsel for the respondent whatever money the Food Corporation of India had paid, it was received by the applicant-respondent in the appeal. The documents, that is, the muster-roll and the accounts of payment, were undeniably with the applicant-respondent. He has not produced them. But he has also not given sufficient reason for the non-production. It is one of the well-

settled principles of law that when documents are in possession of parties to the case, which would have thrown light on the question and party having such documents in possession, fails to produce and refused to produce them without any reason or rhyme and the documents would have thrown light, an adverse presumption had to be drawn against such a party who has got documents in his possession and who has failed or refused to produce the same, without any reason (see *T. S. Murugesam Pillai v. M. D. Gnana Sambandha Pandara Sannadhi* AIR 1917 PC 6). Their Lordships of the Privy Council dealing with the arguments to the effect that the burden was not on the applicant to prove that there were less than 20 persons employed. Dealing with such a situation, their Lordships observed :

"A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and falling, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough - they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is in their Lordships' opinion an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition."

This decision has been followed with approval by their Lordships of the Supreme Court in the case of *Hiralal and Others Vs. Badkulal and Others*, . The relevant observations are found in paragraph 4. Their Lordships had also made a reference to the earlier decision of the Privy Council in the case of *Rameshwar Singh v. Bajit Lal Pathak* AIR 1929 PC 95.

14. In this view of the matter, in my opinion, it has to be held that the oral evidence of the Inspector coupled with the failure of the applicant to produce the necessary documents, that is, muster-roll, etc., which have been in his possession, an adverse presumption has to be drawn that persons more than 20 were working with the respondent and an adverse inference has to be drawn and such a presumption has got to be raised. So oral evidence coupled with this statutory presumption definitely leads me to hold that there were 36 persons engaged. In view of the notification and this finding, in my opinion, the Act did apply to the case of the applicant, i.e., the present respondent.

15. There remains another question whether the applicant-respondent can be said to be the principal employer or the immediate employer. The expression "immediate employer" has been defined u/s 2, sub-section (13) of the Employees' State Insurance Act, 1948, and it reads as under :

"Section 2(13). "immediate employer", in relation to employees employed by or through him, means a person who has undertaken the execution, on the premises of a factory or an establishment to which this Act applies or under the supervision of the principal employer or his agent, of the whole or any part of

any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment, and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer and includes a contractor."

The term "principal employer" has been defined in sub-section (17) of Section 2. It reads as under :

"Section 2(17). "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 (63 of 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."

16. There is no dispute that the liability of making contribution is that of the principal employer. The question is whether the respondent was an immediate employer. The definition of immediate employer clearly indicates that in relation to the employees, employed by a person who has undertaken to execute on the premises of a factory or an establishment to which the Act applies or under the supervision of the principal employer or his agent of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer and it also includes any person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer or a contractor, who lent the services of the persons employed by him to one who he alleges to be the principal employer can also be said to be an immediate employer. But an immediate employer may also be principal employer in some cases. A person will be immediate employer and not principal employer even if employees have been employed by him, if he supplied services to a factory or establishment, to which the Act did apply. It means if the Act did not apply to the institution to whom the services are lent or hired by the contract of service, then, one of the necessary ingredients being absent such contractor or supplier of services cannot be said to be the immediate employer. Really, the distinction will go away between the principal employer and the immediate employer in such cases. If the Act does not apply to one to whom services are lent or let out, by the contractor of his employees and if it is not covered by the Act or to the one whom the Act does not apply then whatever the function of the employees under the immediate employer do, their job, it can be only taken that they are doing their job under

that contractor and the contractor is their principal employer also, because of the definition of principal employer, on whom initial liability to pay the contributions in the first instance, has been fastened u/s 40 of the Act. That Section 40 per se shows under it the principal employer has been made liable to as well as obliged to pay and deposit the contribution of employer and employees, whether directly employed by him or through an immediate employer. The principal employer has been authorised to recover from employees, directly employed by him, by deduction from his wages to the extent of sums representing employees' contribution for the period this head is barred.

17. In the present case, there is no dispute between the parties that so far as the Food Corporation of India is concerned, the provisions of the Act are not applicable to it as it is a Government instrument and the Government has got control over it. It is also profitable at this juncture to refer to the observations of their Lordships of the Supreme Court in the case of Workmen of The Food Corporation of India Vs. Food Corporation of India, . In paragraph 18 it has been observed at p. 12 :

"The long title of the Act shows that the Act was enacted to provide for the establishment of Food Corporation for the purpose of trading in food grains and other foodstuffs and for matters connected therewith and incidental thereto. By Section 3, the Central Government was authorised to establish a Corporation to be known as the Food Corporation of India. Section 5 provides for the initial capital and for acquiring power to increase the capital in such manner as the Central Government or the State Government, as the case may be, may determine, initial capital being provided by the Central Government. Section 7 provides for the constitution of Board of Directors. The management of the Corporation is to vest in a Board of Directors and the Board of Directors in discharging its functions shall act, amongst others, according to the instructions on questions of policy as may be given by the Central Government. The annual net profit of the Food Corporation of India has to be paid to the Central Government the annual net profit of the Food Corporation of India has to be paid to the Central Government (Section 33). Every Food Corporation has submit to the Central Government an annual report of its working and affairs and the same has to be laid before the Houses of Parliament. Section 45 confers power on the Food Corporation to make regulations not inconsistent with the Act and the Rules made thereunder to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of the Act. Without prejudice to the generality of the power conferred by Section 45(1), the regulations must provide for, amongst others, the methods of appointment, the conditions of service and scales of pay of the officers and employees of Food Corporation other than the Secretary of the Food Corporation of India.

From the perusal of the scheme of the Act, it is undeniable that the Food Corporation of India is an instrumentality of the State....."

18. A perusal of the scheme, as laid down by their Lordships of the Supreme

Court, clearly shows that the initial capital provided by the Central Government, the annual net profit of the Food Corporation would be paid to the Central Government and it is also to submit a report of its working and affairs to the Central Government, which is to be laid before the Houses of Parliament and the management no doubt is carried by the Board of Directors appointed by the Central Government. Therefore, being instrumentality of the State, it must be acting under the instructions of the Government of India. Parties also admitted that the Employees' State Insurance Act does not apply to the Food Corporation of India. When this Act does not apply to the Food Corporation of India, then it means the contractor has sold the services of its workers for the payment made to him, to the Food Corporation of India, to which the Employees' State Insurance Act applies. When the Act does not apply, then there the position remains that the second respondent could not be said to be merely immediate employer, but he also constitutes himself and continues to be the principal employer.

19. In this view of the matter, in my opinion, the Act and the provisions of the Act did not apply to the respondent (applicant) and there was responsibility on him to make the contribution and comply with the notice. The notice was perfectly valid and the Insurance Court committed a substantial error of law in taking the view that the Act did not apply to it. The question of application of the provisions of the Act in the context of the construction of the provisions of the Act, can definitely be said to be a substantial question of law as well as failure of the Employees' Insurance Court to determine the question of number of employees, amounted to a substantial error of law committed by the Insurance Court.

20. In this view of the matter, in my opinion, the appeal deserves to be allowed and is hereby allowed. The order of the Employees' Insurance Court is hereby set aside and the order dated November 2, 1987, is held to be valid and operative.

The respondent is granted 6 months' time to comply with the requirements of the order impugned November 2, 1987.

21. The appeal as such is allowed. Costs are made easy.