
(2011) 07 PAT CK 0213

In the Patna High Court

Case No : Miscellaneous Appeal No. 304 of 2007

Employees State Insurance Corporation

APPELLANT

Vs

Uma Shankar Bajaj

RESPONDENT

Date of Decision : 11-07-2011

Acts Referred:

Citation : (2011) 07 PAT CK 0213

Final Decision : Allowed

Judgement

Rakesh Kumar, J.—Heard Sri Sudhir Kumar Bijpuria, learned Counsel for the Appellant. None appeared on behalf of Respondent.

2. The present memo of appeal has been preferred u/s 82 of the Employees State Insurance Act, 1948 (hereinafter referred to as the "E.S.I. Act") against the decision dated 18th April, 2007 passed by the Presiding Officer, Labour Court & Employees State Insurance Court, Patna (hereinafter referred to as the "Insurance Court") in E.S.I. Case No. 5 of 1998. By the said order the Insurance Court has set aside the demand of contribution made by the Appellant.

3. Short fact of the case is that on 28.01.1998 a notice was issued under the signature of Deputy Director, Employees' State Insurance Corporation to the Respondent/owner-cum-proprietor of M/s Gokul Mini Restaurant, situated at Patna under the provisions of the E.S.I. Act for furnishing declaration, statement of contribution, deposit of contribution and to take steps to get the employees registered under the E.S.I. Act.

4. Aggrieved with the notice dated 28.01.1998 the Respondent filed an application u/s 75(i)(g) of the Insurance Act which was registered as E.S.I. Case No. 5 of 1998 with a prayer to adjudicate as to whether the coverage of the Respondent's restaurant under the scheme and provisions of the "E.S.I. Act" was justified or not. As per notice demanding contribution, Respondent's restaurant was covered with effect from 01.04.1996 u/s 2(12) of the "E.S.I. Act". The Respondent/restaurant was also directed to submit declaration form,

statement of contributions, payment of contributions and for taking compliance of the other requirements.

5. Before the Insurance Court the Appellants appeared and filed its show cause detailing therein that on 19.12.1997 and 23.12.1997 a survey and an inspection was conducted. A survey was conducted in the restaurant by an Insurance Inspector under the provisions of Section 45(2) of the "E.S.I. Act" for assessing applicability and coverage of the restaurant. In survey, it was noticed, that from the period April 1996 to November 1997, 14 employees in each month were employed in the restaurant. The restaurant in question was functioning in two parts i.e. lower portion and upper portion. The workshop of the restaurant was found functioning in upper portion where electrical energy and Liquified Petroleum Gas (hereinafter referred as "L.P.G.") was being used for preparation of sweets and food etc. In the lower portion of the restaurant a deep freezer for storage/keeping of sweets and cold drinks was found available. Accordingly, it was considered that restaurant was using power in manufacturing process and since by using electricity and L.P.G. in manufacturing process in the restaurant more than 10 persons were employed, notice demanding contribution was issued to the restaurant.

6. Before the "Insurance Court" the Respondent who is the proprietor of the restaurant was examined as A.W.1 and admitted that in the restaurant 13-14 employees were functioning. However, it was claimed that number of employees never exceeded 20. Always the number of employees was less than 20. He also admitted that from time to time inspection was done by the E.S.I. Inspector.

7. Before the "Insurance Court" both the parties adduced evidence and finally by order dated 18th April, 2007 the "Insurance Court" set aside the notice demanding contribution and allowed E.S.I. Case No. 5 of 1998.

8. Aggrieved with the order of "Insurance Court" the Appellants preferred the present appeal which was admitted for hearing on 7.7.2009. Despite appearance of sole Respondent through his counsel, at the time of hearing none appeared on his behalf.

9. Sri Bijpuria, learned Counsel for the Appellants, at the very outset submitted that the order impugned is contrary to the materials available on record. It was argued that in the proceeding before the court below sufficient materials were brought on record to establish that in the restaurant at the time of inspection more than 10 employees were found functioning and in the restaurant electricity as well as L.P.G. was being used in manufacturing process. It was also established that in the restaurant "Mixi Machine" was found being used for preparation of food and deep freezer was also found which was being used for keeping sweets and cold drinks.

10. It was submitted that despite availability of aforesaid evidences/materials on record, the learned "Insurance Court" has recorded a finding that there was no evidence to show that in the restaurant about 14 persons were employed. There

was also no evidence of "Mixi Machine".

11. According to Sri Bijpuria the order impugned is liable to be set aside on this ground alone.

12. It was submitted that during evidence the Respondent himself has admitted that 14 persons were functioning. Even though it was an admission of the Respondent, the learned "Insurance Court" has recorded that there was no evidence showing employment of 14 persons in the restaurant. He further submits that inspection report was also brought on record during the proceeding before the court below which was self explanatory and makes it clear that during inspection it was found that in the restaurant on upper portion i.e. workshop, gas and electric "Mixi Machine" for preparation of sweets, samosa, kachauri etc. were in use. A deep freezer was found on the lower portion of the shop for storing/keeping sweets and cold drinks etc. During inspection the representative of Respondent one Sri S.N. Agrawal had produced attendance-cum- wage register from April 1996 to November 1997 wherein in each month the employments of the employees was shown as 14.

13. Learned Counsel for the Appellant submits that since in the restaurant "L.P.G." and electricity was being used for the purposes of preparation of sweets, samosa and kachauri and in the restaurant there were more 14 employees, the restaurant has rightly been treated as a factory, and as such, the Respondent was rightly issued coverage demand. In support of his contention the learned Counsel has relied on a judgment of Hon"ble Supreme Court reported in Bombay Anand Bhavan Restaurant Vs. The Deputy Director, ESI Corporation and Another, He has referred to paragraph No. 39, page 70 of the same judgment which is as follows:

In our view, the use of LPG satisfies the definition of power as it is mechanically transmitted and is not something generated by human or animal agency. Since the establishments of the Appellants involve a manufacturing process with the aid of LPG, which can now be termed as power, the establishments of the Appellants can be termed as factories, and therefore, the ESI Act will apply to these establishments.

14. Sri Bijpuria has further submitted that a restaurant involved in preparing food etc. can be termed as a factory. Learned Counsel to corroborate this argument has referred to a division bench judgment of the Bombay High Court reported in 1980 1 LAB I.C. 100 Poona Industrial Hotel Ltd. v. I.C. Sarin and Anr. It was submitted that preparation of sweets, samosa, kachauri etc. in restaurant in question was a manufacturing process and in the restaurant electricity and L.P.G. was also found being used, and therefore, same has rightly been covered under the "E.S.I. Act" and demand for contribution was rightly made.

15. It was further submitted that inspection was done in presence of representative of the Respondent, and accordingly, provisions contained in Section 45A of the "E.S.I. Act" was fully complied with.

16. Besides hearing learned Counsel for the Appellant, I have also perused the materials available on record including the lower court record. In this appeal a counter affidavit was filed, which is on record. I have also perused the same.

17. After going through the record the court is of the opinion that the learned Insurance Court has committed serious error of record.

18. In the evidence of applicant's witness, who was none else but the sole Respondent (proprietor of the restaurant), himself has specifically been admitted that in the restaurant 13-14 persons were employed. He has also admitted that inspection was conducted in his restaurant in paragraph No. 1 of his deposition whereas in the order impugned the learned "Insurance Court" has recorded that there was no evidence about 14 persons since name of 14 persons and other details were not disclosed. Besides this, perusal of inspection report which is on record also makes it clear that 14 persons were regularly employed in the restaurant.

19. The court is of the opinion that the "Insurance Court" has committed apparent error of record. Moreover, the objects of E.S.I. Act is primarily for the welfare of employees and for welfare of the employees in accordance with law demand for contribution of employer i.e. Respondent (proprietor of the restaurant) was made.

20. Since the "Insurance Court" has recorded a finding which is contrary to the materials available on record, there is no option but to set aside the impugned order, and accordingly, order dated 18th April, 2007 passed by the Presiding Officer, Labour Court & Employees State Insurance Court, Patna, is hereby set aside and appeal stands allowed.