
(1999) 07 KAR CK 0056
In the Karnataka High Court

Employees" State Insurance Corporation, Bangalore	APPELLANT
Vs	
Super Tailors, Gulbarga	RESPONDENT

Date of Decision : 08-07-1999

Acts Referred:

Employees State Insurance Act, 1948 — Section 2 (12), 45, 75, 82

Citation : (1999) ILR (Kar) 3497 : (1999) 5 KarLJ 653 : (2000) 1 LLJ 451

Hon'ble Judges : M.P. Chinnappa, J

Bench : Single Bench

Advocate : Sri V. Narasimha Holla, for the Appellant; Smt. K. Subha Ananth for Sri K. Kasturi, for the Respondent

Judgement

1. Heard.

2. Super Tailors, the respondent herein is a partnership firm carrying on tailoring business since 1985. The Inspector of the Appellate Corporation who conducted the statutory inspection of the respondent-establishment found that it was employing 12 persons on wages and was using power for the purpose of running the sewing machines for stitching and also for ironing the clothes after stitching. The Inspector prepared a list of persons working in the premises during his visit indicating the names of the employees, designation, their salaries, etc. It was signed by one of the partners of the firm. Accordingly, the appellant passed an order holding that the establishment was covered under the purview of the Act w.e.f. 14-9-1993 and hence a Code No. 53-11705-19 was allotted to the respondent-firm. The respondent challenged the coverage of the establishment by filing an application u/s 75 of the ESI Act before the ESI Court, Hubli, in ESI Appln. No. 1 of 1994 for determining that the persons working for the applicant firm on piece rate work are not employees within the meaning of the ESI Act and that the respondent is not liable to pay the employees" contribution. After assessing the evidence, the ESI Court passed an order dated 30-9-1997 u/s 75 of the Act allowing the application and declaring that the applicant firm is not covered under the ESI Act and the same is not liable to pay employees"

contribution. Being aggrieved by that order, the ESI Corporation preferred this appeal.

3. The learned Counsel for the appellant has vehemently argued that the ESI Court has committed an error in holding that the application is maintainable notwithstanding the fact that the respondent has not approached the ESI Corporation u/s 45 of the Act. He also submitted that the finding or interpretation of the Court with regard to the use of electric power was contrary to Section 2(12) of the ESI Act. Further, the Court is not justified in applying the law laid down as in *Sudershan Weaving Factory, Amritsar v Employees' State Insurance Corporation and Another*, to the facts of the case. Therefore, he submitted that the appeal may be allowed and the impugned order be set aside.

4. Per contra, the learned Counsel for the respondent has painstakingly argued that there is no substantial question of law involved in this appeal and the appeal is not maintainable u/s 82 of the ESI Act. She also submitted that the findings recorded by the ESI Court are only on questions of fact and therefore, it cannot be gone into by this Court. She also contended that the evidence adduced by the appellant is insufficient to hold that the respondent-firm is covered under the ESI Act. The ESI Corporation has passed an order u/s 45-A of the Act. Therefore, the question of approaching the ESI Corporation u/s 45 does not arise. For the foregoing reasons, she submitted that the appeal is liable to be dismissed.

5. In view of the above arguments, the first question that arises for consideration is as to whether the application filed u/s 75 of the Act is maintainable.

6. The contention of the learned Counsel for the appellant is that the ESI Corporation has not passed any order directing the respondent to pay the amount. Therefore, it was always open to the respondent to approach the appellant-corporation and place materials to dispel the findings on the basis of the report of the Inspector to avoid coverage. At the outset, the appellant who was respondent before the ESI has not specifically pleaded in the objection statement that since the respondent did not approach the appellant u/s 45 of the Act, the application is not maintainable. But very vaguely it is stated that the application is not maintainable. Under those circumstances, it is not open to the appellant to contend that the application filed before the ESI Court is not maintainable. In the notice Ex. R-2 it is specifically stated that on the basis of the particulars in respect of the factory submitted by the Inspector on 14-9-1993 the factory falls within the purview of Section 2(12) of the Act w.e.f. 14-9-1993 provisionally. Thereafter, the appellant also mentioned that for the sake of convenience, the establishment was allotted Code No. 53-11705-19 and directed to use this number in all their future communications. Therefore, it is now not open to the respondent who have participated in the proceedings before the Court to contend that it is not the order passed u/s 45-A and that it was open to the respondent to approach the Corporation u/s 45 of the Act. This contention appears to be raised only to wriggle out of the situation. At this juncture it is necessary to refer to the decision rendered in *Employees' State Insurance*

Corporation v Central Press and Another, wherein their Lordships have held:

"The scheme of the Act after its amendment by Act 44 of 1966 is that the Corporation itself should, in a case where there is omission on the part of the employer to maintain records in accordance with Section 44 of the Act, determine the amount of contributions on the strength of such information as it may collect and can then make the demand u/s 45-A. If the employer refuses to comply with the demand so made, the matter can come up before the Employees' Insurance Court u/s 75 of the Act. The Court should give the Corporation a direction to perform its duty where it considers that this should be performed by the Corporation. It cannot decline to perform its own duty because the Corporation has failed to discharge its function".

Further, it is also held in judgment rendered by the Supreme Court in Employees' State Insurance Corporation v M/s. F. Fibre Bangalore (P) Ltd. In that case, the Full Bench of this High Court passed an order which reads as follows:

"In the result, we answer the question referred to us as follows:

Where, in cases to which provisions of Section 45-A of the "Act" are attracted, the Corporation by an order made in accordance with that section determines the amount of contribution payable and that claim is disputed by the employer, it would not be necessary for the corporation to seek a resolution of that dispute before the Insurance Court. Such a claim is recoverable as arrears of land revenue. If the employer disputes the claim it is for him to move the Insurance Court for relief. In other cases -- other than cases where determination of the amount of contributions u/s 45-A is made the corporation, if its claim is disputed by the employer, should seek an adjudication of the dispute before the Insurance Court, before enforcing recovery".

While considering the finding of this Court, the Supreme Court has held:

"The question is as to who would approach the Insurance Court for adjudication and determination of a dispute whether the establishment of the employer is attracted by the provisions of the Act and/or what is the number of employees it has employed etc.? It is seen that Section 45-A is in the nature of best judgment assessment on the basis of the information collected by the Inspector. In the impugned order the High Court holds that it is for the employer to challenge it and seek adjudication. When there was dereliction of duty on the employer to either register itself with the Corporation under the Act or when there is failure to deposit the contribution with the Corporation under the Act or failure to deposit the contribution with the account of the corporation towards employers' and employees' contribution as envisaged hereinbefore, the Corporation is empowered to make best assessment judgment u/s 45-A and call upon the employer to deposit the amount with the Corporation.

The Full Bench of the High Court has held that in a case where the order u/s 45-

A becomes final, there is no need for the Corporation to seek adjudication before the Insurance Court. In all other cases, the Corporation is required to go to the Insurance Court have it adjudicated and then make a demand. We are of the view that the Full Bench of the High Court is clearly in error to reach that conclusion. Though Section 75 of the Act does not envisage as to who has to approach the Insurance Court, by necessary implication when the employer denies the liability or applicability of the provisions of the Act or the quantum of the contribution to be deposited by the employer, it is for him to approach the Insurance Court and seek adjudication. It is not for the Corporation in each case whenever there is a dispute, to go to the Insurance Court and have the dispute adjudicated. Otherwise, the Act would become unworkable and defeat the object and purpose of the Act".

Thus it is clear that the objection raised by the appellant that the application was premature and not maintainable is liable to be rejected.

7. The next question that is required to be considered is as to whether the appeal filed by the ESI Corporation is maintainable.

8. According to Section 82(2) of the Act, and as per the judgment of the Division Bench of the Kerala High Court in Employees" State Insurance Corporation v Cheeran"s Auto Agencies, it is held:

"Section 82 makes it clear that an appeal lies to the High Court from an order of the Insurance Court only if it involves a substantial question of law. The question whether two persons are employees or not is a question which has to be decided on an assessment of facts and it is a question of fact. It cannot be treated as a substantial question of law".

Further, their Lordships of the Supreme Court in Sir Chunilal V. Mehta and Sons Limited v Century Spinning and Manufacturing Company Limited, answered the question as to what is substantial question of law. It has held:

"The proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well-settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law Rimmalapudi Subba Rao Vs. Noony Veeraju and Others, and AIR 1927 110 (Privy Council) , rel. on and Kaikhushroo Pirojsha Ghiara Vs. The C.P. Syndicate Ltd., : AIR 1949 300 (Nagpur) , criticised".

With these principles in mind, it is now necessary to consider as to whether a substantial question of law is involved in this case.

9. The Inspector who inspected the factory has stated that there were 12 persons working in the premises. He has noted down the names of those persons and the money paid to them by the employer. However, the respondent has totally denied that they are their employees and they have been paid wages by them. The respondent further contended that there were only 8 persons working on cut-piece contract basis and not on wages. The learned ESI Court after assessing the evidence has come to the conclusion that the ESI Corporation failed to prove that there were more than 10 persons working in the concern and they have been using power for their manufacturing process. The fact that the respondent has electricity connection to their factory is not in dispute but they claim that the electricity is not used for manufacturing process. The evidence of R.W. 1 is to the effect that there were iron boxes and power is used for running the machine, over locking machine and iron boxes. But his evidence on these aspects was rightly not accepted by the Court in view of the inconsistency in the statement made before the Court and also the materials collected by them. The evidence is discussed by the ESI Court in detail in para 10 of the order. It is incumbent on the appellant to establish as required under sub-section (12) of Section 2 of the Act which reads:

" "Factory" means any premises including the precincts 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".

From a bare reading of the section it is abundantly clear that it is for the appellant to establish that 10 or more persons are employed for wages on any day of the preceding 12 months in any part of which a manufacturing process is carried with the aid of power. It is an admitted fact that power is supplied to this factory but the respondent has specifically denied that at no point of time 10 or more persons were employed in the factory. On the other hand, it is stated that only 8 persons were working on the basis of piece rate contracts. The R.W. 1 has produced the list as per Ex. R-1(a). As could be seen from it, he has mentioned 12 names and the wages said to have been paid by the respondent. It is held by this Court in a decision in *Regional Director, Employees' State Insurance Corporation, Bangalore v Karnataka Asbestos Cement Products*, that the list of employees prepared by the E.S.I. Inspector, in the course of his visit to the establishment, must contain the name, father's name, place from which the

employee hails, the designation, the length of service and the signature or thumb impression of the employee, as the case may be. But in this case, except mentioning the date as also the wages, he has not satisfied any one of the requirements. Therefore, the Court below has rightly rejected the evidence of R.W. 1.

10. The learned Counsel for the appellant further argued that the evidence of R.W. 1 clearly discloses that iron box was used for ironing readymade garments and therefore, it can be said that power was used for manufacturing process. In that connection, he also placed reliance on a decision in *M/s. Kalpana Dresses, Bombay v Employees' State Insurance Corporation*, wherein the Bombay High Court has held that ironing is a process of treating the articles with a view to their use for sale in the market. Readymade garments must be ironed properly before they can be sold in the market. As it is a process of treating the garments, it must be held that manufacturing is carried on with the aid of power so as to constitute the place or premises, a factory as defined under the Act. I fully agree with the principles enunciated in this judgment by the Division Bench of the Bombay High Court. But as stated above, the appellant has failed to establish other requirements of Section 2(12) of the Act.

11. Further, the judgment rendered by the Full Bench of the Allahabad High Court in *Stan pace Industries Private Limited v S.A. Patil, Presiding Officer and Another*, that the High Court u/s 82 of the ESI Act as Appellate Court cannot interfere with the findings of fact recorded by the Employees' Insurance Corporation. From the above discussion and in the light of the judgments referred to above, it is abundantly clear that there is no substantial question of law involved for this Court to entertain this appeal and the number of persons working in the factory and the use of power, etc., are purely questions of facts. Therefore, viewed from any angle, this appeal has no merit and is not maintainable.

Accordingly, this appeal stands dismissed.