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(1998) 01 AP CK 0007

In the Andhra Pradesh High Court

Case No : A.A.O. No. 319 of 1992

Employee''s State Insurance Corporation, Hyderabad — APPELLANT

Vs

Ravi Engineering Works, Nandyal, Kurnool District — RESPONDENT

Date of Decision : 19-01-1998

Acts Referred:
Employees State Insurance Act, 1948 — Section 1(5), 2(1), 2(12), 38(3), 38(4)

Citation : (1998) 2 ALD 732 : (1998) 3 ALT 150

Hon'ble Judges : B.K. Somasekhara, J

Bench : Single Bench

Advocate : Mr. B.G. Ravinder Reddy, for the Appellant; Mr. Ramesh Ranganatham, for the Respondent

Judgement

1. The appellant/ESI Corporation questions the correctness of the order of the ESI Court in E.I. Case No. 42/90 dated 6-12-1991.

2. The respondent herein questioned the order of the appellant in AP. INS-IV/52-7923-65 dated 26-9-1990 seeking contribution towards Employees Slate Insurance, on the ground that it was not covered by the provisions of the E.S.I. Act, 1948 (in short'' the Act''), by filing a petition u/s 75 of the Act. It was resisted by the appellant. The respondent is a fabricating unit situated in the commercial area of R.S.Road, Nandyal, Kurnool District. The Inspector of the appellant made a visit to the workshop of the respondent on 24-7-1989, recorded the statements of the customers with regard to the employment strength of the firm etc., and allegedly it was found by the Inspector, that the attendance register, wage register and salary register showed that eight permanent workers and five casual labourers were working in the factory for the period from April 1988 to November, 1988 and there were seven permanent workers and five casual labourers in December 1988, six permanent workers and five casual labourers working from January, 1989 to June 1989. There was no contribution from the respondent for the period. Proceedings were initiated u/s 45 of the Act assessing the contributions and steps were taken to recover the

arrers of contribution for the said period with interest under the provision, which was challenged by the respondent u/s 75 of the Act. It was contended on behalf of the appellant that the respondent is a factory within the meaning of Section 2(1) of the Act and was governed by the provisions of the Act in view of the notification issued u/s 1(5) of the Act since 10 or more persons were working during the relevant period and secondly within 12 months prior to the date of the demand and therefore was covered by the provisions of the Act. the ESI Court found that there was no inspection of the factory of the respondent for the relevant period regarding which contribution was demanded and therefore the proceedings u/s 45 of the Act was not justified and accordingly the petition was allowed holding that the respondent/factory was not covered under the ESI Act and that is the subject-matter of this appeal.

3. Mr. Ravindra Reddy, the learned Standing Counsel for the appellant has contended that the testimony of R W. 1 which was supported by his report of Inspection showed that 10 or more persons were working within 12 months prior to the last date of the period for which proceedings were initiated u/s 45 of the Act and therefore notwithstanding the definition of ''factory'' u/s 2(12) of the Act regarding number of persons having been employed, viz., 20, in view of the notification under Section.1(5) of the Act covering the areas within which the factory of the respondent is situated, the respondent was covered by the provisions of the Act and therefore the proceedings were justified. It is also his contention that for the relevant period, the respondent had not contributed as required under the provisions of the Act. It is his specific contention that when once the factory of the respondent is covered by the provisions of the Court by virtue of the notification u/s 1(5) of the Act, as the 12 months preceding 20-10-1989 viz., April 1988 falls within the period form 20-10-1989 to 31-3-1990 the provisions of the Act becomes operational by virtue of such notification and in view of the proviso added to Section 2(12) of the Act, the factory continues to be governed by the provisions of the Act.

4. The learned Counsel for the respondent Sri Ramesh Ranganatham contends that in the first place factually the factory of the respondent is not located within the area prescribed in the schedule of the notification issued u/s 1(5) of the Act and therefore on facts, the factory is not governed by the provisions of the Act for the purpose of contribution. Secondly, it is contended that even assuming that if was to be governed by the provisions of the Act factually if established, the proviso added to Section 2(12) of the Act being on 20-10-1989 not being restrospective, the appellant cannot take advantage of it to make it retrospectively actionable u/s 45 of the Act.

5. Therefore, only two questions arise in this appeal notwithstanding what the ESI Court has held, viz., (1) Whether the respondent is located within the area to be governed by the provisions of the Act by virtue of the notification under Section. 1(5) of the Act and (2) whether the proviso to Section 2(12) of the Act would be either retrospective to cover the period for which the contribution was

sought to be enforced or that becomes operative retrospectively in view of the covering of such a factory by virtue of the implications of the notification u/s 1(5) of the Act.

6. If the first question is held in the negative, then only the second question becomes relevant. Therefore, that question is taken up as the first measure for recording the finding. As rightly contended by the respondent, no such contention was set up before the ESI Court by the appellant and no such notification was also referred to in the order. However, the learned Standing Counsel for the Appellant has depended upon such a notification u/s 1(5) of the Act which the learned Counsel for the respondent has demonstrated as not applicable to the factory of the respondent, the reason being that the applicability of the provisions of the Act to certain areas has been described in the schedule by description of the establishment and the areas in which the establishments are situated. The factory, as per the admitted address of the respondent, is located within Kurnool district in Nandyal town. The last portion of the schedule mentions only Adoni and certain villages totally excluding Nandyal, either town or rural village, to be covered by the notification. Therefore, on facts the appeal will fail. However, Mr. Ravindra Reddy, learned Standing Counsel for the appellant points out that there may be subsequent notifications to include Nandyal also and the area within which the respondent is located to extend the operation of the provisions of the Act. After verification he had to concede that there are no such later notifications. Therefore, on facts, the first question should be answered in the negative.

7. Regarding the second question, this Court is doubtful whether the operation of an Act by virtue of amendment on a particular date makes it retrospective in relation to the computation of the period to extend the operation of the Act if in an establishment or a factory certain persons were working, numbering 10 or more to be governed by virtue of the notification issued u/s 1(5) of the Act. The learned Counsel for the respondent is right in relying upon Mithilesh Kumar and Another Vs. Prem Behari Khare, , to affirmatively establish that no law is retrospective, particularly when the liability or right is already vested, it cannot be retrospective unless either expressly or with necessary implication such retroactivity is inferred from a statute. Added to it no computation in a provision to operate by virtue of a notification can be called as governance of the situation for the purpose of retroactivity of the amendment of a piece of legislation unless the amendment itself indicate such retrospective operation. The proviso to Section 2(12) of the Act, if correctly understood, means that when once the factory or a premises or an establishment is to be covered by the provisions of the Act, it becomes governable by virtue of the amendment. No more meaning can be brought out from such a provision, the illustration could be that notwithstanding the definition of ''factory'' u/s 2(12) of the Act, if there was a notification u/s 1(5) of the Act to bring the factory of the respondent within the governance of the provision as per the schedule in the notification during the period for which the contribution is made enforceable, it is not necessary to

prove that for all the period there was such a fulfilment of the condition. To elaborate the illustration further, if such a situation arose even on one day during such period, in view of the application of the provision u/s 1(5) and the notification issued thereunder, the contribution becomes payable not only during the period seeking contribution but also for all the time and that is the interpretation sought to be put up by the Supreme Court. But in the present case, the demand for contribution was only for the period 20-10-1989 to31-3-1990. It is not the case of the appellant that on any one of the days for the period such condition was fulfilled to borrow the purpose and effect by virtue of the notification u/s 1(5) of the Act. Therefore, in the absence of the retrospective effect of the proviso to Section 2(12) of the Act, it is difficult to bring the respondent within the provisions of the Act for the sake of contribution. There is one more circumstance which will not go well with the interpretation of the learned Standing Counsel for the appellant, if Section 2(12) of the Act after amendment is applicable from 20-10-1989, there is a benefit of the applicability of the Act for the factories where 10 or more persons are employed or were employed on any day preceding 12 months therefrom. It has practically substituted the implication of the notification to be issued u/s 1(5) of Act. In that view of the matter, it cannot fall back on a notification u/s 1(5) of the Act In other words, it only means that to fulfil the implications of Section 2(12) of the Act, such a condition to have 10 or more persons should be for the period regarding which contribution is sought to be enforced and not to fall back upon an incident for a period prior to the period of the demand. That clearly shows that in order to enforce the provisions of the Act for a factory or premises, the implications of Section 2(12) should exist either for the whole period or for any day within 12 months next before the date of the demand preceding amendment. What Mr. Ravindra Reddy, the learned standing Counsel wants to demonstrate is that more than 10 persons were employed within 12 months prior to 20-10-1989 viz., April 1988 and therefore the proviso is applicable and that requires examination.

8. There is all the force in the contention of Mr.Ravindra Reddy that the amended Section 2(12) of the Act is retrospective at least for a period of 12 months prior to 20-10-1989 when the amendment act came into force. Therefore, as per the requirement of the provision if ten or more persons or workmen had been employed within 12 months prior to 20-10-1989 then the amended provision operates and becomes retrospective and nothing more than that But, Mr. Ramesh Ranganatham, the learned Advocate for the respondent points out that again Section 2(12) of the Act does not indicate the date on which the period of 12 months has to be reckoned and therefore it must be dependent upon the period for which such a liability occurs and the right to seek contribution can be demanded by the ESI Corporation for that purpose. In this regard, he has drawn the attention of this Court to Section 38, sub-sections (3) & (4) of Section 39 and sub-section (23) of Section 2 of the Act to fix the factual position as to the liability to contribute and the period for which the contribution becomes

obligatory. Undoubtedly, the liability of the employer or the management lies within the obligation of Sections 38 and 39 of the Act. The rate of contribution has to be prescribed by the Central Government within the powers under sub-section 2(12). The contribution will be in relation to the wage period as provided under sub-section 23 of Section.2 of the Act, to mean the period for which the wages are ordinarily payable to the employee or worker, whether in terms of the contract of employment, express or implied or otherwise. As per sub-section (4) of Section 39 of the Act, the contributions payable in respect of each wage period shall ordinarily fall due on the last day of the wage period and where an employee is employed for part of the wage period, or is employed under two or more employers during the same wage period, the contributions shall fall due on such days as may be specified in the regulations. Therefore, the computation for reckoning twelve months prior to 20-10-1989 is subject to the above factual matters to determine the wage period and the liability to contribute in accordance with law or the contract of employment as the case may be. To this extent, even barring the law laid down by the Supreme Court in the pronouncements supra, by satisfying the test of retroactivily of enactment. Section 2(12) of the Act becomes retrospective.

9. In the present case, factually it was verified and found that more than ten employees were engaged for the relevant periods from April, 1988 to June 1989, but the discussion of the evidence in this regard by the ESI Court is not very clear as to what was the wage period in relation to the establishment of the respondent and what was the last date of such wage period either as per the contract or as per law etc., which possibly require further investigation for the purpose of enforcing the impugned coverage of demand. Barring that, there is no difficulty in this case to enforce liability on the part of the respondent to contribute. To make it more specific, the appellant- Corporation has to make out a case that the respondent had engaged more than ten persons within twelve months prior to 20-10-1989 and further within the wage period regarding which the contribution was payable in accordance with Section 3 9(3) of the Act, However, it is to be clarified that in this case the period of contribution shall be confined to the period from 20-10-1989 to 31-3-1990. regarding which the claim was sought to be enforced and nothing more than that.

10. In the result, the appeal is allowed and the order of the ESI Court is, however, modified to the extent stated above subject to the condition that the claim in this case by the ESI Corporation shall be only for the period from 20-10-1989 to31-3-1990 further subject to determining the wage period etc., for the purpose of recovery in the light of the observations made above.