
(2016) 11 GAU CK 0068
In the Gauhati High Court
Case No : MFA No. 53 of 2002

ESI Corp.

APPELLANT

Vs

Satyanarayan Prasad

RESPONDENT

Date of Decision : 24-11-2016

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(14AA), Section 78
Factories Act, 1948 — Section 2(g), Section 2(k)

Citation : (2017) 1 GauLT 249

Hon'ble Judges : Mr. Prasanta Kumar Deka, J.

Bench : Single Bench

Advocate : Mr. K.K. Nandi, Advocate, for the Appellant; Mr. R.L. Yadav, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Mr. Prasanta Kumar Deka, J. (Oral) - Heard Mr. K. K. Nandi, the learned counsel appearing on behalf of the appellant. Also heard Mr. R. L. Yadav, learned counsel appearing on behalf of the respondent.

2. In this appeal, the judgment dated 03.10.2011 passed by the learned Presiding Officer, ESI Court, Dibrugarh in ESI Case No.2 of 2000 has been challenged. Though at the time of admission of this appeal the substantial question of law were not formulated however, before hearing this appeal both the parties agreed to the following substantial question of law:

"1. The substantial question of law arises is that whether use of LPG in the kitchen for preparing food items in the kitchen of a hotel/restaurant amounts to use of power and whether the same is a manufacturing process as per section 2 (14 A A) and Section (15C) of the ESI Act 1948 read with Section 2 (g) and 2(k) of the factories act, 1948.

2. The substantial question of law arises is whether preparation of food in the kitchen with LPG of a Hotel/restaurant is an establishment/factory as per Section

2(12) of the ESI Act, 1948."

3. Mr. Nandi in order to substantiate the substantial question of law submits that as per Section 78 of the Employees State Insurance Act, 1948, the learned court below is a civil court and under such circumstances, the learned court below ought to have passed the judgment as per the provision of Order 20, Rule 5 CPC, 1908. Mr. Nandi argues that the learned court below having the power of a civil court ought to have framed the issues and discussed those issues as required under Order 20, Rule 5 of the CPC, having not done so, the learned court below has erred in applying its jurisdiction. Mr. Nandi refers to the notification No. GLR.385/74/56 dated 22.07.1975 and took to the Schedule of the said notification of the Government of Assam wherein the establishment requiring the enforcement of the ESI Act, 1948 has been defined. Mr. Nandi mainly pointed out Schedule premises No.1 which is described as follows:

"Any premises including the precincts thereof whereon ten or more persons but in any case less than twenty persons are 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 but excluding mine subject to the operation of Mines Act, 1952 (35 of 1952) or a Railway running shed or an establishment which is exclusively engaged in one or more of the manufacturing processes specified in clause (12) of section 2 of the Employees State Insurance Act, 1948(34 of 1948)."

4. The learned Court below has not considered the said notification in its proper perspective, accordingly the learned court also failed to apply its jurisdiction in the true perspective to substantiate the manufacturing process as referred to the premises, No.1 of the Schedule herein above stated.

5. Mr. Nandi took this court to the definition stipulated under Section 2(g) and 2(k) of Factories Act, 1948 in order to substantiate that the shop premises in question was covered under the premise No.1 of the schedule as because the said shop/hotel is a hotel having its manufacturing process with the aid of the power. In order to substantiate his claim, Mr. Nandi relied upon Delhi Gymkhana Club Ltd. v. Employees State Insurance Corporation reported in 2015 (1) SCC 142. Mr. Nandi also relied on a judgment dated 13.08.2015, M/S Speed Sales Pvt. Ltd v. Employees State Insurance Corporation and Another registered as RFA 81/2006 which was disposed of on 13.08.2015. Mr. Nandi relying another decision from the Hon"ble Apex Court, Employees State Insurance Corporation v. Bhakrabeas Management Board and another (Civil Appeal No. 8335/2004) submitted that the employees ought to have been made party in the present proceeding. Mr. Nandi also submitted that the learned court below has failed to discuss the evidence on record and wrongly decided the proceeding. The learned court below being a civil court ought to have discussed the evidence on record and none discussion of the materials on record has led to perversity of the finding given by the court below. Mr. Nandi, therefore submits that the impugned judgment is liable to be set aside.

6. Countering the argument of the appellant, Mr. R L Yadav submits and pointed out that Section 78 of the Employees State Insurance Act, 1948 does not empower the court below as a full-fledged civil Court, some trapping is to be satisfied under Section 78 Sub Section 1 so far the civil court is concerned. Countering further the argument of the counsel of the appellant, Mr. Yadav submits that Section 78(2) prescribe that the Employees Insurance Court shall follow such proceeding as may be prescribed by Rules made by the State Government. For the said reason the question of applicability of Order 20, Rule 5 of the CPC in the Employees Insurance Court does not arise at all. Mr. Yadav further submits that the pleadings of the respondent/petitioner is sufficient to show that the Employees State Insurance Act has no applicability in the said hotel coupled with the evidence on record. Mr. Yadav further submits that the question of admission as pleaded by the appellant in their written statement does not arise at all inasmuch as it was the Inspector, who surveyed and he is supposed to record the impression that he collected on the basis of his survey. Mr. Yadav argues that there is no illegality in the order nor there is any perversity in the judgment passed by the learned Court below.

7. Perused the case record and also perused the impugned judgment. Having gone through the impugned judgment, it is observed that the learned court below while passing the impugned judgment did not frame any issues nor there is any discussion with regard to the evidence laid by both the parties. It is true that even if no issues are framed the parties to the proceeding are well aware with regard to their respective stand taken to prove their own case. However, none discussion of the evidence on record clearly shows that the judgment does not reflect the actual materials on record. In order to give the reply to the substantial question of law the evidence of the parties are perused. The petitioner/ respondent side has adduced two witnesses along with certain exhibits including Ext. 2, the registration certificate issued by the Inspector of Shops and Establishment, Dibrugarh, Ext-7, the employees attendance register. The demand notice of the appellant to the respondent as exhibits 3, 4 and exhibit 5, the show cause reply of the respondent. On the other hand the appellant exhibited Ext-A, the survey report of the Inspector, ESI, Ext-B the preliminary inspection report, Ext-C, the observation report, Ext-D, notice dated 09.07.1998 to the respondent/petitioner. The PW-1, respondent himself in his chief has stated that he used coal and fire wood as the main fuel for preparation of the food stuff in his hotel. In his chief he also deposed that he has 7 to 8 numbers of employees. In the cross-examination he deposed that he had never produced any receipt for purchase of coal and fire wood. Further he deposed in his cross that he had never mentioned the names of the employees in his petition. In a specific question, the PW-1 denied that on 01.04.1998 at the time of inspection the Inspector found 22 numbers of employees. Similarly he denied that on 17.06.1998 at the time of inspection the Inspector found 15 numbers of employees. He denied that he used fridge. But though the present appellant relied the survey report of 01.04.1998 and 17.06.1998 wherein the appellant

submits that the PW-1 had signed in the said report, however, the same was not confronted for contradiction by the PW-1 as required under Section 145 of the Indian Evidence Act. The PW-2 is an employee of the respondent. This PW-2 in his chief deposed that he used to maintain the Ext-7, attendance and pay register of the hotel. In a suggestion, the said PW-2 denied in preparing the said Ext-7 afresh for the purpose of the proceeding. One Mr. Madhab Biswas deposed as DW-1 for the appellant. In his chief he deposed that on 03.10.1997, he was serving as ESI Inspector at Tinsukia. He inspected the hotel in question and found 22 numbers of employees on 17.06.1998, and he found that LPG and deep freezer were used for working purpose and accordingly he informed vide Ext-A to cover the hotel under the ESI Scheme. In his cross-examination he deposed that he could not recollect the name of the employees nor he could recollect to whom he asked about the information of the employees. He could not recollect the number of cooks working in the precincts and he proved the demand notice for coverage of 22 numbers of employees vide Ext-8.

8. From the evidence on record it cannot be concluded that the hotel used LPG in the kitchen inasmuch as from the cross-examination of DW-1 it is very much apparent that he could not recollect the number of cooks and definitely a preponderance would come that he did not visited the kitchen and as such he had not seen the person/persons engaged in cooking and the fuel so used. Regarding the manufacturing process, I have perused both Section 2(g) and 2(k) of the Factories Act, 1948. Section 2(g) defines power and Section 2(k) defines the manufacturing process which is reproduced below:

"2(g) "power" means electrical energy or any other form of energy which is mechanically transmitted and is not generated by human or animal agency;

2(k) manufacturing process" means any process for-

(i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing or otherwise treating or adopting any article or substance with a view to its use, sale, transport, delivery or disposal; or

(ii) pumping oil, water, sewage, or any other substance; or

(iii) generating, transforming or transmitting power; or

(iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or book-binding; or

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; or

(vi) preserving or storing any article in cold storage ; "

From the definition of manufacturing process it cannot be concluded that the process of cooking food in a hotel will fall under the ambit and scope of manufacturing process as defined under the Factories Act, 1948.

9. Mr. Nandi relied on *Delhi Gymkhana Club Ltd. v. Employees State Insurance Corporation* reported in 2015 (1) SCC 142. In that case the Hon'ble Apex Court held that Gyamkhana Club is a factory wherein more than 20 persons employed in preparation of food stuffs and serving in kitchen, catering division of the club to provide catering service to its members and guests for payment. It was held that the club falls within the pureview of the ESI Act and preparation of food items in the kitchen of the appellant club amounts to manufacturing process and all the persons employed for the purpose of supply and distribution food and for other duties in connection with the kitchen and catering are to be recorded as employees of factory under Section 2(12) of ESI Act. In the said decision, the Hon'ble Apex Court held that although the term "kitchen" "catering" of a club may not be called a factory in any parlance having regard to the definition of manufacturing process and that ESI Act being a beneficial legislation a liberal interpretation has to be adopted, so long as manufacturing process is carried on with or without the aid of power by employing more than 20 persons and as such it would come within the meaning of factory as defined under Section 2(12) of the ESI Act. So Hon'ble Apex Court though comes to the finding that the kitchen and the catering services did not fall within the meaning of the factory in common parlance, however, considering the scheme of the ESI Act which is a beneficial legislation a liberal interpretation has been adopted. So in the present case in hand though kitchen and catering of a hotel does not fall within the meaning of the factory under the Factories Act, 1948, however, for the purpose of the ESI Act, the same will be termed as a factory and the process carried thereon will fall under the term "manufacturing process". Thus, the hotel in question and the process involved therein will be termed as a factory.

10. Under Section 2(12) of the ESI Act 1948 the definition of factory was amended in the year 2010 and prior to that the meaning of the factory was as follows:

"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 or any day of the proceeding 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 or 1952) or a railway running shed."

The said definition of factory prior to 2010 had two limbs, when the manufacturing process is carried with the aid of power then the number of employees must be 10 or more but if the manufacturing process is being carried out without the aid of power then the minimum number of employees must be

20 for the purpose of running the hotel. The present case is prior to 2010. Concentrating to the present case in hand and the finding already arrived herein above that the manufacturing process carried on within the hotel premises have no aid of power, under such circumstances the number of employees has a vital question to be decided for the purpose of the coverage of the ESI Act, 1948.

11. From the perusal of the evidence on record the definite number of employees could not be ascertained. Mr. Nandi argues that the survey report of the Inspector was signed by the proprietor of the hotel himself and as such the number of persons employed on the day of inspection was more than 20. I cannot accept this argument inasmuch as the said survey report wherein the proprietor of the present hotel put his signature was not confronted by showing his signature for elucidating in contradiction of PW-1. For the said reason I hold that the numbers of employees employed by the proprietor of the hotel is below 10 and as such the substantial question of law No.1 is answered in the negative. Similarly the substantial question of law No.2 is also decided in the negative.

12. Against the submission of Mr. Nandi as to the power of the ESI Court, I am of the opinion that the said court is not a civil court and except the procedures stipulated under Section 78 of the ESI Act, 1948 other rules prescribed in Civil Procedure Code (CPC) 1908 in changing Order 20, Rule 5 are not applicable. Further none framing of the issues had not affected any of the rights of the parties to the proceeding inasmuch as the parties are fully aware with respect to their respective burden and onus to be discharged for proving their own case and defence.

13. Accordingly, this appeal is dismissed.