

(1990) 10 KL CK 0057
In the High Court Of Kerala
Case No : M.F.A. No. 350 of 1985

E.S.I. Corporation

APPELLANT

Vs

Foam Mattings (India) Ltd.

RESPONDENT

Date of Decision : 10-10-1990

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(13), 2(9), 40, 41

Citation : (1990) 10 KL CK 0057

Hon'ble Judges : Paripoornan, J;Balanarayana Marar, J

Bench : Division Bench

Advocate : T.D. Rajalakshmi and P.N. Mohanan, for the Appellant; M.V. Joseph, for the Respondent

Judgement

Balanarayana Marar, J.—The appeal is directed against the order of Insurance Court, Alleppey on Insurance Case No. 225 of 1982. Appellant is a Corporation fully owned by the Government of Kerala and covered by the Employees State Insurance Scheme. An Inspector of the Appellant Corporation after Inspection reported that Respondent had not paid contribution on certain items of payment. It was further reported that 7 security men who were in the "watch and ward staff were also not brought under the coverage of the scheme. Respondent was called up on to pay contributions on a sum of Rs. 20,13,354 paid by them to SIDECO, a Government Company who had undertaken a construction work of an additional building as well as on an amount of Rs. 3,81,150 paid for the construction of packing and work sheds. Respondent disclaimed liability to pay contribution for the reason that the additional factory building, the workshed and the packing shed were constructed by SIDECO on contract basis and that the entire amount had been paid to them. They had raised a further contention that the workers were engaged by SIDECO of their contractors. Dissatisfied with the reply of Respondent Appellant called upon Respondent to pay contribution. That order was challenged by Respondent before E.S.I. Court. That application was allowed finding that none of the employees of Respondent were engaged in the construction work and that contribution if at all to be paid has to be paid by

SIDECO who had undertaken to do the work employing their workers. The Court further observed that the insured persons are not identifiable and that there cannot thus be any beneficiaries. The Court found that Respondent is not liable to pay contribution. Hence the appeal.

2. That the contract work was undertaken by SIDECO, a Government Company employing their own workers is not disputed. An additional building for Respondent Company and packing and workshed were the constructions made. The E.S.I. Corporation claimed the contribution payable under the Act from Respondent who is alleged to be the principal employer. The short question that arises for consideration is whether the Respondent is liable to pay such contribution.

3. Before we proceed to consider the main question involved in this case it is appropriate to refer to the definition of the word "employee" in Employees State Insurance Act (For short the Act). Employee is defined in Section 2(9) thus:

"Employees" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and-

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with work of, the factory or establishment, whether such work is done by the employee in this factory or establishment or elsewhere; or

(ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;

and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment; but does not include-

(a) any member of the Indian naval, military or air forces; or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed (one thousand and six hundred) rupees a month;

Provided that an employee whose wages (excluding remuneration for overtime work) exceed (one thousand and six hundred) rupees a month at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period.

Three categories of persons come under this definition. They are:

- (i) Persons directly employed by the principal employer.
- (ii) Persons employed by or through an immediate employer; and
- (iii) Persons whose services are temporarily lent or let on hire to the principal employer.

Persons employed for wages on any work connected with the administration of the factory or establishment are also included in the definition. Any person whose wages exceed one thousand six hundred rupees per month is excluded from the definition. We are concerned with persons who are employed through an immediate employer since the construction work had been entrusted to a contractor. Immediate employer has been defined in Section 2(13) thus:

"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.

In order that a person employed by or through immediate employer to come within the definition of employee contained in the Act the following requirements must be satisfied.

- (i) He must be employed for wages in or in connection with the work of a factory to which the act applies.
- (ii) He is engaged on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment.

4. The question whether workers engaged for the construction of an additional building for expansion of a factory are employees as defined in the Act came up for consideration before the Madras High Court in *Employees' State Insurance Corporation Vs. Sri Sakthi Textiles (P) Limited*, . It was held that a factory means any premises including the precincts thereof where twenty or more persons are employed and where in any part of it a manufacturing process is being carried on. Putting up additional buildings for future expansion of the existing factory was found to be totally unconnected with the existing factory. For that reason it was held that the definition of employee would not bring within its purview persons who are employed in the construction of such additional buildings. The Supreme Court reversed that decision in *Regional Director, Employees' State Insurance Corpn., Madras Vs. South India Flour Mills (P) Ltd.*, . After referring to

the relevant sections of the Act and the decisions on this point the Supreme Court held that the work of construction of additional buildings required for the expansion of a factory must be held to be ancillary, incidental or having some relevance to or link with the object of the factory. It was further held that the expression "work of the factory" should be understood in the sense of any work necessary for the expansion of the factory or establishment or for augmenting or increasing the work of the factory or establishment. It was observed that such work is incidental or preliminary to or connected with the work of the factory or establishment. Reversing the decision of the Madras High Court it was held that the workers employed for the construction work of additional buildings for the expansion of the factories are employees within the meaning of Section 2(9) of the Act. In that case the Supreme Court was concerned with the category under Clause (i) of Section 2(9) viz. persons who are directly employed by the principal employer on a work connected with the work of the factory.

5. In the present case we are concerned with Sub-clause (m) since the workers were employed by or through an immediate employer, the contractor who had under-taken the construction work. Are these workers engaged on work which is preliminary to the work carried on in or incidental to the purpose of the factory is the further question that arises for consideration. The Supreme Court had occasion to consider this matter in *B.M. Lakshmanamurthy Vs. The Employees' State Insurance Corporation, Bangalore*, . The Appellant in that case and his brother are partners of a firm which is a factory as defined in the Act. There is another factory situated on Appellant's land which was leased out to two persons. Granite stones were brought from the quarry to the factory of those persons, viz. the contractors. They are cut and dressed in the said factory and thereafter sent to the factory of the Appellant where they are designed, polished and exported. The E.S.I. Corporation claimed contribution payable by the Appellant on account of the workers employed in the factory of the contractors. The E.S.I. Court decided against the Corporation. On appeal the High Court held that the contractors are the immediate employers and the Appellant was the principal employer. On appeal by special leave the Supreme Court held that the work in the two places has an intimate correlation and is a piece of an integrated whole and the said work by the contractors through their labour is ordinarily part of the work of the principal factory undertaken by the contractors. It is observed that the other factory is situated in the premises of the Appellant's factory which according to the definition clause include the precincts thereof. The two contractors were found to be immediate employers within the meaning of Section 2(13) and the workers employed for cutting and dressing the granite stones by the immediate employers are employees within Section 2(9)(ii) of the Act, being employed through the immediate employers on the premises of the factory including the precincts thereof. The Supreme Court further held that there is a definite environmental as well as fractional unity between the two portions, even though separated by a wall in which there was a door which sometimes was closed.

6. The workers in this case were engaged in the work of the additional constructions of the factory building as well as some sheds. As held by the Supreme Court in the decision cited above the construction work is one incidental or preliminary to the work of the factory. In any case the construction is one connected with the work of the factory. They were engaged by SIDECO who is the immediate employer. They had undertaken the execution of the construction which is incidental to the purpose of the factory. It cannot therefore be disputed that the contractor viz. SIDECO is the immediate employer coming within the definition contained in Section 2(13) of the Act. Persons who are employed through an immediate employer are included within the definition of employee contained in Section 2(9) of the Act. That being so the workers engaged by SIDECO for the construction are to be treated as employees under the Respondent and the wages paid to them are to be reckoned for the purpose of computing the contribution payable under the Act.

7. The next question that arises for consideration is whether the liability to pay contribution is on the immediate employer or on the principal employer. The liability to pay contribution is always on the principal employer Section 40 of the Act stipulates that the principal employer shall pay in respect of every employee, whether directly employed by him or through an immediate employer, both the employer's contribution and the contribution of the employee. This section imposes an obligation on the employer to pay the contribution of the employer and that of the employee in the first instance. The employer has a right of reimbursement from the employee or employees regarding his or their portion of the same. The liability to deduct the employees contribution is therefore on the employer and such contribution has to be deducted from the wages. If the employer fails to deduct such wages he can be made liable for the same. The only restriction imposed in Section 40 is that the employer can recover the contribution of the employee only by deduction from his wages and not otherwise. It is open to the immediate employer to deduct the contribution from the wages of his employees. Such contribution as well as the contribution payable by him has to be paid by the immediate employer. Incase the immediate employer fails to pay his contribution or collect the contribution of the workers employed by him the liability is that of the principal employer to pay the contribution of the employer as well as that of the employee engaged by the immediate employer. The remedy of the principal employer is to proceed u/s 41 of the Act which enables him to recover the amount of contribution so paid from the immediate employer either by deduction from any amount payable to him by the principal employer under any contract or as debt payable by the immediate employer. Section 41 makes it clear that the immediate employer shall be entitled to recover the employees contribution from the employee employed by or through him by deduction from wages and not otherwise. The immediate employer has therefore a duty to deduct the contribution of the workers engaged by him from the Wages paid to them and to pay the same together with his contribution to the Corporation. In case he fails to do so the principal employer

has to pay the same. The liability under the Act is on the principal employer even in respect of workers employed by or through an immediate employer. Such liability extends to the employer's contribution as well as the contribution of the employee. The principal employer cannot therefore escape from the liability by saying that the workers are engaged by the contractor.

8. Learned Counsel for Respondent has a contention that SIDECO, the contractor who undertook the work of construction is a Government Company and the persons employed by them are covered by the Act. No material is seen to have been produced before the Insurance Court either to show that SIDECO is covered under the Act or that the contribution had been deducted by them and paid to the Corporation. It is true that the Corporation cannot levy the contribution from the principal employer and the immediate employer. So long as the immediate employer has not been able to show that the contribution under the Act has been deducted from the wages of the workers employed by them and that the same had been remitted together with the contribution payable by them the Corporation can only look to the principal employer for those payments. The obligation to pay both contributions viz. the employer's contribution and the contribution of the employees is on the principal employer as per Section 40 of the Act. He can escape from the liability only if it is shown that the immediate employer had made the requisite contributions. It is seen from the impugned order that no evidence was produced by Respondent to show payment of contribution by the immediate employer. Appellant can make the claim only against Respondent who is the principal employer and that claim has to be sustained so long as discharge of the liability by the immediate employer has not been proved. The Court below has therefore committed a grave illegality in finding that Respondent is not liable to make the contribution. The action of the Appellant in proceeding against Respondent for realising the contribution payable under the Act is therefore justified. The impugned order is therefore liable to be set aside.

9. Respondent has a further contention that the workers were employed by SIDECO and that they had left the place on completion of the work. A list of the workers has not been furnished to the Respondent nor does it appear that Respondent has insisted SIDECO to furnish them with a list of the employees. The Insurance Court may be right in observing that the insured persons are not identifiable. But it is the duty of the Respondent to ascertain the names of the persons employed by the SIDECO for the construction of the work and then to deduct the contribution payable under the Act from the wages of those employees as well as to make that payment together with the contribution of the employer to the Corporation. That they had not maintained any list of the workers is no excuse from making the payments under the Act. Respondent shall ascertain the names of workers and the wages paid to them from SIDECO. Since SIDECO is a Government Company one would expect them to maintain registers and other records showing the names of the workers and the wages paid to them during the relevant period. It will be open to Respondent to get those particulars

from SIDECO.

10. Yet another contention raised by learned Counsel for Respondent deserves consideration. The contribution is alleged to have been claimed on the entire amount paid to the contractor. That amount was taken into account by Appellant to estimate the contribution payable. It cannot be disputed that the amount paid to the contractor includes cost of materials, wages paid to the workers, profit etc. Contribution cannot be levied on all these items. The wages paid to the workers are to be ascertained and the contribution to be determined on that amount. While doing so the wages paid to the workers whose wages exceed Rs. 1,600 per month are to be excluded. The authority has therefore to ascertain the wages paid to the workers. From out of the amount paid to the contractor the contribution can be levied only on the wages so paid.

In the result the appeal is allowed and the impugned order is set aside. Appellant is directed to determine the contribution payable by the Respondent under the Act in accordance with law and in the light of the observations contained in the judgment. In the circumstances parties are directed to suffer their respective costs.