
(1991) 01 KL CK 0020
In the High Court Of Kerala
Case No : M.F.A. No. 150 of 1986

E.S.I. Corporation

APPELLANT

Vs

Premier Timber Supplies

RESPONDENT

Date of Decision : 18-01-1991

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(2), 2(22), 2(9)

Citation : (1991) 63 FLR 861 : (1991) 2 KLJ 368 : (1993) 3 LLJ 886

Hon'ble Judges : U.L. Bhat, J;D.J. Jagannadha Raju, J

Bench : Division Bench

Advocate : C.S. Rajan, for the Appellant; M.V. Joseph, for the Respondent

Final Decision : Allowed

Judgement

Jagannadha Raju, J.—This is an appeal filed by the Regional Director, E.S.I. Corporation the first respondent in Insurance Case No. 73 of 1983 against the judgment dated 24.10.1985 in I.C. No. 73 of 1983 on the file of the Employees' Insurance Court, Alleppey.

2. The appellant, a partnership firm running Premier Saw Mills and Premier Timber Supplies filed Insurance Case No. 73 of 1983. It is a contention of the applicant that Premier Saw Mills is an establishment covered by the ESI Scheme, and that contributions are being remitted by the applicant regularly. It is claimed that the Premier Timber Supplies is a different and separate unit, and the effort of the first respondent to treat it as part and parcel of Premier Saw Mills and cover the employees of the Premier Timber Supplies is not proper. It is also claimed that the Insurance Inspector's claim regarding non-payment of contribution towards certain amounts is not correct. These amounts are classified as labour charges, and they are not wages. The Insurance Court accepted the applicant's case in part and rejected the claim regarding Premier Timber Supplies being a different unit and came to the conclusion that there is functional integrity and unity of work in respect of both the establishments, and therefore, all workers working in the two units should be brought under coverage of the

E.S.I. Scheme. It was found that a few employees who are regularly working under the contractor are not yet covered. The Court also came to the conclusion that the demand for contribution on repairs and maintenance, lorry hire charges, wages paid to temporary employees is not sustainable. The court came to that conclusion on the ground that those amounts were received by unknown and unidentifiable persons who cannot be covered now. Similarly elephant hire charges do not amount to wages. It should be excluded. No contribution can be claimed on that. The court directed the present appellant to make a re-assessment in the light of the observations in the judgment.

3. The appellant's counsel contends that even temporary and casual workers who worked for some time and went away are to be covered by the Act, and the fact that they are now unidentifiable is no ground to exclude the wages payable to them from the amount for which contributions are to be paid. The learned Standing Counsel contends that the definition of "employee" in Section 2(9) covers temporary workers and casual employees. He also contends that decisions have laid down that temporary and casual workers are also covered by the definition of "employee" and wages paid to them are liable for contribution. He further contends that even employees employed through a Contractor are covered by the Act and principal employer is liable to pay the contribution by virtue of Section 40. He places reliance upon Sections 2(9) 2(2) 2(13) and 38 - 43 and the General Regulations of 1950, particularly Regulations 36 and 39.

4. On behalf of the contesting respondent, Premier Timber Supplies, it is contended that as the labourers worked for a short period, and left the employment long ago, and as they are not identifiable at this stage, it would be unjust to demand contribution from the employer towards wages paid to them. He also contends that amounts shown as repair and maintenance charges, labour charges, lorry hire charges and wages paid to temporary employees are not liable for payment of contribution. Similarly elephant hire charges are only a hire amount, and they do not come within the definition of "wages". He contends that the judgment of the Insurance Court does not warrant interference.

5. It may at once be stated that the wages paid to attimari employees are wages paid not because they are employed voluntarily or out of volition, but because they are a sort of imposition on the employer, and it is sometimes a payment made without they actually doing any work or service. Hence the amount paid to attimari employees has to be excluded from the amount reckoned for computing the contribution. Similarly lorry hire charges and elephant hire charges are liable to be excluded. Hire charges for hiring elephants do not fall within the meaning of "wages" as defined in Section 2(22) of the Act. It is not an amount of remuneration paid or payable in cash to an employee. The definition of "employee" u/s 2(9) only contemplates any person employed for wages. It does not include elephants hired for doing certain work. Lorry hire charges have necessarily to be excluded because they do not fall within the definition of "wages".

6. The most important question that has to be considered in this appeal is whether the wages paid to casual and temporary employees who worked long ago, and left the employment, and who are unidentifiable now, are to be included in the amount on which the employer is liable to pay the contribution. The other question that has to be considered is whether the Premier Timber Supplies and the Premier Saw Mills can be considered as one single establishment for the purpose of the E.S.I. Act.

7. According to Section 2(12):

"'factory' means any premises including the precincts thereof 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 with the aid of power or is ordinarily so carried on....."

The amendment made to this Section includes a factory which is engaged for a period not exceeding 7 months in a year, and it also includes seasonal factories. The definition of "immediate employer" in Section 2(13) covers a contractor who through his employees under the supervision of the principal employer or his agent does whole or any part of the 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 any person who has entered into a contract of service with him temporarily. In view of these definitions the Insurance court rightly held that there is functional integrity and unity of work in respect of both the establishment and hence the Premier Timber Supplies is to be treated as part and parcel of the Premier Saw Mills, and the employees working in the Premier Timber Supplies are also covered by the ESI Scheme. It should be remembered that even workers employed through a contractor, that is the immediate employer, are covered by the Act, and u/s 40 the principal employer has to pay contributions in the first instance, and he has a right to recover contribution from the immediate employer u/s 41.

8. As regards the other aspect, whether temporary workers are covered by the Act and whether workers who had left the service, and who are now unidentifiable, are to be excluded, we have ample judicial authority to indicate that such workers are also covered by the Act and that contribution has necessarily to be paid on the wages paid to such employees. In *A.P.S.E. Board v. E.S.J.C.*, Hyderabad 1977 L.I.C. 316 a Division Bench of the Andhra Pradesh High Court categorically laid down in paragraph 17 at page 319 as follows:

"17. Both Clause (4) of Section 39 and Clause (3) of Section 42 establish beyond doubt that a casual worker is entitled to payment of contribution by the employer towards employer's contribution as well as employee's contribution, though he is employed even for a day or two or a few days in a week. The effect of these two clauses is emphatic enough to declare that the word "employee" as defined u/s 2(9) of the Act includes casual worker also."

A Full Bench decision of the Karnataka High Court in *E.S.I. Corporation., Bangalore v. Suvarna Saw Mills* 1979 L.I.C. 1335 (FB) lays down the law at page 1338 as follows :

"The definition of the word "employee" contained in Section 2(9) of the Act does not make any difference between a casual or temporary or permanent employee. It is wide enough to include even a casual employee employed for a day for wages. Therefore, every person who is employed for wages on any work connected with the work of a factory or establishment to which the Act applies except those exempted by the definition fall within the definition of the word "employee". Section 38 of the Act specifically states that all employees in factories or establishments to which the Act applies shall be insured in the manner provided by the Act."

Regional Director, ESI Corporation v. Fashion Fabrics 1990 2 CLR 842, dealing with the question whether temporary employees who did not pay employees' contribution are covered by the Act or not, and whether they are entitled to the benefits, observed as follows:

"....it is clear that the Employees' Insurance Court has held that the temporary employees are the employees who will come under the insurable employment. Being the employees coming within the meaning of insurable employment under the Act, there can be no dispute that these employees have to be insured under the Act. The question whether these employees are entitled to the benefits, since no contribution has been paid and they were not insured as mandated by the Act is not very relevant as far as this appeal is concerned. From the facts, it is clear that what was demanded by the appellant is contribution for the period the temporary employees were engaged by the respondent. As soon as an employee who will come under the insurable employment, it is the obligation of the employer, here the respondent, to comply with the provisions of the Act."

These observations of this Court also indicate that temporary employees are covered by the Act. This docs also deal with another aspect, viz., that under Sections 39 40 and 40(1) there is an obligation fastened on the principal employer to pay the contributions in the first instance. The primary liability to pay contributions is that of the employer. These observations are in tune with the Full Bench decision of the Karnataka High Court and the Division Bench decision of the Andhra Pradesh High Court.

9. A recent judgment dated 19.10.1990 of a Division Bench of this Court in M.F.A. No. 350 of 1985 dealt with the question whether temporary employees are covered by the definition of "employee" u/s 2(9). It also considered the question whether employees employed through a contractor are employees for whom the principal employer will have to pay contribution. The Bench decision also lays down that 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.

10. In view of these weighty pronouncements, it is quite clear that temporary employees as well as casual employees who may now be unidentifiable and employees employed through contractors are certainly covered by the Act, and the principal employer has the primary liability to pay contribution regarding the wages paid to them. The mere fact that no deductions were made from the wages does not absolve the principal employer from his liability to pay contribution to the Corporation.

11. In the view we have taken, we allow the appeal in part and hold that even temporary and casual employees who are now unidentifiable are covered by the Act, and they are undoubtedly employees of the first respondent herein, and they are covered by the Act. The Corporation while making a fresh assessment shall include those people and the wages paid to them for computing the contribution payable, by the first respondent. It is hereby made clear that the wages paid to attimari employees, lorry hire charges, elephant hire charges are not includible in the amounts for which contributions can be claimed. In other respects, the judgment of the Insurance Court is confirmed. Each party shall bear its own costs.