
(2013) 05 PAT CK 0034

In the Patna High Court

Case No : Miscellaneous Appeal No. 207 of 2009

E.S.I. Corporation, Deputy Director and Recovery Officer

APPELLANT

Vs

M/s. Hotel Nihar

RESPONDENT

Date of Decision : 17-05-2013

Acts Referred:

Employees State Insurance Act, 1948 — Section 44, 45, 45A, 45B, 45C

Citation : (2013) LabIC 2555

Hon'ble Judges : Akhilesh Chandra, J

Bench : Single Bench

Advocate : Sudhir Kumar Bijpuria, for the Appellant; Sanjeev Kumar, Vinay Kumar Datta and Kumar Manish, for the Respondent

Final Decision : Allowed

Judgement

Akhilesh Chandra, J.—This is an appeal preferred against the Judgment dated 22nd January, 2009 passed in E.S.I. Case No. 03 of 2003 by Presiding Officer, Labour Court & Authority under Employee's State Insurance Court, Patna. The respondents preferred a case before the court below seeking relief that applicant's hotel (Nihar) does not come under the purview of E.S.I. Act, consequently, the demands made above in Annexure-6 either in pursuance of Annexures-2 & 3 or in pursuance of Annexures-4 & 5 is illegal and baseless and further to restrain the operation of Annexures-6 & 3 relating to realization of the demands etc.

2. In paragraph-1(e) of the plaint, they have stated, "Whether having a Kitchen in the said hotel maintained only for the food arrangement of the staff of the hotel and for personal requirement of the management for their only personal use will cover the hotel as a factory or not?" And in paragraph-2, it is stated, "That the applicant's hotel is only a residential hotel having no arrangement of fooding either for their customers or guest or for the other general public and is only for the use of either the employees of the hotel or for the partners or his own guest who used to sit in the hotel for their personal purposes". And lastly in

paragraph-3, they are clear in their assertion, "..... The dispute is only that since there is a Kitchen, the applicant's hotel has been covered treating the same as a factory not an establishment". Apart from the grounds relating to date and manner of inspection by the authorities and submission of demand, period of limitation etc., all such assertions have specifically been denied by the appellants by filing written statement.

3. The Tribunal below on considering the materials allowed the case giving rise to the present appeal.

4. Learned counsel for the appellants vehemently contended that the establishment in question was a factory. Due inspections were made during which deep refrigerators etc. were also found. Number of employees etc. speaks a lot about the coverage under the Act, whereas, learned counsel for the respondent, besides taking the technical objections regarding the time and manner of inspection and information given, has contended that the hotel in question was exclusively residential and the same cannot be considered as a factory only because during the period of inspection, it is said that deep refrigerators were also found. All such contentions made above have been vehemently disputed by the learned counsel representing the appellants.

5. As is evident from the materials available on record and contentions of learned counsel, undoubtedly, the respondent is a hotel and on behalf of the plaintiff-respondent, two witnesses have been examined before the Tribunal below i.e. A.W. 1, namely, Binay Mohan Prasad, an accountant of the said hotel, who in cross-examination has clearly stated that "..... Meray yahan nasta, samosha, bread, omlet tatha pouch ka waiwastha hai. Meray yahan Beer ka waiwastha nahi hai Beer ka waiwastha nahi kiya jata hai.....". This statement of the witness relating to arrangement of break fast without any specific exception of such provision made only for the limited persons (owners and employees of the hotel) works the same applicable for all there may be or may not be arrangement for lunch and dinner, but if arrangement for breakfast which are to be prepared and properly maintained it cannot be said that the establishment was not a factory for the purposes of the Act. The main defence challenging the demand appears vanished by own witness of the plaintiff-respondent. Another witness examined as A.W. 2, namely, Aditya Ghosh, an employee of the hotel has come to cover up the damage done to the plaintiffs case by earlier witness and tried to say that "Grahak ke khane pinay ka intazam nahi hai" and he further admits that in inspection by the authorities were conducted earlier.

6. None of the owners or partners appeared/came as witness to support the contentions made in the plaint since the contentions regarding the hotel being residential having no arrangement for fooding is failed and court below without taking into consideration the evidence afore discussed has arrived at a finding and allowed the claim which is contrary to the materials available on record. This alone may be sufficient to annul the findings of the court below and allow the

appeal.

7. However, the court below apart from the oral evidence discussed above, the respondents have produced the following documentary evidence:-

Signature of Amur Shankar Sahay on Form-C1 (Ext-1) and on waived Letter no.-936 dt-4.10.2001 (Ext.-2), Observation sheet (Ext.-3), Form-C18 dt-7.10.2002 (Ext-4), Details of wages (Ext.-5), Form C-18 dt-7.10.2002 (Ext.-6), Form-C-19 dt-30.01.2003 (Ext.-7), Order of u/s-45-A (Ext.-8) and Notice of demand to defaulter dt-18.02.2003 (Ext.-9).

On the other hand, on behalf of the appellants, the following documents are produced:-

Inspection report dt-3.8.2001 on waived marked (Ext.-A), Survey report dt-15.10.1979 (Ext.-B), Inspection report from C-10 dt-25.02.1992 (Ext.-C), Letter dt-6.7.1992 of E.S.I. (Ext.-D), Observation sheet dt-3.8.2001 (Ext.-E) and Form C-11 dt-26.12.1979 (Ext.-F).

Besides the above solitary witness on their behalf, Birendra Kumar Sinha, the Assistant Director of the E.S.I. claiming of doing inspection of the hotel on 03.08.2001 and also stated about the earlier inspections made by the others and their reports are also on record.

8. It is evident from Exhibit-1 that during inspection in the month of November, 1979, one form under Regulation 10-B was submitted by the persons concerned with the hotel in question. Exhibit-2 is the notice demanding the contribution from April, 1999 to June, 2001 with interest with specific demand of relevant papers for the period 20th October, 1989 till March, 1999 with a clear warning that in absence of production of the required documents the recovery may be done after issuance C-18 on ad-hoc basis. Exhibit-3 is the observations made during inspection on 03.08.2001 on basis whereof contribution appears fixed. Exhibit-4 is a demand of sum of Rs. 3458/- to be paid within stipulated period. Exhibit-5 is details of wages. Exhibit-6 is reminder for payment of substantial amount mentioned therein. Exhibit-7 is C-19 stating some additional demand under the provisions of 45-Gha to 45-Cha of the Act. Exhibit-8 is order u/s 45-A of the Act dated 30th January, 2003. Lastly, Exhibit-9 is notice of demand against default dated 18th February, 2003 in Certificate No. P/42-4852-In II dated 30th January, 2003.

9. On the other hand, Exhibit-A is the inspection report of the year 2001 indicating earlier allotted Code No. 42-4852 to the hotel, and also observations in Column-18, provisions covered from 20.10.1989. Exhibit-B is the survey report of the year 1979. Exhibit-C indicates the details of inspection made earlier on 25.02.1992 for 1990-1992 and also indicate Code No. 42-4852-11 and non-compliance of earlier demands. Exhibit-D is demand notice dated 6/14.07.1992 with a warning for legal action if remained un-complied. Exhibit-E is another demand made in the year 2001. Exhibit-F is letter dated 26.12.1979, requesting

to comply the direction given therein any other inspection.

10. It is contended by learned counsel for the respondents that it was the corporation to move before the court under the Act within stipulated period for realization of the demands, if any, but on not doing so, it is barred by law of limitation.

11. The submissions made above cannot be accepted in face of decision of Apex Court in a case

Employees' State Insurance Corporation Vs. M/s. F. Fibre Bangalore (P) Ltd., , wherein, after considering the various provisions of the Act (The Employee's State Insurance Act, 1948) such as 45-A, 45-B and 75, which reads as such:-

45-A. Determination of contributions in certain cases.-(1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 or any [Social Security Officer] or other official of the Corporation referred to in sub-Section (2) of section 45 is [prevented in any manner] by the principle or immediate employer or any other person, in exercising his functions or discharging his duties u/s 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment:

[Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard]

[Provided further that no such order shall be passed by the Corporation in respect of the period beyond five years from the date on which the contribution shall become payable.]

(2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation u/s 75 or for recovery of the amount determined by such order as an arrear of land revenue u/s 45-B [or the recovery u/s 45-C to section 45-I].

45-B. Recovery of contributions.-Any contribution payable under this Act may be recovered as an arrear of land revenue.]

75. Matters to be decided by Employee's Insurance Court.-(1) If any question or dispute arises as to-

(a) whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution, or

(b) the rate of wages or average daily wages of any employee for the purposes of this Act, or

(c) the rate of contribution payable by a principal employer in respect of any employee, or

(d) the person who is or was the principal employer in respect of any employee, or

(e) the right of any person to any benefit and as to the amount and duration thereof, or

[(ee) any direction issued by the Corporation u/s 55-A on a review of any payment of dependant's benefits, or]

[***]

(g) any other matter which is in dispute between a principal employer and the Corporation, or between a principal employer and an immediate employer, or between a person and the Corporation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues payable or recoverable under this Act, [or any other matter required to be or which may be decided by the Employee's Insurance Court under this Act],

Such question or dispute [subject to the provisions of sub-section (2-A)] shall be decided by the Employee's Insurance Court in accordance with the provisions of this Act.

(2) [Subject to the provisions of sub-section (2-A), the following claims] shall be decided by the Employee's Insurance Court, namely:-

(a) claim for the recovery of contributions from the principal employer;

(b) claim by a principal employer to recover contributions from any immediate employer;

[***]

(d) claim against a principal employer u/s 68;

(e) claim u/s 70 for the recovery of the value or amount of the benefits received by a person when he is not lawfully entitled thereto; and

(f) any claim for the recovery of any benefit admissible under this Act.

[(2-A) If in any proceedings before the Employee's Insurance Court a disablement question arises and the decision of a Medical Board or a Medical Appeal Tribunal has not been obtained on the same and the decision of such question is necessary for the determination of the claim or question before the Employee's Insurance Court, that Court shall direct the Corporation to have the question decided by this Act and shall thereafter proceed with the determination of the claim or question before it in accordance with the decision of the Medical Board or the Medical Appeal Tribunal, as the case may be, except where an appeal has been filed before the Employee's Insurance Court under sub-section (2) of section 54-A in which case the Employee's Insurance Court may itself determine all the issues arising before it]

[(2-B) No matter which is in dispute between a principal employer and the Corporation in respect of any contribution or any other dues shall be raised by the principal employer in the Employee's Insurance Court unless he has deposited with the Court fifty per cent. of the amount due from him as claimed by the Corporation:

Provided that the Court may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this sub-section.]

(3) No Civil Court shall have jurisdiction to decide or deal with any question or dispute as aforesaid or to adjudicate on any liability which by or under this Act is to be decided by [a Medical Board, or by a Medical Appeal Tribunal or by the Employee's Insurance Court]

12. And in paragraph-5, of the aforesaid decision in case of "Employees" State Insurance Corporation (supra), it is held:-

5.... 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.

13. Another decision of Apex Court in a case E.S.I.C. Vs. C.C. Santhakumar, , considering the decision made in case of "Employees" State Insurance Corporation" (Supra), wherein, almost similar view has been taken that there is no limitation prescribed against realization of the amount due as contribution etc. from the employer. It is equally relevant to refer the decision of Andhra Pradesh High Court in a case Udipi Sri Anand Bhavan Vs. Regional Director, Employees" State Insurance Corporation, since the respondents have not at all challenged earlier demands but come only against the demands made in the year 2001. Thus, on overall careful consideration of the facts and circumstances, the impugned judgment is not sustainable. Accordingly, it is set-aside and the appeal stands allowed, on contest. However, there shall be no order as to cost.