

(1979) 07 KL CK 0008
In the High Court Of Kerala

E.S.I.C.

APPELLANT

Vs

Ayurvedic Industrial Co-op. Pharmacy

RESPONDENT

Date of Decision : 23-07-1979

Acts Referred:

Employees State Insurance Act, 1948 — Section 2

Citation : (1980) 2 LLJ 66

Hon'ble Judges : Subramonian Poti, J;Janaki Amma, J

Bench : Division Bench

Judgement

Subramonian Poti, J.—The question before us in this appeal is one which had come up before us on earlier occasions and in view of the fairly elaborate arguments addressed before us in this case we feel it appropriate to deal with the question in some detail in this appeal.

2. We had occasion to consider the question of coverage, under the provisions of the Employees State Insurance Act, of persons casually engaged. We held that such casual workmen are not within the scope of coverage under the Act. But we are afraid that in some cases before the Employees Insurance Courts of the State our decision has not been applied in its true spirit. That is possibly because the use of the term "casual labour" in that context has not been properly understood in such cases by the Employees State Insurance Court. That is the reason why we propose to deal with the question here, now that the question is raised before us in this appeal.

3. The appellant before us is the Regional Director of the Employees' State Insurance Corporation. The complaint is that the Employees Insurance Court was in error in holding that the employees of the applicant were not liable to be covered merely because they were employed for a short period. The applicant was a Co-operative Pharmacy engaged in the manufacture and sale of Ayurvedic medicines. According to the applicant the regular employees were only 9 in number and they had to employ temporarily more number of persons during a period of about 20 to 25 days on account of the fact that they obtained an order

from the State Government for supply of medicines. To cope with that order they had to manufacture more medicines than was normal. It was on that account that they took into service some more employees for a period of 20 to 25 days. These persons were not, according to the applicant, liable to be covered as they were casual employees or casual workers. That plea seems to have appealed to the Court. Consequently it has been found that the applicant had not employed the required number of workers in the factory calling for coverage.

4. It was in the decision in A.S. 789 of 1972 and 55 of 1973 that we happened to notice that a casual worker would not come within the scope of the Act. But after considering the case we observed there that "a casual worker of the nature with which we are concerned in these cases"" would not be an employee. The relevant part of the judgment is in paragraph 4 which runs thus:

The very term "employ" means "keeping a person in service". It is different from engagement which may be of a casual nature. A person employs his driver, his gardner, his house keeper and ayaah for the children. But in that sense a person does not employ workmen who are engaged casually to take goods from the shop to the residence, or to do such other work which is of a casual nature. The mere fact that wages are paid for a particular item of work does not create a relationship which may properly be termed as that of an employee. In other words every engagement is not an employment. Employment excludes such engagements as are of a casual nature. That is quite in keeping with the spirit of the Act, for, the Act envisages contribution by the employer as well as the employee and the benefit to be conferred upon such employee in the form of medical, maternity and other amenities. That being the case we do not think that a casual worker of the nature with which we are concerned in these cases would be an employee in whose case coverage is called for.

5. We referred to the above decision in E.S.I. Corporation v. United Electrical Industries (1975) KLT 714. We said in that decision thus:

The mere fact that certain workmen are referred to as casual workmen does not, of course, determine their character but if, from the facts, it is found that they are not "employed" by the employer but are mainly engaged for casual labour, then, of course, there is no scope for demanding contribution in respect of such workmen.

6. We had occasion to consider this in the decision in President, K.P. Co-operative Society v. E.S.I. Corporation (1975) KLT 670. We said thus in that decision:

"Employment" denotes a larger concept than what is denoted by the term "engagement". This Court had occasion to consider this question and to observe that in the case of a casual worker it may be said that he is engaged whereas employment connotes a master and servant relationship and the concept of a non-casual service. An apprentice is allowed to work in order that he may learn the trade. In fact he is a student and the premises are his training ground. Even if he is paid any allowance it would not be "wages" as the term is defined in

Section 2(22) of the Act for such wages should be remuneration paid or payable in terms of the conditions of employment. This necessarily suggests the idea that the payment is that which the person executing the work can claim as of right as return for the work he does. In the case of an apprentice though he may also assist in the work of the factory and he may also turn out work it is not to get such out-turn that he is permitted to work but to enable him to learn the trade. He may be given some incentive such as the prospect that he may be absorbed in the establishment and his training in the establishment may stand him in good stead elsewhere. While it may be said that he is working in the factory it cannot possibly be said that he is employed for wages in the factory as in the case of a workman in the factory. It is in this context that we have to notice that the Legislature which was aware of the definition of the term "workman" in the Industrial Disputes Act, 1947 did not include the term "apprentices" also in the definition in another subsequent enactment relating to labour relations. Possibly this circumstance may be of assistance in considering the scope of the term "factory". We are not to be understood as stating that in every situation where the term "apprentice" is used what we have said would necessarily follow for there may be instances where a workman or employee may be disguised as an apprentice. Should there be any controversy that though such a one is styled as apprentice he is really not one as the term is understood but is really a workman or an employee that would necessitate the examination of the relationship between such apprentice and employer in that case to determine whether the real relationship is of master and servant or of teacher and pupil. Since there is no controversy in the case before us that the apprentice who was entertained was really not an apprentice but was "employed" as is generally understood we need not go into the question.

7. It has been argued before us by Sri Sankaran Nair learned Counsel for the corporation that to may not be right in indicating that master and servant relationship is a distinguishing feature of employment which falls within the coverage of the Act. In other words whether a person is a casual workman or not is not to be determined on the basis of existence or otherwise of a master and servant relationship. We have also been addressed on the question whether length of the period of service is a relevant factor.

8. We had attempted to highlight on earlier occasions that every engagement need not necessarily be employment. There may be engagements which may not amount to service and so long as it is not service by one under another there is no question of a relationship calling for coverage under the Act. This does not mean that the service must be under the person who is called upon to effect coverage under the Act. But the person whose coverage is called for must be a person who is kept in the service of another or in other words who is employed by another. We can envisage many instances where a person does work for another without entering into his service, and on the basis merely of a contract to carry out such work. No doubt service is also a contractual relationship. But where there is no case of a person entering into the service of another but

nevertheless he is governed by a contractual obligation in executing a particular work such person is not "employed" within the concept of the Employees State Insurance Act. A porter, for instance, no doubt does the work of the passenger for wages. But he is not an employee of the person whose work he does. A plumber called in to repair is no doubt paid for his work but for that reason he does not enter into a contract of service or employment. Instances need not be multiplied. Actually in practice it is easy to distinguish between a case where a person who is paid wages for his work is so paid not because of an express or implied contract of service entered into by him and a case where a person is employed in service and wages paid to him. In the latter case there is relationship of master and servant, while in the former the person who is paid wages is evidently not in the service of another. One of the main distinguishing features may be said to be disciplinary control. When a person is in the service of another however short the period of service may be he is under the disciplinary control of the other to the extent such service calls for such control. But in the case of a person who is not in the service of another there is no disciplinary control and the relationship is governed by the obligations arising under the contract of engagement.

9. Casualness is not to be determined on the basis of length of service. A person may be taken into service, say, for a week, still he would be one in service. The shortness of the period does not render it any other than service. A person may work for another without entering into his service for more than a week. The period need not necessarily indicate that he is in the service of the other. The "casualness" we have referred to in our earlier decisions is not necessarily related to the length of the period of work.

10. We do not think that the High Court of Andhra Pradesh in the decision in *Andhra Pradesh State Electricity Board Vs. Employees' State Insurance Corporation*, , has taken a view different from the view taken by our High Court though a casual reading of the headnote may indicate so. The term "casual labour" has been used in that decision in a sense different from that in which we happened to use it. The term casual labour was used there to distinguish it from regular labour. The question there was whether persons employed for short periods would be liable to be covered by the Act. The contention raised in that case was that the purpose of the Act may not be promoted by calling for coverage of persons who had been employed for very short periods. But the Act itself indicates that length of time is not relevant Section 2(9) defines "employee" thus:

"Employee" 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 the work of, the factory or establishment, whether such work is done by the employee in the 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 the 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.

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

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed five hundred rupees a month:

Provided that an employee whose wages (excluding remuneration for overtime work) exceed five 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;

Section 2(12) defines factory thus:

"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 but does not include a mine subject to the operation of the Mines Act, 1952 or a railway running shed;

"seasonal factory" means a factory which is exclusively engaged in one or more of the following manufacturing processes, namely, cotton ginning, cotton or jute pressing, decortications of groundnuts, the manufacture of coffee, indigo, lac, rubber, sugar (including gur) or tea or any manufacturing process which is incidental to or connected with any of the aforesaid processes and includes a factory which is engaged for a period not exceeding seven months in a year--

(a) in any process of blending, packing or repacking of tea or coffee; or

(b) in such other manufacturing process as the Central Government may, by notification in the Official Gazette, specify;

The expressions "manufacturing process" and "power" shall have the meanings respectively assigned to them in the Factories Act, 1948;

The term "employee" is related to factory and the term "factory" takes in any premises whereon twenty or more persons are employed or were employed for

wages on any day of the preceding twelve months. Therefore, even if on one day the number exceeds the one specified it would be a factory. If an establishment falls within the definition of factory by reason of the fact that for a few days in the year the number of person employed are sufficient to bring it within the term " factory " it must necessarily follow that the employment of such number of persons even for a day is significant or relevant. The High Court of Andhra Pradesh rightly took the view that merely because the employees were employed for a short period it cannot be said that they are not liable to be covered. No doubt because of the shortness of the period such employees were referred to as casual labourers and if that term is understood in that sense no doubt they are liable to be covered. In fact in the case before us too the Employees Insurance Court has understood the term "casual labourers" in the sense in which the Andhra Pradesh High Court used that expression, but applied the decision of this Court wherein the term was used in a slightly different context and sense.

11. Though the decision in *E.S.I. Corporation v. Gnanambika Mills* (1974) Lab. I.C. 798 , may appear to be in agreement with the view taken by this Court in the cases to which We have adverted we think it is really not so. If the Madras High Court is to be taken to have said that a person who was employed in service for a short period would not be liable to be covered under the Act because the Act provides for certain benefits to the employees in case of sickness, maternity and other matters, which benefits could not have been intended to be extended to employees serving for a short period, we cannot agree. On the other hand if what the Court purported to lay down in the decision was that if the employment was of a casual nature in the sense there was no case of any person being taken into service of another for that short period we may agree with the view taken by the Madras High Court. In *Regional Director, E.S.I.C., Bangalore Vs. Davangere Cotton Mills*, a Division Bench of the Karnataka High Court has expressed its agreement with the view taken by the Andhra Pradesh High Court in *A.P.S.E. Board v. E.S.I. Corporation*, (supra). That was a case where the employment of casual workers had become necessary as the compound wall of the factory had come down and some repairs had to be effected to the main building of the factory. The wages of such workers amounted in all to about Rs. 4,500. But that represented only one percent of the total wages disbursed during the relevant period. These persons were not found to be covered by the Employees State Insurance Court. After considering the decisions on this question the Karnataka High Court agreed with the view taken by the Andhra Pradesh High Court in *A.P.S.E. Board v. E.S.I. Corporation* (supra). From the facts of the case in the decision of the Karnataka High Court it is not evident that exactly was the nature of the relationship between the workmen and the employer.

12. We make it once again clear that the use of the term "casual labour" need not necessarily be taken to be determinative of the question. It is neither the length of time for which a person serves nor the manner in which parties choose to refer to such service that would be relevant. The question would be whether

there was a contract of service resulting in the relationship of master and servant. In the absence of this there would be no scope for coverage.

13. The result is that the appeal stands allowed. The matter is remitted back to the Employees State Insurance Court to consider the question of coverage of the employees in the light of what has been said in this judgment No costs.