
(1997) 09 MAD CK 0051
In the Madras High Court
Case No : C.M.A. No. 161 of 1989

E.S.I.C.

APPELLANT

Vs

Ditty Knitters

RESPONDENT

Date of Decision : 08-09-1997

Acts Referred:

Employees State Insurance Act, 1948 — Section 2, 2(22), 2(9), 75

Citation : (1998) 79 FLR 452 : (1998) 1 LW 190 : (1998) 1 MLJ 719

Hon'ble Judges : N.V. Balasubramanian, J

Bench : Single Bench

Advocate : Miss Radha Srinivasan, for the Appellant; S. Raveendran, for the Respondent

Judgement

R. Balasubramanian, J.—The appellant in this appeal is the respondent in E.S.I.O.P. No. 41 of 1987 on the file of the District Judge,

Coimbatore (Employees State Insurance Court). The respondent in this appeal is the petitioner in that proceedings. In this Judgment, the parties to

this appeal are referred to in the same rank in which they are described in the original proceedings before the Employees State Insurance Court.

2. The dispute relating to payment of contribution arose in respect of payments made to carpenters, cart man ,persons entrusted with the work of

stitching the materials given by the petitioner and the amount paid to Sampathkumar and Krishnakumar. The petitioner is a partnership concern

engaged in the business of manufacture of hosiery items. The disputes raised by the petitioner in the above proceedings was opposed by the

respondent. The Insurance Court, after going through the materials placed before it found that the petitioner is liable to contribute in respect of

payments made to carpenters and cart man .No appeal has been filed by the

petitioner before the lower court against that finding of the Insurance Court. Therefore, it had become final.

3. The only surviving dispute in this appeal is with reference to the payments made to the persons who were entrusted with the work of stitching and the payments made to Sampathkumar and Krishnakumar. As far as the payments made to the persons entrusted with the work of stitching, it would be useful to refer to the relevant allegations made in the petition filed u/s 75 of the Employee's State Insurance Act (hereinafter referred to as "the Act") before the Insurance Court.

The petitioner incurred certain expenses towards stitching the hosiery products. The petitioner, entrusted the materials to some outside independent agencies to carry out stitching work. Those agencies after completing the work of stitching in their own premises, returned the stitched items and submitted their bills for the charges therefore. These amounts are not wages paid to the employees of the petitioner concerned and hence do not constitute wages for contribution. The petitioner accounted these charges and expenses incurred towards stitching work under the head "Stitching Charges" in its books of accounts.

It is seen from the allegations made in the petition as extracted above, that there is no whisper at all that they had no supervision of the work entrusted by them to the outside agencies for stitching. The fact that the petitioner entrusted the materials to outside agencies for the purpose of stitching and made payments to those people in regard thereto, is not at all disputed by the respondent. However their case, is even then in respect of those payments as well, the petitioner, being the employer, is bound to make the contribution. In this connection, my attention is drawn to Sec.

2(9) of the E.S.I. Act which defines the term "employee". Sub-clause (i) of Sub-sec. (9) of Section 2 of the Act is not attracted to the facts of this case since it is established not only from the exhibits produced by the petitioner but also from Ex. B-1 inspection report that this stitching work is entrusted by the petitioner to the outside agency. Therefore, the question whether the persons who were entrusted with the work of stitching would come within the definition of the word "employee" would have to be decided in the context of Sub-clause (ii) of Sub-section (9) of Section 2 of the Act. The above referred to sub-clause is extracted hereunder :

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)

(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"".

A reading of the above extracted sub-clause would show that persons who are not covered under Sub-clause (i) of Sub-sec. (9) of Section 2 of

the Act can be brought within the definition of "employee" only when the following things are established viz.

(a) The person should be employed by or through an immediate employer on the premises of the factory or establishment

Or

(b) 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.

Stitching the materials, which in this case are banians and vests is definitely, ordinarily part of the work of the petitioner's establishment and there

cannot be any dispute about it. There is no material in this case to hold that the outside agencies are doing the stitching work in the premises of the

petitioner's establishment. Therefore, requirement (a) above referred to is also not attracted. Then, one has to consider whether the work of

stitching is under the supervision of the principal employer or his agent. What is meant by the word ""supervision"" would vary from industry to

industry and it will also vary according to the nature of the work. In this context, learned counsel appearing for the respondent did not dispute and

is not in a position to dispute that the petitioner had a right of rejection of the completed material once it comes to them. In fact Ex. P-11 is a bill

stated to be made on the petitioner by an outside stitching agency. This bill is raised for Rs. 5,870.10. It is seen in this bill itself that a sum of Rs.

2,902.74 is deducted from the bill amount and only a sum of Rs. 2,967.36 was passed. Therefore, this amply establishes the fact that the petitioner

has a right of rejection.

4. Learned counsel appearing for the respondent in this appeal would argue that from the mere fact that the petitioner has a right of rejection, it

would not by itself amount to the work being carried out under the supervision of the principal employer or his agent on work.

5. Miss Radha Srinivasan, learned counsel appearing for the appellant in this appeal brought to my notice a judgment of the Honourable Supreme

Court of India in the case of P. M. Patel & Sons v. Union of India, . The Supreme Court in the said Judgment, while dealing with the term

employee"" as defined u/s 2(f) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 held as follows :

To be an employee it is necessary that the relationship of master and servant should exist with the employer. In the context of the conditions and

the circumstances in which the home workers of a single manufacturer go about their work, including the receiving of raw material, rolling the

beedies at home and delivering them to the manufacturer subject to the right of rejection there is sufficient evidence of the requisite degree of

control and supervision for establishing the relationship of master and servant between the manufacturer and the home worker. The work of rolling

beedies is a simple operation which is performed by thousands of illiterate workers, by young and old, men and women, with equal facility and it

does not require a high order of skill. In the circumstances, the right of rejection can constitute in itself an effective degree of supervision and

control. The fact that the rejection takes place in the presence of the home workers plays a merely supportive role in determining the existence of

the relationship of master and servant. Though it is open to home worker to get the work done by one or the other member of his family at home,

the absence of the element of personal service is of little significance when the test of control and supervision lies in the right of rejection"".

6. As against the judgment of the Honourable Supreme Court of India referred to above, learned counsel for the respondent brought to my notice

another judgment of the Honourable Supreme Court of India in C. E. S. C. Ltd. etc. v. S. C. Bose & Ors. 1992 I CLR 932 decided under the

provisions of E.S.I. Act. This case had considered the earlier judgment of that court reported in . The facts available in the last referred to

judgment of the Supreme Court is that the Calcutta Electricity Supply Corporation engaged various contractors to carry out the work of excavation, conversion of overhead electric lines and laying of underground cables under public roads, as well as for repair and maintenance of the aforesaid works. There are written contracts between the C.E.S.C and various electrical contractors to whom the works above referred to were entrusted. These electrical contractors got the work done by engaging their own men. The question that arose for consideration was whether the workers employed by the electrical contractors would come within the definition of "employee" as provided for under Sub-sec. (9) of Section 2 of the E.S.I. Act. It was proceeded on the basis that C.E.S.C. had a right of supervision, and therefore, the workers employed by the electrical contractors could be brought under Sub-clause (ii) of Sub-sec. (9) of Section 2 of the Act. Considering the written contract between the parties the Honourable Supreme Court of India held that the work completed by the electrical contractors have to be carried out under the direct supervision of a person holding a valid certificate of competency and the holder of that licence shall maintain a register of supervision and workmen in the prescribed form and shall produce the register for inspection on demand by an electrical inspector or other person authorised in this behalf by the licensing Board. The contract also provides that on the completion of any electrical installation work within the purview of Rule 45(1) of the Indian Electricity Rules, 1956, a test report in that form prescribed by the Board shall be submitted by the holder of this licence to the Secretary.

On those facts the Honourable Judges of the S.C. held after referring to P. M. Patel & Son's case, as follows :

In whatever manner the word "employee" u/s 2(9) be construed, liberally or restrictedly, the construction cannot go to the extent of ruling out the function and role of the immediate employer or obliterating the distance between the principal employer and the immediate employer. In some situations he is the cut-off. He is the one who stumbles in the way of direct nexus being established, unless statutorily functioned ,between the employee and the principal employer. He is the one who in a given situation is the principal employer to the employee, directly employed under him. If the work by the employee is conducted under the immediate gaze or overseeing of the principal employer, or his agent, subject to other

conditions as envisaged being fulfilled, he would be an employee for the purpose of Section 2(9). Thus besides the question afore-posed with

regard to supervision of the principal employer, the subsidiary question is whether instantly the contractual supervision exercised by the immediate

employer (the electrical contractors) over his employee was exercised, on the terms of the contract, towards fulfilling a self-obligation or in

discharge of duty as an agent of the principal employer.

P. M. Patel's case, , can also be of no help to interpret the word "supervision" herein. The word ""as such"" is not found employed in Section 2(f) of

the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, but found used in the text of the judgment. It appears to have been used

as a means to establish connection between the employer and the employee, having regard to the nature of work performed. But what has been

done in Patel's case cannot ipso facto be imported in the instant case since the word "supervision" in the textual context required independent

construction. In the ordinary dictionary sense ""to supervise"" means to direct or oversee the performance or operation of an activity and to over-see

it, watch over and direct. It is work under eye and gaze of someone who can immediately direct a corrective and tender advice. In the textual

sense "supervision" of the principal employer or his agent is on "work" at the places envisaged and the word "work" can neither be construed so

broadly to be the final act of acceptance or rejection of work nor so narrowly so as to be supervision at all times and at each and every step of the

work. A harmonious constructions alone would help carry out the purpose of the Act, which would mean moderating the two extremes. When the

employee is put to work under the eye and gaze of the principal employer, or his agent, where he can be watched secretly, accidentally, or

occasionally, while the work is in progress, so as to scrutinise the quality thereof and to detect faults therein, as also put to timely remedial

measures by directions given, finally leading to the satisfactory completion and acceptance of the work, that would in our view be supervision for

the purpose of Section 2(9) of the Act. It is the consistency of vigil. The proverbial "a stitch in time saves nine". The standards of vigil would of

course depend on the facts of each case"".

7. Therefore, it is clear that the judgment of the Honourable Supreme Court of

India reported in C.E.S.C. Ltd. etc. v. S. C. Bose & Ors. and

referred to above alone would be the guiding factor in this case to find out the question whether the payments made by the petitioner to the outside

agencies, to whom the stitching work was entrusted to, could be taken as wages for the purpose of demanding contribution. I have already

extracted the relevant portion of a pleading in this case with reference to the payment made by the petitioner to the outside agencies. To reiterate I

would like to point out that there is no whisper at all anywhere in the entire length and breadth of the petition that in respect of stitching work

entrusted to outside agencies the petitioner had no supervision over the work. It is not as though the petitioner is not aware as to what is meant by

supervision"". Why I say this is, because the dispute was also raised by them with reference to the payments made to the carpenters. In that

context, the pleading raised is extracted hereunder :

The carpenters in their workshop carry out the work with their own men over whom the petitioner had no control of supervision, and as such

these expenses towards wooden boxes purchased are not wages within Section 2(22) of the Act"".

In the grounds raised in the petition relating to stitching charges, it is raised in the following terms :

The respondent ought to have held that the work of stitching of hosiery items was entrusted to outside independent agencies over whom the

petitioner has no control, and the charges paid to them are not wages paid to the employees of the petitioner and hence does not attract the

contribution under the Act"".

No other material whatsoever had been placed before the E.S.I. Court to decide the issue one way or the other. The documentary evidence

produced by the petitioner also does not throw any light on this aspect. No witnesses were examined on the side of the petitioner to establish the

fact whether the petitioner had any supervision or not over the work done by the outside agencies. Neither a written contract is pleaded nor any

terms in respect thereof are mentioned. Therefore, the E.S.I. Court is left only with the bare pleadings alone without any further proof on that

aspect. Honourable Supreme Court of India in the judgment reported in C. E. S. E. Ltd. v. S. C. Bose, had discussed at length while elaborating

on the word ""supervision"" as found in the Act itself. It is useful to once again extract here the relevant portion of what is said by the Honourable

Judges of the Supreme Court in that judgment :

In the textual sense "supervision" of the principal employer or his agent is on "work" at the places envisaged and the word "work" can neither be

construed so broadly to be the final act of acceptance or rejection of work, nor so narrowly so as to be supervision at all times and at each and

every step of the work. A harmonious construction alone would help carry out the purpose of the Act, which would mean moderating the two

extremes"".

If the facts available in the case on hand are looked into, I am unable to find any circumstances which may lead to the conclusion that the petitioner

before the E.S.I. Court had no right of supervision in the work entrusted by them to the outside agencies. However, the E.S.I. Court had come to

the conclusion that when the work is done by the outside agencies, neither the petitioner nor his servants were supervising, it is a mystery. This

observation, which led to allowing the dispute in favour of the petitioner on this point, is without any evidence, and therefore perverse. As already

stated by me, the judgment in P. M. Patel's case, referred to supra and relied on by the learned counsel for the appellant, may not be of any use at

all to decide the issue in this case. But, however, the later judgment of the Supreme Court cited before me by the learned counsel for the

respondent had helped me a lot in understanding what meaning I should attach to the word ""supervision"" as found in Sub-clause (ii) of Sub-section

(9) of Section 2 of the Act. Under these circumstances, I am of the opinion that the finding rendered by the Tribunal answering the question

whether the payment made by them to the outside agencies for work entrusted to them would not be taken as wages appears to be illegal on the

face of it, as there is absolutely no evidence to support such a finding. Therefore, I have no hesitation in accepting the arguments advanced by the

learned counsel for the appellant and accordingly this appeal is allowed. There is no order as to costs.