(1994) 08 BOM CK 0019

In the Bombay High Court

Case No : F.A. No. 2574 of 1983

E.S.I.C. — APPELLANT

Vs

Indian Sewing Machine Co. Ltd. — RESPONDENT

Date of Decision : 10-08-1994

Acts Referred:
Employees State Insurance Act, 1948 — Section 1(5), 2(2), 2(9), 9

Citation : (1995) 1 BomCR 342 : (1994) 96 BOMLR 161 : (1995) 2 LLJ 514

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : R.M. Jayakar, instructed by M.V. Jayakar and Co, for the Appellant; P.K. Rele and P.M. Shah for A.M. Vernekar, for the Respondent

Final Decision : Allowed

Judgement

D.R. Dhanuka, J.—The Employees'' State Insurance Corporation has preferred this appeal against order dated April 29, 1983 passed by the Employees'' Insurance Court, Bombay in Application (ESI) No. 27 of 1979. By the impugned order under appeal, the trial Court held that the head office/principal office and warehouse of the applicant company were not covered under the Employees'' State Insurance Act, 1948. By the said order, the trial Court further held that the establishments mentioned in para. 6 of the application (Exhibit C-1) were also not amenable to coverage under the said Act. By the said order, it was further declared that the applicant company was not required to comply with any provisions of the E.S.I. Act and/or the Scheme and/or the Regulations framed thereunder in respect of or in relation to any of the concerned establishments or the persons employed therein till the time the position disclosed in the application (Exh. C-1) subsisted.

2. Indian Sewing Machine Co. Ltd. is a Corporation organised and existing under the laws of the Stale of New Jersey, U.S.A. having its principal office of business in India at 207, Dr. Dadabhoy Naoroji Road, Bombay. The said company was formerly known as Singer Sewing Machine Company. The respondent is engaged

in the business of marketing of industrial sewing machines and domestic sewing machines and their accessories etc. The respondents do not have and never had a "factory" within the meaning of Employees'' State Insurance Act, 1948. The respondent has several establishments situate in the State of Maharashtra and other parts of India.

3. On September 18, 1978, the Government of Maharashtra issued a notification bearing No. ESI, 1677/3910/PH-15. By the said notification, the provisions of the Employees'' State Insurance Act, 1948 were extended to various classes of establishments mentioned in column 1 of the Schedule appended thereto in the areas specified in column 2 of that schedule. The said notification was issued u/s 1(5) of the Act. By the said notification, "shops" wherein 20 or more employees are employed or were employed for wages on any day of the preceding twelve months were covered by and under the provisions of the said Act if the establishment was situate within the limits of Municipal Corporation of Greater Bombay and within the talukas of Thane district as specified in the said notification.

4. At the head office of the respondent, the respondent employed about 170 employees at the material time out of which about 55 employees were employed on wages of Rs. 1000/- or less. The business of the respondent including the marketing activity was mainly conducted from the said head office. Along with the said head office, the respondent also had a shop situate in the said premises i.e. 207, Dr. Dadabhoy Naoroji Road, Bombay wherein 19 employees were employed at the relevant time.

5. Apart from the said head office and the said shop situate at 207, Dr. D.N. Road, Bombay, the respondents have several other shops situate at various places in the city of Bombay, Thane, Pune and Nagpur employing three to four employees at the said shops. At the material time, the respondent also had a warehouse situate on 14, Thane Street, Carnac Bunder, Bombay, employing 8 employees at the said warehouse. The establishment of the respondent known as head office was got registered by the respondent as a "commercial establishment" under the Bombay. Shops and Establishments Act, 1948. Each of the shops referred to in para 6 of Application (ESI) No. 27 of 1979 was separately registered as a shop under the provisions of the said Act and the warehouse prescribed at serial No. 10 of para 6 of the said application was got registered separately as a commercial establishment under the said Act.

6. Disputes and differences arose between the parties in respect of interpretation of the word ''shop'' used in the said notification dated September 18, 1978 and the coverage of the head office or the shops or the warehouse by or under the provisions of the Employees'' State Insurance Act, 1948. It was the contention of the respondents at the material time that the head office was not covered by the said notification as it was an administrative office and not a "shop". It was the contention of the respondents at the material time that the warehouse referred to at serial No. 10 of para 6 of the above referred application was neither a shop

nor a commercial establishment and was therefore not covered on any view of the matter. It was also the contention of the respondent that each shop described at serial Nos. 1 to 9 in para 6 of the said application was a separate independent unit and these shops were also not covered under the said Act as the number of employees employed at these shops were less than 20. It was the contention of the appellant Corporation at the material time that the number of employees employed at the head office and the shops and warehouse were liable to be aggregated and the head office as well as each of the 10 establishments referred to in para 6 of the application were covered under the Act. It was also contended by the appellants at one stage that these shops were liable to be considered as branches of the head office. An attempt was also made to cover all the establishments under the Act by relying on the doctrine of "clubbing" of various establishments where functional integrality between different establishments was established.

7. On May 10, 1979, the respondent filed the above referred application before the trial Court seeking a declaration that the provisions of the Act did not extend to and/or cover the head office and/or any of the other establishments of the respondent situate within the limits of Municipal Corporation of Greater Bombay and/or Thane, Taluka of Thane District and at different places outside the State of Maharashtra and more particularly the establishment described in paras 6 and 7 of the application. By para. 18 of the written statement of the appellant before the trial Court it was prayed that the trial court be pleased to hold and declare that the principal office/head office/warehouse/shops etc. were all covered under the provisions of the Act with effect from November 12, 1978 and the respondent employer was required to cover all their employees under the said Act. At the trial of the said application, oral and documentary evidence was led by the parties. One Shekhar Barkur Shetty was examined as a witness on behalf of the respondents. No oral evidence was led on behalf of the appellant Corporation. During his examination-in-chief, the said witness stated that none of the establishments detailed in para 6 of the application were inter-connected or dependent on any other establishment. The said witness stated that each of the establishments operated separately and independently. During the course of his cross-examination, the said witness stated that the goods received by the respondents are first stored in their warehouse from where orders for different locations are executed. It was stated that each shop was having a Managing Salesman duly appointed by the head office. All appointments v/ere made by the head office. Salary is paid to the employees at these shops from the head office. It was admitted that all these shops were centrally administered by the head office. Each shop maintains separate accounts. All the accounts maintained by each shop of the respondent are consolidated.

8. It is common knowledge that prior to recent Supreme Court judgments various High Courts including our High Court have taken a narrow view in respect of meaning of the word "shop". The view taken was that the expression "shop" used in the above referred notification meant a house or building where goods

were purchased or sold. In the case of M/s. International Ore and Fertilizers (India) Pvt. Ltd. Vs. Employees'' State Insurance Corporation, , the Supreme Court held that the expression "shop" meant a place of business or place where one''s ordinary occupation was carried out. In the case of M/s. Cochin Shipping co. Vs. E.S.I. Corporation, , the Supreme Court held that the establishment of clearing and forwarding agent was liable to be treated as a shop within meaning of the above referred notification. In this case also, the Supreme Court held that the expression "shop" was not liable to be construed literally particularly as Employees'' State Insurance Act was a welfare legislation. The Bombay High Court had taken a similar view in the case of AIR 1994 1154 (SC) , the Supreme Court held that the office premises of an advertising agency was liable to be considered as a "shop" within the meaning of the above referred notification. By its judgment delivered in the said case, the Supreme Court reversed the view taken by High Courts of Bombay, Madras and Kerala to the contrary in series of cases noticed therein. Any place where an economic or commercial activity is carried on can be considered as a ''shop'' under the above referred notification.

9. Relying on the old case law which held the field then, the trial Court held that the head office/principal office of the respondent could not be treated as a ''shop* within the meaning of the said notification and the same was thus not covered under the Act. In view of the above referred Supreme Court judgment, this view of the trial Court is hereby overruled. In para, 20 of its judgment, the trial Court held that the expressions "commercial establishments" and "shops" were mutually exclusive. It is no longer possible to treat commercial establishment and shop as mutually exclusive for the purpose of Employees'' State Insurance Act.

10. If the head office of the respondent was duly covered establishment as it was a shop employing more than 20 employees at the relevant time, the entire complexion of the controversy changes and the appeal shall have to be decided even in respect of the other establishments in the context of the provisions contained in Section 2(9) of the Act rightly relied upon by the learned counsel for the appellant. With effect from November 18, 1978, the head office of the respondent situate at D.N. Road, Bombay, was covered by and under the provisions of the said Act. The said office has:

1. Marketing Division,

2. Central and Finance Division,

3. Industrial Products Division,

4. Spare Parts Distribution Centre,

5. Purchase and Distribution Division.

6. Training School, and

7. Law and Personnel Department.

11. Section 2(9) of the said Act concludes the controversy in favour of the appellant and against the respondent even in respect of coverage of the shops and warehouse referred to in para. 6 of the above referred application. The establishments referred to in para 6 of the said application are as under:

Sr.No Address Description of Establishment. Number of Employees

1. 207, Dr. D.N. Road, Bombay -400 001. Shop 19

2. Maskati House, 76, Mohamedali Road, Bombay 400 001. shop 3

3 Madhavji Building, Shop No. A-4, 264, S.V. Patel Road, Bombay 400 012. shop 3

4. Shop No. 126, Supari Baug Rd., Parel, Bombay -400 012. Shop 3

5. 684, S.V. Road, Near Era Cinema, Malad West, Bombay - 400 064. Shop 3

6. 212, S.V. Road, Near Oscar Amber Cinema, Andheri West, Bombay - 400 058. Shop 3

7. Narayan Niwas Building, Near Anand Cinema, Thana East, Maharashtra. Shop 4

8. 373 74, Narayan Ptth, Laxmi Road, Pune-411002. Shop 3

9. Shop No. 2, Central Avenue Road, Nagpur-400018. Shop 3

The learned counsel for the appellant submits that any person employed for wages in connection with the work of the establishment covered under the Act is also covered by definition of the expression "employee" u/s 2(9) of the Act. Section 2(9) of the said Act reads as under-

"(9) "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;......"

All persons employed for wages connected with distribution or sale of the products concerning the establishment covered under the Act are thus specifically covered u/s 2(9) of the said Act. The employees working in the shops or warehouse referred to hereinabove were employed for wages on work connected with marketing of the sewing machines which is the main business of the respondent. In view of the applicability of the above referred provisions to the case of each of the shops and the warehouse referred to hereinabove, nothing more is required to be decided in this appeal. The concept of clubbing of different shops or different establishments or treating the same as one establishment is technically different. It is not necessary for the purpose of this appeal to decide as to whether the employees working at each of the shops or the warehouse are liable to be clubbed together or whether the 10 establishments described in para 6 of the above referred application are liable to be treated as one establishment. All these employees are directly covered u/s 2(9) of the Act as discussed above.

12. In the result, it must be held that the head office of the respondent is covered by and under the said Act with effect from November 12, 1978. All the employees working in the said head office or working in the shops or the warehouse referred to in para 6 of the application whose wages at the material time did not exceed sum of Rs. 1000/- were and are also covered by and under the provisions of the said Act. It is not necessary to examine the reasoning of the trial Court in detail as the said reasoning runs counter to the recent judgments of the Supreme Court as indicated above.

13. In the result, the appeal is allowed. Order of the trial Court passed on April 29, 1983 in Application (ESI) No. 27 of 1979 is set aside. Application (ESI) No. 27 of 1979 is dismissed. The respondent is directed to comply with the provisions of the Act and pay the amount of contribution payable by them to the appellant within two months of the receipt of the notice of demand calculating the figures of contribution payable by the respondent to the appellant.

14. Having regard to the facts and circumstances of the case, there shall be no order as to costs.

15. The Registrar, High Court, Bombay, is directed to return the records and proceedings to the trial Court as expeditiously as possible, and latest within one month from today.

16. Issue of certified copy expedited.