

(2008) 02 DEL CK 0197
In the Delhi High Court
Case No : F.A.O. No. 319 of 1999

ESIC

APPELLANT

Vs

Ved Prakash Gupta

RESPONDENT

Date of Decision : 24-02-2008

Acts Referred:

Employees State Insurance Act, 1948 — Section 75

Citation : (2008) 3 LLJ 626

Hon'ble Judges : Pradeep Nandrajog, J

Bench : Single Bench

Advocate : K.P. Mavi, for the Appellant;

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—Heard learned Counsel for the appellant.

2. The appellant ESIC is aggrieved by an order dated February 15, 1999 passed by the learned Judge, ESIC Court allowing respondent's petition u/s 75 of the ESI Act which challenged an order dated January 31, 1995 passed by the ESI Corporation holding that respondent's establishment was covered under the ESI Act.

3. Shorn of unnecessary details it would be relevant to note that order dated January 31, 1995 was passed on the basis that the business of Ajay Enterprises carried on by the son of the respondent was found to be a part and parcel of the business of the respondent who was carrying on business as the sole proprietor of Liftman Industries. The reason for the said finding was the respondent who was the sole proprietor of Liftman Industries was the father of Ajay, the sole proprietor of Ajay Enterprises. That both businesses i.e. the business of Liftman Industries and Ajay Enterprises were being carried on from the same business premises namely B-13/2, Jhilmil Industrial Area, Shahdara, Delhi and that the electricity connection in the name of the business enterprise of the father was being used by the son as well.

4. Learned Counsel for the appellant urges that even employees engaged by the father and son were being used for carrying on multifarious activities. Counsel further urged that when demanded, relevant record was not shown either to the inspector or the authorities under the ESI Act.

5. As against the stand of appellant, the respondent pointed out that whereas he was engaged in the business of manufacture of lift appliances, his son was not manufacturing anything but was in trading business i.e. sale of hardware goods. It was further urged by the respondent that only 10% of the goods sold by his son were lifting appliances and even those related to mostly lifting equipment manufactured by other parties such as Bharat Metal Corporation, Ankur Wire Industries, World Commercial Corporation etc.

6. Before the learned Judge ESIC, documentary evidence was produced by the respondent which revealed separate municipal licenses and registration for the two units. The books of accounts as also income tax returns were also proved.

7. The ESI Court has returned a finding as under:

10. The contention of the learned Counsel for the respondent is that Ajay Enterprises and Liftman Industries are one and the same having interchangeability of the employees and being belonging to Ved Prakash Gupta and his son. On the other hand Ved Prakash Gupta in his statement before the Court as P.W.1 has clearly showed that both the industries are separate. Liftman Industries is a manufacturing unit and Ajay Enterprises is a trading unit. Though it belongs to his son, he is neither the owner nor partner of the firm. Their employees are not inter-changeable and they have nothing common. He has produced his separate sales tax registration, registration with Directorate of Industries and Income Tax. The true copy of the certificates are Exhibit P.W.1/1 and Exhibit P.W.1/2. His firm is functioning since 1974 and Ajay Enterprises started functioning in the year 1986 or 1987. ESIC cannot presume that if two units are run - one in the name of the petitioner and the other in the name of his son, they are part and parcel of the same unit specially when their business activities are different. Ajay Enterprises is a trading unit which sells hardware and other articles and only 10% of the sale is lifting equipments. Liftman Industries is having separate Income Tax, Sales Tax and MCD licence. Simply because these two industries are in the name of the father and the son, it cannot be said that their employees are inter-changeable. The inspector who gave the report could not show how they are inter-changeable - when one is running a manufacturing unit and the other is running the trading unit. Hence both the units cannot be considered to be one and the same, since they are not the branches of the same firm but are independent altogether. Since both the firms are independent firms and they have not employed more than nine workers at a time in any portion of the year or last preceding twelve calendar months and their workers are not inter-changeable and their activities are different and simply because they are running from the same premises number, they cannot be considered as unit of the same firm and are independent units. Hence the

order of the Dy. Regional Director dated February 3, 1995 No. 11-24482-95 after clubbing both the industries is illegal and liable to be set aside on the grounds mentioned in the petition and as discussed above. Hence this issue is decided in favour of the petitioner and against the respondent.

8. Before dealing with the contentions of learned Counsel for the appellant it needs to be recorded by this Court that as the First Appellate Court it would not be within the province of this Court to re-appreciate evidence and merely because two views are possible take a view other than the view taken by the Court of first instance. It is settled law that where two views are possible, the one accepted by the Court of first instance would bind the First Appellate Court. The First Appellate Court would be justified in interfering with a finding of fact where it is shown that material evidence or a material circumstance has been ignored by the Court of first jurisdiction. Additionally, it would be permissible for the Appellate Court to see whether the view taken by the Court of first instance is perverse.

9. Guided as aforesaid, it needs to be noted that the statement of accounts, balance-sheets etc., certificate of incorporation, sales tax registration and municipal licenses were duly proved by the respondent pertaining to the firm Liftman Industries and the firm Ajay Enterprises. The same revealed that the firm of the respondent was manufacturing lifting equipment and the firm of his son was trading in hardware. The sales of the firm of the son revealed hardly 10% sales relatable to lifting equipment. Though the trading and profit and loss account as also balance sheets do not give the break up of the lifting equipment sold relatable to the firm of the respondent and other firms but I note that in his testimony, the respondent stated that his son was selling hardware predominantly belonging to third parties and not what was manufactured by him. I note that the testimony of the respondent on this aspect of the matter remained unchallenged in cross-examination. It would also be relevant to note that the respondent deposed that there were two meters in the premises, one was a power meter exclusively used by Liftman Industries and the other was a light meter exclusively used by Ajay Enterprises.

10. In my opinion, in a circumstance where father and son are carrying on two different business from the same premises the test to apply whether the two business have been split up to overreach the law or not is to see not only the environmental proximity but even the functional unity. Additionally, the nature of the two works and in particular whether one is complementary to make it a part of the complete whole of the other also has to be considered. Unity of ownership, functional integration, interchangeability of employees and unity of purpose all have to be viewed cumulatively. There is no law which prohibits a father and a son from carrying on two separate and independent businesses. There is no law which prohibits a father and a son from carrying on business from the same premises. What has to be considered is whether there is a functional integration or there is proximity in the two businesses where from it can be gathered, after

lifting the veil, that the businesses are the two faces of the same business.

11. Tested on the aforesaid legal norm it would be relevant to note that whereas the business of the respondent is manufacturing, that of the son is trading.

12. Further, 90% of the goods traded by the son are not the kind of equipment manufactured by the respondent.

13. Further, even 10% of the lifting equipments sold by the son is not entirely manufactured by the respondent. Only part thereof is manufactured by the respondent. The 2 firms have separate registrations under sales tax, municipal licence etc. There is no evidence to show that the employees of the 2 firms were being interchanged.

14. A father allowing his son to use his premises as also the electricity would not make any difference for the reason any person can be permitted to enter upon one's premises as a licensee or under a permission.

15. On the evidence on record I find no infirmity in the view taken by the learned Judge, ESI Court.

16. The appeal is dismissed.

17. No costs.

18. TCR be returned forthwith.