
(2014) 01 KL CK 0087
In the High Court Of Kerala
Case No : Ins. APP. No. 72 of 2011

F. Basheer

APPELLANT

Vs

Regional Director, ESI Corporation and Another

RESPONDENT

Date of Decision : 08-01-2014

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(17), 2(9)

Citation : (2014) 141 FLR 870 : (2014) 1 ILR 765 : (2014) 1 KHC 361 : (2014) 1 KLJ 532 : (2014) 2 KLT 451 : (2014) LabIC 1292 : (2014) 3 LLN 162 : (2014) LLR 637

Hon'ble Judges : S.S. Satheesachandran, J

Bench : Single Bench

Advocate : P.B. Suresh Kumar, Leo George, K.N. Sasidharan Nair, K.P. Sujesh Kumar and M. Sunil, Advocate for the Appellant; P. Sankarankutty Nair, (SC), Advocate for the Respondent

Final Decision : Dismissed

Judgement

S.S. Satheesachandran, J.—The appeal is directed against the judgment dated 12.10.2010 in I.C. No. 22 of 2005 by the Employees Insurance Court, Kollam, hereinafter referred to as the E.I. Court.

2. Applicant is the appellant. His application was for quashing the recovery notice and assessment made against him imputing that he had failed to pay contribution for the employees of his hotel. Various challenges were raised to impeach the assessment made and recovery proceedings initiated by Employees State Insurance Corporation, hereinafter referred to as the Corporation, but all of them were turned down by E.I. Court. In the appeal also all such grounds are reiterated, but, at the time of hearing, challenge was confined to only one of them that even on materials placed the hotel with respect to which appellant was proceeded as the owner/employer could not be covered as an establishment under the Employees State Insurance Act, for short the Act.

3. Ext. B2 list of employees collected from the cashier of the hotel includes name

of the appellant also as one of its employees and that had been conceded to by RW 1 examined on behalf of Corporation, is the case projected by counsel for the appellant to assail the order of the E.I. Court. Appellant proceeded as the employer/occupier of hotel does not fall under the definition of "employee" nor he can be counted as one among the employees, to determine whether the hotel is covered under the Act, according to counsel. In Ext. B2 list he was wrongly included among the ten employees working in the hotel which that formed the basis of the proceedings initiated for assessment and later for recovery proceedings for realisation of contribution, is the further submission. Orders passed by Corporation on the premise that he is also one among the employee are liable to be quashed, is the submission of learned counsel. Resisting the challenge learned counsel appearing for the Corporation contended that an employer could have also a dual capacity as employer and employee. In a case where he has such dual capacity establishment could be covered if the required number of employees thereof demands coverage under the Act, according to counsel. Challenge now canvassed with reference to Ext. B2 list that appellant proceeded as employer was included as an employee in such list and he could not have been included to determine the number of employees of the hotel for covering it as an establishment under the Act, was not canvassed nor raised before the E.I. Court to impeach the assessment made and also recovery proceedings initiated and as such in the present appeal preferred against the order of the E.I. Court it cannot be set forth as a substantial question of law for entertaining the appeal, is the submission of the Standing Counsel for Corporation. Challenge by appellant over his inclusion as an employee in Ext. B2 list to question the proceedings against him as employer/occupier of the hotel and assessment of recovery proceedings could at best give rise only to a dispute on facts and such a dispute having not been raised before E.I. Court cannot be set forth as a substantial question of law to impeach the order of that court, contends the Standing Counsel for Corporation.

4. Appellant, infact, had even disputed his status as proprietor/employer of the hotel in respect of which proceedings were initiated against him under the Act. He disputed his proprietorship over the hotel with various other grounds to impeach the assessment and recovery proceedings against him by the Corporation. Such challenges are not presently pursued in the appeal. When he was proceeded as the "employer" he would not become nor be treated as an employee of the hotel, and if he was excluded, on Ext. B2 list and other materials relied by Corporation the hotel could not have been covered under the Act, was not set forth as a challenge to assail the assessment made and recovery proceedings before the E.I. Court. Whatever challenges raised to resist the assessment and recovery proceedings, on the materials placed have been found to be unsustainable by the E.I. Court. Still, on the materials if appellant could show that the establishment with respect to which he was proceeded against could not be covered under the Act as it goes to the very root of the case, his failure to raise a specific challenge over the question of coverage of

establishment before the E.I. Court cannot be given too much significance in entertaining and disposing this appeal on merits. Appellant can be proceeded in respect of his establishment, hotel, only if the minimum number of employees as prescribed under the Act are employed in such establishment. So much so, I find challenge raised by appellant that he being an employer cannot be considered as an employee and if he is excluded from the list of employees, then, establishment (hotel) in respect of which he is proceeded as employer does not have the required minimum number of employees to be covered under the Act, has to be examined. That alone is the challenge canvassed in the appeal with reference to Ext. B2 list of employees furnished by the Cashier of the hotel to assail the order of E.I. Court.

5. The definition of "employee" u/s 2(9) and "principal employer" u/s 2(17) of the Act have to be looked into. Section 2(9) defines an employee thus:-

(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) (or any person engaged as apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961),

(and includes such person engaged as apprentice whose training period is extended to any length of time) but does not include)--

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

((b) any person so employed whose wages (excluding remuneration for overtime work) exceed (such wages as may be prescribed by the Central Government) a month:

Provided that an employee whose wages (excluding remuneration for overtime work) exceed (such wages as may be prescribed by the Central Government) 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(17) of the Act defines "principal employer" thus:-

Principal employer" means--

(i) in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under (the Factories Act, 1948 (63 of 1948), the person so named;

(ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the head of the Department;

(iii) in any other establishment, any person responsible for the supervision and control of the establishment;

Whether a "principal employer" covered under the Act can also be an employee as defined is the short question that is emerging for consideration in the light of the challenge canvassed in the appeal. That question has to be looked into with reference to the scheme and provisions of the Act which is intended for the welfare of the working class. There is no bar or interdiction under the Act prohibiting a principal employer from being treated and considered as an employee of his establishment for the purpose of the Act. The definition of "principal employer" in respect of an establishment, other than a factory or establishment under the Government can be any person responsible for the supervision and control of that establishment. When that be so, a person in control and supervision of the establishment who is employed for wages in or in connection with the establishment can also fall under the definition of the employer. Challenge canvassed by the appellant before the E.I. Court to assail the assessment made and recovery proceedings is that the hotel, establishment proceeded against, belonged to his brother. License for conducting the hotel was obtained in his name and he was found to be the occupier, to hold him the principal employer of that establishment liable to be proceeded under the Act. He was proceeded as the principal employer, that alone, would not entitle him to show that he cannot be considered as an employee of the establishment. This court in *The Insurance Inspector, Employees State Insurance Corporation, Ernakulam Vs. M/s. Victory Tile Works, Alwaye*, has held that in the scheme of the Act there is no apparent conflict of interest between the principal employer and the employee and there is no reason why if a person satisfies, the definition of employee and belongs to that class he cannot in certain cases be also a principal employer. View expressed by this court as above has been approved by the apex court in *Employees' State Insurance Corporation Vs. Apex Engineering Pvt. Ltd.*, wherein it has been held that the decision rendered in *M/s. Victory Tile Works* case falls in line with the scheme of the Act. When that be the settled position of law that a principal employer can have dual capacity, as an employee

also, and, if so, he can be reckoned for determining coverage of the establishment under the Act, and, where no case was canvassed before the E.I. Court by appellant that he could not be treated as an employee for any reason whatsoever, that challenge canvassed in appeal to assail the order of the E.I. Court cannot be sustained.

In such circumstance, appeal fails. Appeal is dismissed directing both sides to suffer their respective costs.