

(2004) 08 BOM CK 0039

In the Bombay High Court

Case No : Writ Petition No. 1809 of 2004

Gauri Mohan Pohoomul

APPELLANT

Vs

Regional Director, Employees State Insurance Corporation
and Another

RESPONDENT

Date of Decision : 06-08-2004

Acts Referred:

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

Citation : (2004) 5 BomCR 537 : (2005) 104 FLR 603 : (2005) 1 LLJ 478 :
(2004) 4 MhLj 1027 : (2005) 1 SLJ 489

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : D.A. Athavale, for the Appellant; H.V. Mehta, for the Respondent

Judgement

F.I. Rebello, J

1. Rule. Heard forthwith. 2. The petitioner who has joined as owner and Proprietor of M/s A. G. Daftary is carrying on the business as Engineers and Contractors in the name and style of M/s A. G. Daftary. By the present petition they impugn the order dated 17-12-2003 passed by the Employees State Insurance Court, Mumbai. The said decision was rendered pursuant to application made by the petitioner herein u/s 75 of the E.S.I.S. Act pursuant to notification No. ESI/1677/3910/PH-15 dated 18-9-1978. The case of the petitioner is that they are registered as approved contractors with the Government of Gujarat, Roads and Buildings Division as also the Mumbai Municipal Corporation as also CIDCO, and do the work like building construction including retaining walls, water storage reservoirs, construction of road over bridges and foot over-bridges including pre-stressed construction, construction of cement concrete roads etc. The inspector of the respondents it is averred had visited the office of the applicant on 8-3-1989. The muster roll was called for the period of January, 1988 onwards and according to petitioner it was confirmed that 7/8 workers were employed in the office of the petitioner. The petitioners were informed that based

on the inspection as also records of the persons working at the site of the petitioner's construction works and the salary register maintained at the establishment of the petitioner, the establishment is covered u/s 1(5) of the Act.

The petitioner disputed the claim by their letter contending that the provisions of the Act were wrongly applied to them and that the notification of 18-9-1978 was not applicable to them. It was contended that the office of the petitioner is not a shop. The respondent in their written statement set out that in the survey made by E.S.I Inspector on 8-3-1989 and on verifications of the salary register maintained by the petitioners between the period April, 1986 to February, 1989, the petitioner had been employing more than 20 persons on wages in their establishment. Based on this scrutiny and the documents, respondent held that the applicant's establishment is a shop covered by the notification of 18-9-1978 and as such amenable to provisions of Section 1(5) of the E.S.I. Act. The word "Shop" it is contended has a wider meaning and is capable of bringing "establishments" within its ambit. The petitioner's activities it was averred, relate to resource services for price and therefore, the establishment is shop. In rejoinder the petitioner denied that there are 19 persons in their establishment.

3. Issues were framed. While answering the issues, the learned court held that from the evidence on record in the establishment of the Head Office, there are 7/8 employees. At the site there are employees of sub contractors and the petitioner had also appointed their own staff. It was also admitted that the company is covered under the Provident Fund Act. The court held that it is for the petitioner to prove how many employees of the Head Office are deputed on the site and how much salary was paid and whether they are drawing the salary beyond the limit prescribed under the Act. The petitioner instead of producing evidence was disowning its status as employer although they are employees of the petitioner. Their salaries are drawn from the Head Office. The court then recorded that though their works seems to be different, they were receiving salaries from Head Office and as such those persons can be viewed as employees under the E.S.I. Act. The judgment relied on behalf of the petitioner in the case of Cemendia Company Ltd. Vs. Employees' State Insurance Corporation, was considered and distinguished. Thereafter in Paragraph 12 on assessing documentary evidence available and considering also the workmen employed by the petitioner at the site, the court held that the strength of the employees for the year 1986-87 was more than 20. Therefore, held that the petitioner were rightly covered. It is this order which is subject matter of the present challenge.

4. At the hearing of this petition on behalf of the petitioner, it is contended that the workmen employed at the site by the company cannot be said to be employees employed at the establishment i.e. Head Office of the petitioner. If that is so considering the records available, the number of employees at the establishment is less than that required for coverage under the Act and consequently the order is liable to be set aside. It is pointed out that the ESI Court has not correctly appreciated the true import of the judgment in Cemendia

(supra).

On the other hand on behalf of the respondent, their learned counsel contends that what is to be considered is the extended meaning of the definition employees within the meaning of Section 2(9) of the Employees Insurance Act, 1948 and if this extended definition is considered, the employees working at the site as they are doing the work directly connected with or incidental to the work of establishment will have to be also counted to find out whether the establishment is covered by the provisions of the ESI Act.

5. Having heard learned counsel, the question is whether the order impugned is liable to be confirmed or set aside. For the purpose of discussion, it will be essential to note the definition of employee u/s 2(9)(i) and (2) which reads as under :

"(2)(9)(i) : "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....."

A reading therefore, of the said definition would make it clear that any employee directly employed by the principal employer to do work incidental or preliminary or connected with the work of the establishment would fall within the definition of employee as contemplated u/s 2(9). An argument was however, advanced on behalf of the petitioner, that the establishment at the Head Office, is different from the company and merely because the company engages the employees and deposes them to do the work at the site would not mean that these employees are doing work in respect of the establishment. So construed, the extended definition would not apply. In the instant case, nothing has come on record to show that apart from the establishment at the Head Office, petitioner's have any other establishment. A finding of fact has been recorded and it is admitted on the part of the petitioners and more so at the bar that the salaries of the workmen employed at the site are paid from the Head Office. There being no other establishment, the leave of employees posted at the site is sanctioned from the Head Office. The contract work is taken by the establishment at the Head Office and also executed by the establishment at the Head Office. If this is considered then clearly the workmen employed for the purpose of completing the contracts which have been taken at the Head Office are doing the work connected or incidental with the work of establishment at the Head Office and consequently

they will be deemed to do the work of the establishment in the absence of the petitioners establishing the existence of any other establishment or shop. In the judgment in the case of *Cemendia* (supra) the learned Judge of this court after examining various judgments held that for the purpose of considering the issue whether the employee is doing the work in relation to the establishment what is to be answered is whether the employees at the work site do anything work in relation to or in connection with the work at Depot. In that case depot and some other establishment were registered as factory. The question was whether the workers at the site were doing the work connected with the factory. On the evidence on record, the court held that though depot and other establishment may be doing the same work in connection with the factory, the employees at the site were not doing any work in connection with the factory and in these circumstances held that the impugned order therefore, which had taken a view that the employees at the work site were not covered cannot be faulted with. In other words, judgments which were adverted to and relied upon the same view has been reiterated, namely that the employees concerned must do the work directly or incidental to the work of the establishment. The other aspect of the matter is that there is really nothing like a distinction between a company and the Head Office or other establishment. The company is only the corporate name under which the company carries on its business and in the instant case, it is in fact a proprietary concern. What has to be registered is not the company but its establishment.

6. That really does not answer the issue. It is an admitted position that the number of employees working in the establishment at Head Office physically, are less than the number which are required for the purpose of coverage under the Act. It is only in the event that the employees working at the site are taken into account, then the requisite number is satisfied for the purpose of coverage under the Act. The issue then is whether the extended definition is only for the purpose of granting benefit to the employees not working at the establishment or whether it is also for the purpose of considering whether such workers along with the employees at the establishment, must also be considered to constitute the required number for the purpose of coverage under the Act. In the case of *Cemendia* the issue was whether in respect of the establishment already covered under the Act, the employees working elsewhere who were doing the work incidental to the establishment already covered by the Act were also liable to be covered for the purpose of ESI Act. In the instant case, therefore the question as posed earlier is slightly different. Section 1 of the Act provides for application of the provisions of the Act to establishments. We are here concerned with Section 1(5) which provides that the appropriate Government may in consultation with the Corporation and where the appropriate Government is a State Government, with the approval of the Central Government, after giving six month's notice of its intention of so doing by notification in the Official Gazette, extend the provisions of the Act or any of them, to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise. It is pursuant

to this power and in exercise thereof that the State of Maharashtra has issued the notification in exercise of its powers under sub-Section (5) of Section 1 and with effect from 12-11-1978 to cover the establishments as set out therein. In the instant case, we are concerned with entry No. 3 of the said notification which reads as under :

"3. The following establishments wherein twenty or more employees are employed, or were employed for wages on any date of the preceding twelve months, namely : (i) hotels; (ii) restaurants; (iii) shops; (iv) cinemas, including preview theatres; (v) newspaper establishments as defined in Section 2(d) of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (45 of 1955)."

One of the items covered by the entry under 3(iii) is shop. As rightly pointed out on behalf of the respondents, the word shop has been given an extended meaning and on behalf of the petitioner their learned counsel has not disputed the same considering the large number of judgments on the subject. What therefore, the section covers is establishments and shops where 20 or more employees are employed, or were employed for wages on any day of the preceding twelve months. So read it is clear that employees either working at the establishment or at other places, including sites doing work connected with the establishment are to be counted for the purpose of considering the total number to see whether the "establishment" is covered by the provisions of the Act.

7. Coming to the facts of this case, there is no dispute that the salaries of the employees at the site are paid by the establishment and that they are posted at the site for doing the work being executed by the establishment. The establishment retains full control over their service conditions in the absence of any other establishment exercising control. So considered, admittedly there is no dispute that the requisite number of employee were employed during the relevant year 1986-87. Once that be the case, it cannot be said that the judgment of the ESI Court disclose any error apparent on the face of record and for that matter there is any error of jurisdiction.

8. In the light of the above, Rule discharged. There shall be no order as to costs.