
(1991) 02 RAJ CK 0065
In the Rajasthan High Court

Gautam Textiles

APPELLANT

Vs

Regional Director, ESIC and Others

RESPONDENT

Date of Decision : 22-02-1991

Acts Referred:

Employees State Insurance Act, 1948 — Section 1, 2, 75, 82

Citation : (1991) 2 ACC 620

Hon'ble Judges : Milap Chand Jain, J

Bench : Single Bench

Judgement

Milap Chandra Jain, J.—This appeal has been filed u/s 82, employees" State Insurance Act, 1948 (hereinafter to be called "the Act") against the order of the Employees" State Insurance Court (Civil Judge), Jodhpur dated May 17,1988 by which it has rejected the petition of the petitioner moved u/s 75 of the Act. The facts of the case giving rise to this appeal may be summarised thus.

2. The petitioner firm carries on Dying and Printing business without using any power since November, 1979 in Marudhar industrial Area, II Phase, Basni, Jodhpur. The petitioner-appellant filed a petition u/s 75 of the Act for quashing the demand of Rs. 26,183.49p. with the allegations, in short, as follows. The non-petitioner-respondents issued a demand for the recovery of Rs. 26,143.49p. as contribution of the period upto October 27, 1982. The Act was made applicable in this Area in the factories in which 20 or more labours were working with effect from March 28,1982 and as such no demand could be raised prior to March 28, 1982. A recovery certificate been issued to the Collector Jodhpur for the recovery of the said amount of Rs. 26,143.49. The amounts of contribution in respect of the period prior to March 28, 1982 were deposited on the assurance of the non-petitioner-respondent No. 2 that the same would be adjusted and the petitioner-appellant would not be burdened to pay the whole amount in lumpsum on the applicability of the Act, No opportunity of hearing was given before issuing the said demand of Rs. 26,183.49p. The non-petitioners admitted in their reply that the petitioner firm carries on Dying and Printing business in his factory at bansi,

Phase II, Jodhpur and the said amount has been deposited as contribution and recovery certificate has been sent to the Collector, Jodhpur for the recovery of the said amount. The remaining allegations of the petition have been denied. It has further been averred that the petitioner firm uses electric motor for operating colour paste machine, the Act was applicable to the petitioner firm since September 7, 1980, more than 20 persons are working in the petitioner's factory since the beginning the factory was duly inspected on October 7 1980 and form No. 1 was duly submitted by it. The demand of Rs. 26,143,49p. has rightly been issued. In its rejoinder, the petitioner has averred that electric motor has never been used to operate the colour paste machine, all work is done by hand process and the provisions of the Act were applicable to its factory with effect from March 28, 1982 and not prior to it.

3. The trial court framed the following issues:

?1? D;k oknh QeZ es lkjk dk;Z gs.M izksls! Is gksrk gS rFkk ^^ ikoj ^^ dk mi;ksx ugh fd;k tkrk gS\ -----oknh

?2? D;k oknh QeZ es chl Is de O;fDr dke djrs gS\-----

?3? D;k 28-3-82 Is iwoZ oknh izfr"Bku ij vf/kfu;e ds izko/kku ykxw ugh gksrs gS\ \-----oknh

?4? D;k@oknh izfr"Bku Is va"knku dh olwyh jksdh tkuh pkfg,\

?5? vuqrks"k\

4. The petitioner examined its partner Parasmal bansal P.W. 1 and tendered and proved three documents. The non-petitioner examined E.S.I. Inspector S.C. Jain D.W.1 and tendered and proved three documents only. After hearing the parties the learned trial court dismissed the petition holding that the Act is applicable since September 7, 1980, power is used in ceiling fans, said demand of Rs. 26,143.49 has correctly been raised and more than 30 labourers have always worked in petitioner's factory.

5. It has been contended by the learned Counsel for the appellant that the learned trial court has seriously erred to hold that the Act became applicable with effect from September 7, 1980 and in fact it was applicable with effect from March 23, 1982. He further contended that it is not at all proved from the evidence on record that electric motor was ever used for operating colour paste machine, there is great variance in between the pleading and proof of the respondents, it has not been pleaded in the reply that power was used in ceiling fans and the learned trial court has seriously erred in holding so despite no pleading on this point

6. The learned Counsel for the respondents duly supported the order of the learned Employees' State Insurance Court, Jodhpur. He contended that notification No. S-38013/9/80-H.I. dated September 5, 1980 published in Government of India Gazette Part II (3) (ii) dated September 6, 1980 (paper No.

C15/9) was issued u/s 1(3) of the Act making the Act applicable to the Basni Industrial Area, Jodhpur with effect from September 7, 1980 and as per the provisions of Sub-section (4) of Section 1 the said notification stood applicable to all factories other than seasonal factories. He further contended that the notification No. S.O./10 dated March 11, 1982 (Paper No. C 15/2) was issued by the State Government under Sub-section (5) of Section 1 of the Act to make applicable the provisions of the Act to other establishments with effect from March 28, 1982. He lastly contended that the petitioner's partner Parasmal Bansal P.W. 1 admitted in his cross-examination that electricity is used in his factory in the electric fans and as such it cannot be said that power was not used in the petitioner's factory during the relevant period.

7. To appreciate the contentions of the learned Counsel for the parties it is necessary to quote the provisions of Section 1 of the Act. They run as under:

1. Short title, extent, commencement and application-(1) This Act may be called the Employees' State Insurance Act, 1948.

(2) It extends to the whole of India

(3) It shall come into force on such date or dates as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act or different States or for different parts thereof.

(4) It shall apply, in the first instance, to all factories (including factories belonging to the Government) other than seasonal factories.

(5) 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 months notice of its intention of so doing by notification in the Official Gazette, extend the provisions of this Act or any of them, to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise.

It is clear from the above quoted provisions that by issuance of a notification under Sub-section (3) the Act becomes applicable to all factories other than the seasonal factories, it is further clear that to make applicable the provisions of the Act to other establishments a notification is required to be issued under Sub-section (5) by the appropriate Government. Thus Sub-section (3) deals with factories and Sub-section (5) deals with other establishments.

Sub-section (12) of Section 2 defines "factory" as under:

"Factory" means any premises including the precincts thereof whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952) or a

railway running shed.

It is not in dispute that more than 20 persons were employed and manufacturing process was carried on in the petitioner's factory. There is dispute about the use of power. The appellant's case is that power was not used and the respondents case is that power was used in operating colour paste machines. The appellant's partner Parasmal Bansal P.W. 1 has deposed that the entire work of dying and printing is done by hand process and electricity is not used. He has also stated on oath that power connection has not been taken. No suggestion was put in his cross-examination that electricity was used in his factory for operating colour paste machine. The E.S.I. Inspector S.C Jain D/W.1 has also not said that electricity was used in the petitioner's factory for operating colour paste machine. He has simply proved the inspection reports Ex. A/2 and A/3 of his colleague J.D. Anuja. In the cross-examination he has stated that printing is done by hand process in the petitioner's factory.

8. It is correct that the petitioner's partner Parasmal Bansal P.W. 1 has admitted in his cross-examination that fans are used in his factory. He has further stated that fans are operated for the labours and not for the purpose of drying the printed cloth. It is well settled law that no evidence amount of can be looked into upon a plea which has not been put forward. Admittedly, it has not been averred in the written reply that electricity is used by the petitioner in operating fans used for drying printed cloth. As such it is very difficult to say that the plaintiff's establishment was a factory as defined above. When it was not so the Act did not become applicable to the plaintiff's establishment by notification dated September 5, 1980. When the Act was not applicable with effect from September 6.7. 1980, the petitioner was not liable to make any contribution and the demand raised for the period from September 7, 1980 to March 27, 1982 was not valid. To this extent, the learned trial court should have allowed the petitioner's petition.

9. Consequently, the appeal is partly allowed. The demand raised for the period from September 7, 1980 to March 27, 1982 is quashed. To this extent, the appellant's petition moved u/s 75 of the Act is allowed and the order under appeal is modified.