

**(2010) 09 DEL CK 0411**  
**In the Delhi High Court**  
**Case No : F.A.O. 568 of 2003**

Gopi Chand and Others

APPELLANT

Vs

Employees State Insurance Corp.

RESPONDENT

**Date of Decision :** 21-09-2010

**Acts Referred:**

Employees State Insurance Act, 1948 — Section 45A, 75, 82  
Evidence Act, 1872 — Section 101, 103

**Citation :** (2010) 172 DLT 565 : (2011) 128 FLR 78 : (2011) 121 FLR 78 :  
(2011) 2 LLJ 426

**Hon'ble Judges :** Siddharth Mridul, J

**Bench :** Single Bench

**Advocate :** Pradeep Kumar Arya, Narinder Chaudhary and Mukesh Sharma, for the Appellant; K.P. Mavi, for the Respondent

**Final Decision :** Dismissed

## Judgement

Siddharth Mridul, J.—The present appeal u/s 82 of the Employees State Insurance Act, 1948 (hereinafter referred to as "the Act") assails the order dated 5th May, 2003 passed by the ESIC Court, Tis Hazari Court in ESIC Petition No. 20/96.

2. The appellants submitted before the ESIC Court that the appellant No. 1 carries on the business of cement siding at Shakur Basti, New Delhi and owns a truck bearing registration No. DLH 2255. The appellant No. 1 also stated that he has a cabin bearing No. 10, allotted to him at Badi Lane, Shakur Basti Railway Siding, Delhi. It was also stated that the appellant No. 1 had five sons i.e. appellant Nos. 2 to 6 herein who also had their independent transport business. The appellant further stated that all the appellants are income tax assessee having their own individual income tax account numbers and are carrying on business in their own name and maintaining books of accounts separately. It was further stated by the appellants that they are all independent business persons/units carrying on their own business in their own name and neither the

supervision nor the control of the business units of the appellants is in one hand. The appellants, therefore, assailed the order of the respondent-corporation dated the 9th July, 1993 before the ESIC Court on the ground that the respondent-corporation had clubbed the businesses of all the appellants and presumed it to be a single unit. It was further stated by the appellants before the ESIC Court that one truck could have a maximum of seven employees only and as such none of the appellants could be covered by the Act.

3. The respondent-corporation filed a written statement to the petition filed by the appellant herein, before the ESIC Court and stated that a survey of the appellants' businesses was conducted on the 3rd May, 1993 and 52 persons were found working with them. The respondent-corporation further submitted that all the appellants are carrying on their business together and the supervision and control of the businesses is in one single unit and as such the appellants are covered under the Act.

4. After the completion of the pleadings, the learned ESIC Court framed the following issues:

(i) Whether the clubbing and covering of the petitioner is illegal and as such the impugned demand is liable to be set-aside?

(ii) Relief.

5. By the impugned order dated the 5th May, 2003, the ESIC Court held that the appellants have been rightly clubbed together and are consequently covered under the Act. The ESIC Court, therefore, dismissed the petition filed by the appellants herein as being without merit.

6. Aggrieved by the impugned order, the appellants have preferred the present appeal praying therein that the impugned order dated 5th May, 2003 passed in ESIC Case No. 20/96 may be set aside and the petition u/s 75 of the Act filed by the appellants be allowed.

7. On behalf of the appellants the sole ground that has been urged is that, the ESIC Court did not appreciate the evidence on record since it failed to consider that no suggestion or cross-examination was done by the respondents suggesting to the appellants that their supervision and control is in one hand, and that their employment figure stated in the respective examination-in-chief is wrong and incorrect.

8. Per contra, on behalf of the respondent-corporation it was urged that the appellants were all operating from one place and that they had failed to produce the best evidence in their possession to establish that there was no unity or supervision or control.

9. In support of the submissions of the respondent-corporation Mr. K.P. Mavi, Advocate invited the attention of this Court to the decision of the Supreme Court in LLJ 1 1960 Associated Cement Companies Ltd. v. Their Workmen. In the said

decision, the Supreme Court stated as under:

The Act not having prescribed any specific tests for determining what is "one establishment," we must fall back on such considerations as in the ordinary industrial or business sense determines the unity of an industrial establishment, having regard no doubt to the scheme and object of the Act and other relevant provisions of the Mines Act, 1952, or the Factories Act, 1948. What then is "one establishment" in the ordinary industrial or business sense? The question of unity or oneness presents difficulties when the industrial establishment consists of parts, units, departments, branches, etc. If it is strictly unitary in the sense of having one location and one unit only, there is little difficulty in saying that it is one establishment.

(emphasis supplied)

10. Mr. Mavi also invited the attention of this Court to the decision of the Supreme Court in 1997 SCC (L&S) 190 Employees State Insurance Corporation v. F. Fibre Bangalore (P) Ltd. where the Supreme Court held as under:

The Full Bench of the High Court has held that in a case where the order u/s 45-A becomes final, there is no need for the Corporation to seek adjudication before the Insurance Court. In all other cases, the Corporation is required to go to the Insurance Court, have it adjudicated and then make a demand. We are of the view that the Full Bench of the High Court is clearly in error to reach that conclusion. Though Section 75 of the Act does not envisage as to who has to approach the Insurance Court, by necessary implication when the employer denies the liability or applicability of the provisions of the Act or the quantum of the contribution to be deposited by the employer, it is for him to approach the Insurance Court and seek adjudication. It is not for the Corporation in each case whenever there is a dispute, to go to the Insurance Court and have the dispute adjudicated. Otherwise, the Act would become unworkable and defeat the object and purpose of the Act".

(emphasis supplied)

11. Counsel for the respondent-corporation with reference to Section 101 and 103 of the Indian Evidence Act, 1872 further submitted that since the appellants who were in possession of the register of employees and the register of salary, had withheld this information, they had failed to discharge the burden of proving that they employed lesser employees so as to fall outside the purview of the Act.

12. I have gone through the pleadings of the parties and the record of the case and have considered the submissions made by counsel before this Court.

13. In the present case it is seen that during the cross-examination of each of the appellants, most of them stated in cross-examination that their office address is Cabin No. 10, which was also stated to be the office of appellant No. 1. Although, appellant No. 2 in his cross-examination denied that he had anything to do with Cabin No. 10, the said appellant did not disclose as to from

where he is operating at the Shakur Basti Cement Siding. Similarly, appellant No. 6 did not enter the witness box. Furthermore, the appellants did not place on record either before the ESIC Court or before this Court on record, any books of account maintained by them. The appellants also did not place on record or produce the best evidence in their possession, namely, the register of employees or the register of salary paid to the employees, which would have clearly substantiated the claim made by them that since they did not employ the requisite number of employees independently they were not covered under the purview of the Act. It is also noticed that the appellant Nos. 2 to 6 did not disclose at any juncture the number of employees employed by them purportedly independently.

14. For the aforesaid reason, it is safe to presume that since the appellants were operating from the same cabin and had six trucks in all, the survey report indicating that they were together employing 52 employees appear to be correct and could not be disbelieved. This is also owing to the disclosure made by the appellant No. 1 in the petition itself that one truck could employ seven employees namely i.e. one driver, one cleaner and five labourers. The decision of the Apex Court in *Associated Cement Companies Ltd. v. Their Workmen* (supra) supports this view.

15. In addition, since the facts with regard to the employment of employees were especially within the knowledge of the appellants themselves, the burden of proving the fact that they in fact employed less employees, then the number covered under the Act, was cast on them. Further as held by the Apex Court in *Employees' State Insurance Corporation v. F. Fibre Bangalore (P) Ltd.* (supra) where the employer denies the liability or applicability of the provisions of the Act, it is for him to approach the Insurance Court and seek adjudication. Consequently, it was for the appellants to establish that they did not employ the number of employees requisite to fall within the purview of the Act. However, the appellants have failed to discharge this burden by withholding the best evidence in their possession by way of register of employees and register of salary of employees.

16. Thus, for the reasons aforesaid it is held that the appellants have rightly been clubbed together and covered under the Act. In view of this finding, there is no infirmity in the order under challenge passed by the ESIC Court so as to warrant interference in appeal. Consequently, the appeal is dismissed. No order as to costs.