

(2007) 08 BOM CK 0052

In the Bombay High Court

Case No : First Appeal No"s. 38 and 545 of 2007

Hotel Shree Vaibhav

APPELLANT

Vs

Employees State Insurance Corporation

RESPONDENT

Date of Decision : 04-08-2007

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(12), 2(14AA), 45A, 75
Factories Act, 1948 — Section 2

Citation : (2007) 6 ALLMR 676 : (2008) 2 BomCR 849 : (2008) 116 FLR 321 :
(2008) 2 LLJ 72 : (2007) 6 MhLj 363

Hon'ble Judges : Vasanti A. Naik, J

Bench : Single Bench

Advocate : J.L. Bhoot, in F.A. No. 545 of 2007 and Maldhure, in F.A. No. 38 of 2007, for the Appellant; Maldhure in F.A. No. 545 of 2007 and J.L. Bhoot in F.A. No. 38 of 2007, for the Respondent

Judgement

Vasanti A. Naik, J.—Since the parties to these two first appeals are common and since these first appeals arise out of the order passed by the E.S.I. Court, Nagpur, on 30th October, 2006, they are heard together and are being decided by a common judgment.

2. A few facts giving rise to these first appeals and to the controversy involved therein are stated thus; Instead of referring to the parties as appellant and respondent, it would be convenient in this case to mention them as the employer Hotel and the Corporation. The Inspector of the Corporation visited the unit of the employer Hotel on 21-7-1997 and observed that the employer Hotel was engaged in the business of lodging and providing tea, snacks and cold-drinks to the customers. It was further observed by the Inspector, as is stated in the order u/s 45-A of the E.S.I. Act, 1948, that the employer Hotel was using one oven, L.P.G. Cylinder, a fridge, water-cooler and air conditioners to provide services to the customers. It was also observed that the number of employees working with the employer Hotel at the relevant time was eleven. The Corporation believed that the employer Hotel fulfilled the required conditions necessary for the

coverage under the Act and, therefore, provisionally declared that the employer Hotel was covered u/s 2(12)(a) of the Act, with effect from 1-4-1993. The aforesaid communication dated 21-8-1997 was acknowledged by the employer Hotel but it failed to comply with the statutory provisions of the Act which included the payment of regular contributions. The employer Hotel was given a personal hearing in the matter and after considering the representations and the explanation submitted by the employer Hotel, the order u/s 45A of the E.S.I. Act 1948 was passed on 30-1-2003.

3. It is observed in the order that the registration of the employer Hotel was initially done under the Bombay Shops and Establishment Act, 1948, as a "Restaurant". But the employer Hotel subsequently managed to change the nature of the business from "Restaurant" to a "Residential Hotel" so as to avoid statutory liability of payment of contribution, filing of returns, etc. In the order u/s 45A, it was observed that the employer Hotel was using air conditioners from 1993 onwards along with electronics appliances such as Aqua-Guard, E.P.B.X., television, boiler, lift, submersible pump set, dish antenna/Star T.V., informatics electronics devices for killing flies and mosquitoes and fridge, and the use of the aforesaid devices amounts to "Manufacturing Process" within the wider meaning of the term as envisaged u/s 2 (k) of the Factories Act, which has been adopted in E.S.I. Act, 1948 u/s 2(14AA) which defines "manufacturing process". It was observed by the Corporation that the employees working in the employer Hotel were more than ten and hence the provisions of Section 2(12) of the E.S.I. Act were attracted. The employer Hotel was, therefore, ordered to pay the contribution amounting to Rs. 75,596/- within a period of fifteen days from the date of the order.

4. The employer Hotel challenged the order passed u/s 45A of the E.S.I. Act, before the Employees State Insurance Court, Nagpur, in Application (ESI) No. 1/2003, u/s 75 of the Employees State Insurance Act. The Employees Insurance Court, Nagpur, however, by the judgment and order dated 30th October, 2006, allowed the appeal filed by the employer Hotel and set aside the order passed by the Corporation u/s 45A of the Act. The matter was remanded to the competent authority under the E.S.I. Act for reconsideration of the same by giving opportunity to the employer Hotel to produce evidence in case it was found necessary. The judgment passed by the E.S.I. Court on 30th October, 2006 is challenged by the Corporation as well as the employer Hotel in these two first appeals.

5. It is submitted by Mrs. Maldhure on behalf of the Corporation that the Employees Insurance Court was not justified in remanding the matter to the competent authority, specially when the Court could have decided the question of applicability of the provisions of the Act to the unit of the employer Hotel, on the basis of the evidence tendered by the parties on record. According to the learned Counsel for the Corporation, the employer Hotel was using air conditioners, television, boiler, refrigerator, etc. for the customers who were lodged in the

Hotel and hence the use of the aforesaid items by itself amounted to "manufacturing process". Relying on the provisions of the Section 2(k) of the Factories Act, it was submitted on behalf of the Corporation that the aforesaid devices were "adapted" by the employer Hotel in order to use them for the convenience and comforts of the customers. Relying on the definition of "manufacturing process" in Section 2(k) of the Factories Act, it was further submitted that the aforesaid devices were used for the comforts of the customers and since there were thirteen employees employed with the employer Hotel, the employer Hotel was carrying on "manufacturing process" within the meaning of the term in Section 2(k) of the Act. The counsel for the Corporation relied on the decisions reported in 1995 (II) CLR 70 and 1987 L I.C. 1197, specially paragraph 10 thereof to show that the respondent was carrying on "manufacturing process" within the meaning of Section 2(k) of the Factories Act. It is submitted by the counsel for the appellant that the hotel establishment was a factory within the meaning of Section 2(12) of the Employees State Insurance Act and was carrying on "manufacturing process" with the aid of power within the meaning of Section 2(k) of the Factories Act and hence, the order passed u/s 45-A of the Act was just and proper.

6. On the other hand, it was submitted by Shri J.L. Bhoot appearing on behalf of the employer hotel that the hotel establishment was not a "factory" within the meaning of Section 2(12) of the Employees State Insurance Act and it did not carry on "manufacturing process" within the meaning of Section 2(k) of the Factories Act. It was further submitted on behalf of the employer Hotel that the employer Hotel was merely using the air conditioner and other items which were mentioned in the order u/s 45-A for the purpose of use of its customers. However, the employer Hotel was neither making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing or otherwise treating or "adapting" these articles with a view to use them for its customers, It was submitted on behalf of the employer Hotel that the submission made on behalf of the Corporation that the employer Hotel was "adapting" these articles for the use of its customers was incorrect as the employer Hotel was merely using these articles as they were and was not treating or doing anything to the articles which would change their character or make them different from what they were before. According to the learned Counsel for the employer Hotel, the meaning of the word "adapt" is to make it fit, suitable or adjustable for a new use. Since the employer Hotel was using the air conditioner and other articles without "adapting" them, it could not be said that the employer Hotel was carrying on "manufacturing process" within the meaning of Section 2(k) of the Factories Act.

7. Though the Employees Insurance Court had remanded the matter to the competent authority to decide it afresh, on merits it would not be necessary to do so as the only question which needs consideration and gives rise to a substantial question of law is:

Whether the use of air conditioners in the establishment of the employer Hotel for the use of its customers would be a "manufacturing process" within the meaning of Section 2(k) of the Factories Act?

8. To consider the question involved in these first appeals, it is necessary to consider the provisions of Section 2(12) of the Employees State Insurance Act, 1948. Term "Factory" is defined u/s 2(12) as under

"Factory" means any premises including the precincts thereof where on 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 or a railway running shed.

9. According to the Corporation, the employer Hotel had employed 13 employees at the relevant time and since the "manufacturing process" was carried on in the establishment of the employer Hotel with the aid of the power by the use of air conditioners, the establishment was a "factory" within the meaning of Section 2(12) of the Act. The word "manufacturing process" is not defined under the Employees State Insurance Act, 1948. However, Section 2(14-AA) stipulates that the word "manufacturing process" shall have the meaning assigned to it in the Factories Act, 1948. Hence, it would now be necessary to consider the provisions of the Factories Act and specially the definition of the word "manufacturing process" u/s 2(k) thereof. Section 2(k) defines "manufacturing process" thus

"Manufacturing process" means any process for

- (i) making altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal or,
- (ii) pumping oil, water or sewage, or
- (iii) generating, transforming or transmitting power, or
- (iv) composing types for printing, print by letter press, lithography, photogravure or other similar process or book binding;
- (v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels;

10. Relying on the provisions of Section 2(k)(i) of the Factories Act, it is submitted on behalf of the Corporation that it is not in dispute that the employer Hotel was using air conditioners for the comfort of its customers and though the air conditioner was not made, altered, repaired, ornamented, finished, packed, oiled, washed, cleaned, broken up, demolished or otherwise treated for its use, it was definitely "adapted" for the use of its customers. It was canvassed on behalf of the employer Hotel that adapt meant fit and apt for the purpose and "adapted" also meant to be suitable. Relying on the aforesaid Dictionary

meaning of the term adapted, it was submitted on behalf of the employer Hotel that the air conditioner was fit and apt for the purpose of its use and was suitable for the use of its customers and since the employer Hotel was using the same for the comforts of its customers, it could be said that the air conditioner was "adapted" by the employer Hotel for the use so as to fall within the term "manufacturing process" defined u/s 2(k) of the Factories Act.

11. The submissions made on behalf of the employer Hotel are not acceptable. The Dictionary meaning of the word "adapted" in the New international Webster's Comprehensive Dictionary is to make suitable, as by remodeling, to modify, to conform to a situation or environment. Thus, "adapt" would not mean using the thing or article as it is. To adapt means to make an article suitable by remodelling so as to conform to a situation or an environment. Even according to the Concise Law Dictionary "To Adapt" means to make suitable, to alter as to fit for a new use, to change by adaptation, etc. Thus, it cannot be said by any stretch of imagination that the word "adapt" means that the thing or article is itself fit and suitable. As can be seen from the Dictionary meaning, something more has to be done to the article by adapting it. In fact, adaptation would mean a process of modifying a thing so as to suit a new condition. Thus, the use of air conditioner could have been said to be covered under the definition of the word "manufacturing process" only if some alterations were done to the air conditioner or the air conditioner was modified to make it suitable for some new use. Mere use of air conditioners in the lodging rooms for the comfort of the customers would not be sufficient to hold that the employer Hotel was carrying on "manufacturing process" within the meaning of Section 2(k) of the Factories Act. Since it is not the case of the Corporation that any other process mentioned in Section 2(k)(i) of the Factories Act was experienced by or carried on, on the air conditioner with a view to its use, it cannot be said that the Corporation was justified in passing the order u/s 45-A of the Act as the only term applicable in the instant case, according to the Corporation was "adapting" and as already pointed out hereinabove, the word "adapting" could not be applied to the facts of this case as the air conditioner was not "adapted" for its use in the hotel room. The judgments reported in 1995 (II) CLR 70 and 1987 L I.C. 1197 would not be applicable to the facts of this case. The judgment reported in 1987 L I.C. 1197 relates to a case where milk was filled in pots and was taken to shops for distribution. It was held by the Gujarat High Court in the reported decision that filling of milk in different pots and taking the same to the shops for distribution would be covered by the phrase otherwise "treating" or "adapting" any article or substance with a view to its use, sale, transport or disposal or delivery. Such was not the case here.

12. In yet another decision of this Court reported in 1980 (II) L.L.J 259 and relied on by the Corporation it was held by this Court that the establishment which supplied petroleum products to its customers and further undertook lubrication services of motor vehicles was covered under the Employees State Insurance Act. By applying the clause "treating" or "adapting" in Section 2(k) of

the Factories Act to the facts of the reported case, this Court held that whenever a vehicle was brought by a customer for washing, cleaning, oiling with a view to its use, sale, transport, delivery or disposal, such activity would fall within the definition of the word "manufacturing process". This Court further observed in paragraphs 20 and 21 of the reported judgment that "adapting" meant making fit or making suitable for use of the article. In fact, some of the observations in paragraph No. 21 of the reported case, support the case of the employer Hotel to some extent and are not of any assistance to the Corporation so as to hold that the air conditioner was "adapted" in this case for the use of the customers.

13. For the reasons aforesaid, the substantial question of law framed in this appeal is answered in the negative and against the Corporation. Since the substantial question of law is answered in the negative, it cannot be said that the employer Hotel was a "factory" within the meaning of the term u/s 2(12) of the E.S.I. Act, 1948 and the employer Hotel was carrying on "manufacturing process" with the aid of power merely because the establishment had installed air conditioners in the hotel rooms for the comfort of its customers.

14. Consequently, First Appeal No. 38/2007 is dismissed and First Appeal No. 545/2007 is allowed. The judgment passed by the Employees Insurance Court on 30.10.2006 is hereby set aside. There would be no order as to costs in both these appeals.