

(1994) 07 BOM CK 0084
In the Bombay High Court
Case No : First Appeal No. 353 of 1980

Joint Regional Director, Esi Corporation, Pune

APPELLANT

Vs

L.D. Bhawe and Sons

RESPONDENT

Date of Decision : 21-07-1994

Acts Referred:

Employees State Insurance Act, 1948 — Section 75, 82(2)

Citation : (1999) 3 LLJ 300

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Judgement

D.R. Dhanuka, J.—The Employees' State Insurance Corporation has preferred this appeal against order dated 12th July 1979, passed by the Employees Insurance Court, Pune in application (ESI/LPC) No. 5 of 1978. M/s. L. D. Bhawe & Sons of Pune, the respondent in this appeal had filed the said application u/s 75 of the Employees' State Insurance Act 1948. By the impugned order, the trial Court declared that the 8 shops enumerated in Exhibit 9 and the central office and the two godowns of the respondent herein, one at Satara Road and other at Apte Road, Pune were not covered under the Employees' State Insurance Act 1948 and that the appellant herein was not justified in calling upon the respondent herein to comply with the provisions of the said Act.

2. The respondent in this appeal is a partnership firm carrying on business as an agent of M/s. Bharat Petroleum Corporation for retail distribution and sale of their cooking gas within the Municipal and Cantonment limits of Pune. The respondent has established 8 shops at different places in the area of its operation. The respondent has also its office at Deccan Gymkhana, Pune and its two godowns one at Apte Road and another at Satara Road.

3. On 19th November 1976, the Government of Maharashtra issued Notification No. ESI/1875/800 PH 15 in exercise of the powers conferred on it by sub-section (5) of Section 1 of Act 34 of 1948, notifying that the provisions of the said Act shall extend to the classes of establishments mentioned in column I of the

schedule thereto appended in the areas specified in column II of the schedule. The said notification become operative on 27th November 1976. By the said notification, the provisions of the said Act were made applicable to the classes of establishments setout therein insofar as the said establishments were situated within the limits of the Pune Municipal Corporation, the limits of Pune Cantonment Board, the limits of Kirki Cantonment Board and extended limits of Pune Municipal Corporation comprising he Revenue villages specified therein. Item 3 of the schedule appended to the said notification inter alia reads as under :-

"the following establishments wherein 20 or more persons are employed, or were employed for wages on any day of the preceding 12 months namely;

(1).....

(2).....

(3) shops;

(4) to (6)....."

4. It is common ground that the number of employees working in each of the said shops never exceeded 19 employees. It is stated in the judgment of the trial Court and it is not controverted by learned counsel on either side that at the material time only 6 employees were working at the central office of the Respondent situate at Deccan Gymkhana. It is not disputed that only 9 persons were looking after the work at the godowns of the respondent situated at Apte Road and only three persons were employed by the respondent for looking after its work at Satara Road.

5. Each of the said 8 shops is separately registered under the Bombay Shops and Establishments Act. Each of the said godowns is also separately registered under the said Act. So is the central office of the respondent.

6. It is the case of the appellants that having regard to the applicability of relevant factors in this case, all these 8 shops, though situate at different places, the central office as well as two godowns were and are liable to be clubbed together and treated as one establishment. If the appellant is right in its contention referred to hereinabove, it would follow that the number of employees working in these shops, central office and the two godowns taken together would be more than 20 at the material time. If the contention of the appellant is upheld, it would follow that the provision of the Act were applicable to the respondent in this appeal.

7. In the judgment under appeal, the trial Court highlighted the following facts in support of its conclusion that the said 8 shops, central office and the said two godowns were liable to be considered as separate establishment. The relevant factors highlighted by the trial court in its judgment are as under :-

(1) The said 8 shops were situated at different places in the area of operation of

the respondent;

(2) Each of the said 8 shops was separately registered under the Bombay Shops and Establishments Act;

(3) Each of the shop had a separate Manager to look after the business. At each of the establishments separate registers, muster rolls and pay-sheets were maintained;

(4) Each of the said shops had separate bank account;

(5) Neither of the employees working in one shop were transferred or were transferable to another shop or at head office or vice versa. After considering the test laid down by the Hon"ble Supreme Court in the case of The Associated Cement Companies Limited, Chaibassa Cement Works, Jhinkpani Vs. Their Workmen, the trial Court reached the conclusion that all these shops/ establishments could not be considered as a single establishment for purpose of the said act i.e. Act no. 34 of 1948.

9. The learned counsel for the appellant has submitted that several other relevant factors having bearing on the issue of clubbing were virtually ignored by the trial Court and the impugned judgment and order, therefore, suffers from error of law required to be corrected by this court in this appeal. The learned counsel for the appellant highlighted the following factors in support of his submission :-

(1) All the said shops, central office and the said godowns were owned by single owner i.e. the respondent. Thus the test of unity of ownership was at any rate satisfied in this case;

(2) It was not disputed that Gas Cylinders were supplied to each shop from common godown;

It is necessary to add here and now that it is also not disputed that each shop also has its own godown;

(3) There was unity of control through the head office of the respondent and undoubtedly there was unity its own godown;

(4) If the respondent firm did not exists, none of the shops could exists.

10. The learned counsel for the appellant invited the attention of the Court to various passages from the judgment of the trial Court. It was observed by the Hon"ble Supreme Court in the case of Associated Cement Companies Ltd. that it was impossible to lay down any one test as an absolute test for all cases. The question to be asked is as to whether these shops, central office and godowns are liable to be treated as separate unit though owned by one owner. if the shops, central office and the godowns though belonging to one owner, are separate establishment, the test of unity of ownership loses its significance. The central office is bound to issue some direction to the managers of each of the

shops. Neither of the test relied upon by the learned counsel for the appellant is decisive. The basic question to be asked is as to whether the trial Court has misapplied the test laid down by the Apex Court. The tests laid down by the Hon"ble Supreme court in various cases decided by it have not been misunderstood by the trial court. The question of application of different test to the facts of the case is at the most a mixed question of act and law. Section 82(2) of the Act provides that "an appeal lies to this Court from the decision of the Employees Insurance Court only if the appeal involves a substantial question of law. " I am not prepared to read the judgment of the trial Court to mean that the factors highlighted by the learned counsel for the appellants have been ignored by the trial Court. After balancing all the factors emerging from the record the trial Court reached the conclusion that the test of functional integrality was not satisfied in the instance case. The basic question to be asked is as to whether these different units are liable to be considered as one integrated whole or whether the said units are liable to be considered as independent units. When the Court is required to consider as to whether the units in question are independent units or not, it is not the mandate of law that the units in question must be totally independent of the head office. Different establishments owned by the owner can never be independent of the owner himself for itself. After giving my anxious consideration to all the relevant factors referred to in the judgment of the trial Court and referred to by the learned counsel for the appellant I have reached the conclusion that the impugned order does not suffer from any legal infirmity and this appeal does not involve any substantial question of law. The inferences drawn by trial Court from the proved facts of the case are reasonably possible inferences.

11. Before I wind up the discussion it is necessary to refer to some of the authorities cited at the bar. The learned counsel for the appellant has relied on the recent judgment of Division Bench of this Court being judgment dated 13th July, 1994. In appeal no. 732 of 1993 in Writ Petition No. 931 of 1989. The learned counsel for the appellant has in particular relied on para 3 of the said judgment. Having regard to the facts of the case before the Division bench, the Division Bench of this Court took the view that the transport business carried on at the principal office as well as at branches was totally inter-dependent. In this case, the Division Bench of our Court reached conclusion that the nature of business conducted by Respondent no. 1 in this appeal was such that it could not be carried only at the establishment at Andhra Pradesh without the dependent on the branch office. In this case it is not possible to state that the business at each of the shops in question cannot be carried without the dependents on other shops. In my opinion the ratio of this judgment, with respect has no applicability to the facts briefed in this case.

12. The learned counsel for the respondent referred to and relied upon the ratio of the judgment of the Hon"ble Supreme court in the case of Management of Pratap Press, New Delhi Vs. Secretary, Delhi Press Workers" Union and Its Workmen, and the judgment of this Court in the case of Sunder Transport & Anr.

v. The Regional Provident Fund Commissioner 1992 2 CLR 977 and the judgment of this Court in case of Ebrahim Currim and Sons Vs. Regional P.F. Commissioner and Another, . If appears to be that the respondent is well supported by the ratio of judgments of this case.

13. It appears to me that the basic questions of clubbing of different establishments is required to be decided having regard to the facts of each case after applying the various tests laid down by the Hon"ble Supreme Court and by this court in various judgments. In this regard I am of the opinion that the trial Court has applied the relevant tests and has drawn its own inferences in support of its view that the different shops, the central offices and the two godowns cannot be considered as one establishment. It appears from para 12 of the judgment of the trial Court that the trial Court has also recorded an alternate finding from one another angle. The trial Court has observed that the godowns could not be equated with the shops. The trial court has observed that the different shops could not be clubbed with one another. The trial Court has, however, held that even if the central office and the godowns could be clubbed together, the number of employees working in the central office and the two godowns at the material time were less than 20 and on that count also the central office and the godowns could not be covered under the Act. To my mind the judgment under appeal is substantially correct. This appeal does not this involve any substantial question of law.

14. In the result the appeal fails. The appeal is dismissed.

15. Having regard to the facts and circumstances of the case there shall be no order as to costs.

16. Issue of certified copy is expedited.