(2013) 08 P&H CK 0963

In the Punjab And Haryana At Chandigarh

Case No : F.A.O. No. 599 of 1985

Keselec Lighting Fixtures APPELLANT

Vs

Employees State Insurance Corporation RESPONDENT

Date of Decision : 31-08-2013

Acts Referred:

Citation : (2014) 1 LLJ 319

Hon'ble Judges : Paramjeet Singh, J

Bench : Single Bench

Advocate : A.P. Bhandari, for the Appellant; Vikas Suri, for the Respondent

Final Decision : Dismissed

Judgement

Paramjeet Singh, J.—Instant FAO has been filed for setting aside the judgment and order dated 30.11.1984 passed by learned Employees Insurance Court, Chandigarh. Brief facts of the case are that appellant filed a petition through its attorney against the respondent u/s 75 of the ESI Act, for quashing the order dated 7.1.1983 passed by Deputy Regional Director, ESI Corporation, Chandigarh, vide which Rs. 27,579.49 have been claimed as contribution and Rs. 3311/- have been claimed as interest for the period 4/79 to 7/82 u/s 45-A of the ESI Act. Petitioner is a registered firm situated at Faridabad. As per averments made in petition, the said firm is engaged in the work of fixing chokes, starter seats and holders, wiring/glow lamp soldering, assembling etc. Petitioner-firm purchases chokes etc. from the market and then assembles them in their factory. The workers employed by the petitioner are less than 20 and no power is being used for manufacturing process. The electricity is used only for lighting purpose. Thus it has been pleaded that the petitioner is not covered under the ESI Act. It has been prayed that the order u/s 45-A of the ESI Act passed against the petitioner, demanding the amount with interest is illegal, void and liable to be set aside. No opportunity of being heard was given by the respondent to the petitioner prior to passing of the impugned order. Impugned order is non-speaking.

2. On notice, respondent appeared and filed reply/written statement. Respondent contested the petition on the ground that petitioner is covered under the ESI Act because 10 or more persons are working in the petitioner-firm. Manufacturing process is being carried out with the aid of power. It is also stated that petitioner employed 13 employees on 18.4.1979 and 17 persons were employed on 24.8.1982. Petitioner was served with a final notice. At the time of passing the order contentions raised by the petitioner were considered. There is no illegality in the impugned order. Power of attorney was not competent to file the petition. Replication was filed. Objections raised in the written statement/reply were controverted.

3. After perusal of the pleadings of the parties, Employees Insurance Court framed the following issues:

1. Whether the impugned order dated 7.1.1983 claiming contribution amounting to Rs. 27579.49 paise contribution and interest amounting to Rs. 3311/- passed by the respondent against the petitioner regarding the period 4/79 to 7/80 is illegal, void and is liable to be set aside on the grounds mentioned in the petition? OPP.

2. Whether Sh. S.P. Singh is competent to sign, verify and to present the petition? OPP.

3. Whether the petitioner is not covered under the ESI Act, as alleged in the petition? OPP.

4. Whether written statement has not been filed by a duly competent and authorised person? If not to what effect? OPP.

5. Relief.

4. Employees Insurance Court recorded finding against the petitioner on issues No. 1 and 3, which are the material issues.

5. Aggrieved against the impugned order of the authorities, petitioner has approached this Court by way of present FAO.

6. I have heard learned counsel for the parties and perused the paper-book.

7. Learned counsel for the appellant vehemently contended that Exhibit R-7 clearly indicates that column No. 3-C has been left blank. No documentary evidence indicating use of power for manufacturing process has been mentioned therein. It is further contended that power is only used for the purpose of lighting and no power is used for manufacturing process. In fact, there is no manufacturing but only assembling and soldering of articles with the help of blow torch lamp, which is simple heating torch, which burns liquid fuel. As such manufacturing process is not covered which involves power. So appellant does not fall within the purview of provisions of the ESI Act and Rules framed thereunder. Learned counsel for the appellant further made reference to the statement of P.W. 1 B.K. Arora to contend that while inspection of the factory was

carried out, no worker from the factory was joined by the respondent-ESI authorities. Before passing the order, no opportunity of hearing was afforded. Deputy Regional Director is not competent to pass the order raising a demand of contribution and interest thereon. Learned counsel for the appellant further made reference to the cross-examination of P.W. 1 wherein it was stated that appellant is doing the work of assembling and soldering. Power is not being used in this connection. Electricity bills are received and paid. Electricity bills relate to the premises where assembling and soldering work is being done by blow torch lamps which are operated manually. As such there is no use of power. Reference has also been made to the statement of P.W. 2 Nihal Singh, UDC, H.S.E.B. to contend that they are having single phase meter as well as three phase meter. If the motor is required to be used, for that purpose separate switch has to be installed. Special reference has been made to Exhibit P-12 to Exhibit P-23, photostat copies of the electricity bills.

8. Learned counsel for the respondent contended that appellant is manufacturing and soldering the articles which involve power and as such the statement of the appellant is not sustainable. Learned counsel for the respondent further contended that inspection was carried out on the appellant''s premises on 18.4.1979 then it had employed 13 persons. Thereafter inspection was carried out on 24.8.1982 and at that point of time 17 persons were employed by the appellant. Due notice was served upon the appellant. Contentions raised by the appellant were considered and an opportunity of hearing was given. There is no illegality in the order passed by the authorities as well as by the Employees Insurance Court.

9. I have heard learned counsel for the parties and perused the record.

10. It would be appropriate to consider whether use of blow torch lamp for the purpose of soldering by itself is not energy and transmission of vapors through burner is not transmission of any energy/power.

11. Learned counsel for the appellant contended that it is only the liquid fuel which is ignited through the burners and the vapors are converted into flame and as such there is no transmission of any form of power/energy. Alternatively it was argued that even if it is presumed that blow torch lamp is a form of energy it is not mechanically transmitted because term "mechanical" pertains to and involves machines and blow pump is merely a container and the tube through which vapors pass is not a machine and the transmission of vapors and consequential ignition is not a mechanical transmission. It is further contended that the expression "power" as defined u/s 2(g) of the Factories Act, means electrical energy or any other form of energy which is mechanically transmitted and is not generated by human or animal energy. As such the case of the appellant is not covered under the provisions of the ESI Act. The sum and substance of the contentions raised by learned counsel for the appellant is that blow torch lamp cannot be considered as a power as defined u/s 2(g) of the Factories Act.

12. The emphasis of the learned counsel for the respondent was that use of blow torch lamp for soldering has to be treated as use of power, therefore, the appellant is required to comply with the provisions of ESI Act.

13. In the light of arguments raised by learned counsel for the parties, following questions arise for determination:

1. Whether the factory in question is covered by the provisions of ESI Act?

2. Whether the use of blow torch lamp for soldering and assembling of the articles falls within the definition of use of power as defined in the ESI Act.?

14. ESI Act is made applicable to all the factories, including factories belonging to the Government other than the seasonal factories. Sub-section 4 of Section 1 of the ESI Act shall not apply to a factory or establishment belonging or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under the ESI Act. Section 2 of the ESI Act defines the meaning of certain expressions for the purpose of this Act. Section 2(12) of the ESI Act defines the meaning of expression "factory" to mean any premises including the precincts thereof whereon ten 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 or 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 carried on without the aid of power or is ordinarily so carried on.

15. From the reading of above provisions it is clear that for bringing into the ambit of provisions of ESI Act establishment of the appellant is required to fulfill the following conditions:

(i) Manufacturing process was being carried out in the establishment.

(ii) There was power being used to aid the manufacturing process being carried out.

(iii) 10 or more workers were working in the establishment any day in the preceding twelve months, if power was being used to aid the manufacturing process, or

(iv) 20 or more workers were working in the establishment any day in the preceding twelve months, if power was not being used to aid the manufacturing process.

16. In the light of above, first it is to be seen as to whether there is manufacturing process carried out in the establishment of the appellant.

17. As per Section 14-AA of ESI Act, expression "manufacturing process" shall have the meaning assigned to it in the Factories Act, 1948 (63 of 1948).

18. "Manufacturing process" is defined u/s 2(k) of the Factories Act as under:

"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, sewage or any other substance; or

(iii) generating, transforming or transmitting power; or

(iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding; or

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels;

(vi) preserving or storing any article in cold storage.

19. Admittedly, the appellant is doing soldering work with the help of blow torch lamp, which is manually operated. Admittedly, there is a power connection in the factory but it is alleged that it is being used for lighting purpose only and reference to the statement of witness has been made. In the Form Exhibit R-7 in column 2-A nature of the work carried out in the factory is mentioned as assembling with the aid of power. Although column No. 3-C has been left blank. There is a material evidence on record in the form of Exhibit R-l which is signed by B.K. Arora, Accounts Clerk of the appellant that manufacturing process of assembling is carried out in the factory with the aid of power and electricity. This finding has been recorded by the Employees Insurance Court after appreciating the evidence. Thus, there remains no doubt that manufacturing process is carried out in the factory with the aid of power and during the relevant period of inspection more than ten persons were employed and were working. Even if it is presumed that electricity is only used for the purpose of lighting, it is to be seen whether use of blow torch lamp comes within the definition of power/energy and if ten persons are employed still the factory will be covered under the definition.

20. Let us examine the structure of blow torch lamp, which is commonly known as heating torch which consumes liquid fuel with ambient atmospheric air after vaporizing it using a coiled tube passing through the flame. Even the kerosene fuel type blow torch lamp is also covered. It consists of a reservoir attached to the lamp. In the reservoir, liquid fuel is filled which is pumped by a pressure pump thereafter the vapor passes through the nozzle. Nozzle is attached to the lamp which ignites at its mouth. These are the bare parts of the blow torch lamp which are clearly visible from the naked look at the blow torch lamp. Blow torch lamp can be used by using fuel in the shape of kerosene oil, propane gas etc.

21. Even if for the sake of argument it is presumed that old fashioned blow torch lamp is used in the establishment of the appellant, even then liquid fuel is put to certain pressure with a pump attached to the reservoir and using its vapor heat

is produced. This vapor and heat is just equivalent to the LPG gas flame.

22. Hon''ble Supreme Court in Bombay Anand Bhavan Restaurant Vs. The Deputy Director, ESI Corporation and Another, 3 was considering whether LPG satisfies the definition of power as it is transmitted through a cylinder and the Hon''ble Supreme Court has concluded that use of LPG power is covered as a source of energy, which is mechanically transmitted.

23. In Bombay Anand Bhavan Restaurant v. Deputy Director, Employees'' State Insurance Corporation and Another (supra) Hon''ble Supreme Court has held as under:

38. In many countries transmission of LPG also takes place in a similar manner from a large fixed tank. In case of LPG stored in a cylinder the mechanism of transmission is essentially the same as the gas travels from the cylinder where it is stored to the gas cooking stove. While transmission of electricity involves a switch, transmission of LPG involves a valve mechanism or a regulator to ensure smooth flow. Hence, LPG is a source of energy which is mechanically transmitted by way of the tube attached to the machinery.

39. In our view, the use of LPG satisfies the definition of power as it is mechanically transmitted and is not something generated by human or animal agency. Since the establishment of the appellants involves a manufacturing process with the aid of LPG gas, which can now be termed as power, the establishment of the appellants can be termed as factories, and therefore, the ESI Act will apply to these establishments.

24. Use of blow torch lamp is identical to the use of LPG in a gas cooking stove. In the case of blow torch lamp also fuel is stored in a cylinder which is subject to pressure. Transmission is essentially the same as gas travels from cylinder. Here the liquid fuel travels from the reservoir of the blow torch lamp under pressure and thereafter through a nozzle and when ignites it creates energy. The heat generated which is used in the shape of power, is mechanically transmitted and is not a thing which is generated by human or animal agency.

In view of the ratio of judgment of the Hon''ble Supreme Court in Bombay Anand Bhavan Restaurant v. Deputy Director, Employees'' State Insurance Corporation and Another (supra), blow torch lamp falls in the definition of "use of power". Thereafter it is being used for soldering and assembling various articles manufactured at the factory. As such it is held that manufacturing process carried out in the factory of the appellant involves power and the factory is having more than ten workers, therefore, covered under the provisions of the ESI Act.

It would be appropriate to mention here that Hon''ble Supreme Court in Bombay Anand Bhavan Restaurant v. Deputy Director, Employees'' State Insurance Corporation and Another (supra) has considered how the provisions of social legislation be interpreted and has held as under:

20. The Employees State Insurance Act is a social security legislation and the cannons of interpreting a social legislation is different from the cannons of interpretation of taxation law. The Courts must not countenance any subterfuge which would defeat the provisions of social legislation and the Courts must even, if necessary, strain the language of the Act in order to achieve the purpose which the legislature had in placing this legislation on the statute book. The Act, therefore, must receive a liberal construction so as to promote its objects.

25. Since the establishment of the appellant involves manufacturing with the aid of blow torch lamp, which is termed power, therefore, the establishment of the appellant can be termed as a "factory having more than ten persons", therefore, the ESI Act will apply to this establishment.

26. Next argument of the learned counsel for the appellant was that u/s 45-A of the ESI Act before determination of the amount of contribution employer must be given an opportunity of being heard and in this case determination of the amount of contribution by Deputy Regional Director is erroneous for want of opportunity of hearing. The certificate issued for recovery is liable to be quashed.

27. Admittedly the Corporation is a quasi-judicial authority. It is obligatory on the part of the Corporation to hear the defaulting employer who might be affected by the Corporation''s decision under the provisions of the ESI Act.

28. In the present case, due notice was given vide Exhibit P-11 as well as through Exhibit P-10. Copies of the same were received and reply to the same was filed. In these circumstances, sufficient opportunity was provided to the appellants. It cannot be said that principles of natural justice have not been followed. In view of the above, present appeal is dismissed. No order as to costs.