

(2008) 07 KL CK 0073
In the High Court Of Kerala
Case No : MFA No. 625 of 2002

Managing Partner, Shanthi Flour Mills

APPELLANT

Vs

Regnl. Director, E.S.I.C.

RESPONDENT

Date of Decision : 09-07-2008

Acts Referred:

Employees State Insurance Act, 1948 — Section 1, 2(12), 2(9)
Factories Act, 1948 — Section 2

Citation : (2008) 119 FLR 354 : (2008) 3 ILR (Ker) 658 : (2008) 3 KLJ 465 :
(2009) 1 LLJ 100

Hon'ble Judges : P.N. Ravindran, J;J.B. Koshy, J

Bench : Division Bench

Advocate : Bechu Kurian Thomas, for the Appellant; T.V. Ajayakumar, for the Respondent

Final Decision : Allowed

Judgement

J.B. Koshy, J.—Whether the appellant's establishment is covered under the Employees' State Insurance Scheme as a factory or not is the question to be considered in this case. The appellant is a partnership firm engaged in the manufacture of Orid flour. An inspection was conducted by the Insurance Inspector on 18-4-2000 at the appellant's factory premises. Nine persons were seen employed in the factory and its premises. It has come out in evidence that usually the number of employees engaged in the factory and its premises is seven, but, during two months the appellant had on some days engaged two more casual employees. It was found out from records that the appellant has a sales depot at Kozhikode. Two persons were employed in the sales depot. Therefore, demands were issued for covering the establishment under the Employees' State Insurance Scheme including those two persons also as employees of the factory. It is the contention of the appellant that his establishment is not a factory covered under the Employees' State Insurance Scheme as it is employing less than 10 persons in the factory and its premises and since it is not a covered establishment, it is not liable to pay any contribution

to the employees employed in the factory or elsewhere. When the demand was issued, the appellant approached the Employees' Insurance Court and the E.I. Court held that appellant's establishment is a covered establishment. From that order, an appeal was filed before this Court and the matter was referred to the Division Bench for deciding the question whether employees working far away from the place where manufacturing process is carried on can be counted as workers in the factory for the purpose of coverage under the Employees' Insurance Scheme.

2. Section 2(12) of the Employees' State Insurance Act, 1948 (in short "the Act") defines "factory" as follows:

(12)"factory" means any premises including the precincts thereof--

(a) wherein 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

(b) 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 without 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;

A similar definition is given for the term "factory" u/s 2(m) of the Factories Act, 1948 which reads as follows:

2(m) "factory" means any premises including the precincts thereof--

(i) whereon ten or more workers are working, or were working 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

(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without 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 mobile unit belonging to the armed forces of the Union, railway running shed or a hotel), restaurant or eating place).

3. A large number of decisions were cited before us by the learned Counsel for the respondent to contend that once an establishment is covered, the employees employed elsewhere in connection with the work of the said establishment also will be covered because of the wider definition of "employees" u/s 2(9) of the Act. Section 2(9) of the Act reads as follows:

2(9) "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and--

(i) who is directly employed by the principal employer, on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or

(ii) who is employed by or through an immediate employer, on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;

(and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment) (or any person engaged as apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment:

4. There is no dispute for the proposition that if an establishment is covered, employees employed elsewhere in connection with the work of the said establishment will be covered. In other words, if there is a factory or a covered establishment in Kerala State and its sales office or head office is situated outside the State, all persons employed in the sales or head office will be covered as "employees" subject to the salary limits. But, the question is what is the criteria to decide whether a premises is a factory or not. Section 1 of the Act provides that the Act will apply to all factories and establishments notified in the official gazette. Shops and other establishments employing 20 or more persons are notified. Here, the contention of the E.S.I. Corporation is that if the two employees employed in the sales office at Kozhikode are included as employees in the factory, 11 persons were working and, therefore, it is a covered establishment as a "factory".

5. Now, we will consider ingredients of the definition of the term "factory". To become a factory, 10 or more persons should be or were employed for wages on any day of the preceding 12 months in any part of the premises including the precincts thereof wherein a manufacturing process is being carried on with the aid of power. Therefore, three ingredients are necessary. (1) There should be a premises including the precincts thereof. (2) a manufacturing process is being carried on in that premises (3) 10 or more persons are or were employed in the premises where a manufacturing process is carried on including in the precincts thereof. The Hon'ble Supreme Court has in G.L. Hotels Limited and Others Vs. T.C. Sarin and Another, held that in a restaurant, if manufacturing process is carried on in the kitchen, it can be deemed that in a part of the premises

manufacturing process is being carried on and if 10 or more persons are employed in that restaurant, it can be a factory. The kitchen where the manufacturing process was being carried on was situated in a part of the same premises. The word "premises" is not defined in E.S.I. Act or the Factories Act. The Bombay High Court has in *State Vs. Ardeshir Hormusji Bhiwandiwalla*, held that the word "premises" in Clause (m) of Section 2 of the Factories Act means not only buildings, but includes lands as well. The Apex Court in *Ardeshir H. Bhiwandiwalla v. State of Bombay* AIR 1992 SC 29 has held that the word "premises" refers to either land or buildings or to both depending upon the context. The entire area where salt work is done is a factory as manufacturing process is carried on in the entire premises. In *Read v. Read* 1866 W.N. 386 it was held that premises is synonymous with appurtenances. In *Andrews v. Andrews and Mears* (1908) 2 K.B. 567 it was held that the word "premises" implies "some definite place with metes and bounds, like land, or land with buildings upon it" (Per Buckley L.J.). A mobile van is not part of "premises" and, therefore, it is not part of a shop as held in *Cowlairs Cooperative Society Ltd. v. Glasgo Corporation* 1957 SLT 288. In *In re K.V.V. Sarma* AIR 1953 Mad 269 it was held that the term "precincts" used in Section 2(m) of the Factories Act is usually understood as a space enclosed by walls. In *Metro Motors Private Ltd. Vs. Regional Provident Fund Commissioner, Punjab Ambala Cantt. and Others*, , it was held that service-station and shop situated half a mile away from the place where manufacturing process is carried on cannot be considered as "premises" or precincts of the factory. In any event, in this case, even the E.S.I. Corporation has no case that sales depot situated 150 kilometres away in another city, is within the premises or precincts of the premises where manufacturing process is carried on.

6. The learned Counsel for the "Employees" State Insurance Corporation relied on the decision of the Supreme Court in *Hyderabad Asbestos Cement Products Ltd. Vs. Employees Insurance Court and Another*, . In that case, the factory was admittedly covered and it employed more than 10 persons. The question was whether employees doing administrative work and sales work elsewhere are covered. The Hon"ble Apex Court held that the definition of "employee" is very wide under the Act. Once the factory is covered, all employees employed elsewhere in connection with the work of the factory also will be covered. At paragraphs 11, 12 and 13 of the judgment the issue was discussed by the Hon"ble Supreme Court. The Supreme Court held that the word "factory" is confined to the premises including the precincts thereof where the manufacturing process is carried on. The Supreme Court also held that in view of the wider definition of "employee" u/s 2(9) of the Act, once a factory is covered, all employees employed elsewhere in connection with the work of that establishment also are covered. The Apex Court held that once there is a "factory" it is a covered establishment. Then all "employees" falling within the definition of the said term in Section 2(9) of the Act will have to be covered under the E.S.I. Scheme even though they are not working inside or in the

premises of the factory. At paragraph 12 of the judgment, the Hon"ble Supreme Court after quoting the definition of the term factory, noticed the arguments of the appellant as follows:

The word factory is confined to the premises including the precincts thereof where the manufacturing process is carried on. The submission on behalf of the appellants is that an employee of the factory should not only be an employee falling within the definition of the word "employee" but also an employee of the factory i.e. of a factory as defined in Section 2(12).

The Hon"ble Supreme Court held as follows:

We are unable to accept the contention for on a reading of the relevant sections it is clear that the word "employee" would include not only persons employed in the factory but also persons connected with the work of the factory. The employee may be working within the factory or outside the factory or may be employed for administrative purposes or for purchase of raw materials or for sale of the finished goods. All such employees are included within the definition of "employee."

Therefore, if there is a covered establishment or a covered factory, all employees employed in connection with the work of the establishment or factory wherever they are working are also covered in view of the wider definition of employee. Section 2(9) of the Act is an extended definition wherein contract workers working in the premises and contract workers working outside the premises under the supervision of the principal employer are also covered. But, to attract the above wider definition, there should be a covered establishment or a factory which is coverable under the Act. In all the decisions pointed out, admittedly, there was coverage for the factory. Once a factory or establishment is covered, then all employees will be covered as the definition of employee is wide and they need not work inside or in the premises or precincts of the factory.

7. It was argued that the definition of the term "employee" as well as the term "employee" were amended with effect from 28.1.1968. Earlier, if 20 or more persons were working in the factory, that establishment was covered, but, after the amendment of the Act, if 10 or more persons are employed, it is covered. So, the word "worked" was changed to the term "employed" and, therefore, it is contended that extended definition of "employee" u/s 2(9) is applicable while reading Section 2(12) of the Act also. This matter was also considered by the Supreme Court in *E.S.I. Corporation v. M.M. Suri & Associates (P) Ltd.* AIR 1999 S.C. 803 wherein the Hon"ble Supreme Court held that for covering establishment, there are two factors, (1) in an establishment there should be 20 or more employees (for factories where power is used-the minimum required is 10) and (2) those employees should answer the description of the term "employee" contained in Section 2(9) of the Act. The Supreme Court held as follows:

In our view, therefore, the Act would apply to an establishment only when

number of employees is 20 or more and all those employees answer the description of employee contained in Section 2(9) of the Act.

Therefore, for covering an establishment or a factory, as per the present definition, 10 or more persons should be employed in the premises including the precincts thereof and those 10 persons fall within the definition of the term "employee" in Section 2(9) of the Act. If that be so, that establishment is covered. Once that establishment is covered, all employees employed elsewhere in connection with the work of the said establishment within the meaning of Section 2(9) also are covered in view of the wider definition of the term "employee".

8. In this connection, we also refer to the decision of this Court in *Choisons Vs. E.S.I. Corporation*. In that case, seven persons were employed in a petrol pump. The employer had other businesses also and he had an office far away from the petrol pump. Apart from the employees in the petrol pump, three employees in the office were consolidating and checking the accounts of the petrol pump along with other accounts. Demand was issued for contribution to the E.S.I. Scheme as pumping done in the petrol pump is a manufacturing process and it is a factory and 10 persons are employed counting the number of persons employed in the office as well. It was held in that case that those three employees in the office cannot be counted for coverage of the petrol pump. It is submitted that no appeal has been filed against that judgment and that it has become final. In the above case, it was held as follows:

In view of the very wide definition, if petrol pump is a factory and a covered establishment, three employees working in the office may also be covered as they also, among other things, do some accounting works in respect of the pump. For that petrol pump should be a "factory". But, pump can be said to be a factory if only ten or more persons are employed in the premises or precincts of the pump. Since office is not in the premises or precincts, these three employees are not working in the pump and appellant's petrol pump is not a factory.

9. It is submitted that the factory itself was running at a loss and except during two months, at no point of time it had employed more than seven persons. Admittedly, at no point of time, 10 or more persons worked in the premises including the precincts thereof where the manufacturing process is carried on. Therefore, it is not a covered establishment. Since it is not a covered establishment, question of demanding E.S.I., contribution in view of the wider definition of the term "employee" will not arise. But, we make it clear that if 10 or more persons are employed in the factory premises, in any day of the preceding 12 months, the factory will be covered and then employees in the sales office also are liable to be covered in view of Section 2(9) of the Act. Since even the Employees' Insurance Corporation has no case that in the premises or part of the premises including the precincts thereof where manufacturing process is carried on more than nine employees were employed, it is not a covered establishment. Therefore, we set aside the demand of E.S.I. Corporation and

judgment of the Employees' Insurance Court. The reference is also answered accordingly.

10. The appeal is allowed. No order as to costs.