
(2007) 05 MP CK 0037
In the Madhya Pradesh High Court

Manohar Dairy and Restaurant

APPELLANT

Vs

Employees State Insurance Corporation and Another

RESPONDENT

Date of Decision : 03-05-2007

Acts Referred:

Employees State Insurance Act, 1948 — Section 1, 2, 45A, 45B, 75

Citation : (2007) 3 LLJ 948 : (2007) 3 MPHT 174 : (2007) 3 MPLJ 355

Hon'ble Judges : A.K. Shrivastava, J

Bench : Single Bench

Judgement

A.K. Shrivastava, J.

This appeal has been filed u/s 82 of Employees" State Insurance Act, 1948 (in short "the Act") by appellant assailing the order dated 30-11-1999 passed by Employees" Insurance Court in Case No. 4/95 ESI Act.

The appellant is registered under Indian Partnership Act, 1932 and carries on the business of a restaurant in the name and style of M/s Manohar Dairy and Restaurant. An application has been filed by appellant u/s 75 of the Act before the Insurance Court challenging the legality and validity of three notices dated 3-2-1995, 10-2-1995 and 13-3-1995 issued by the Regional Director of the respondent Employees" State Insurance Corporation whereby the Regional Director has demanded a sum of Rs. 80,988 towards insurance contribution in respect to the employees working in the establishment of appellant.

The contention of appellant before the Insurance Court as well as before this Court is that the appellant establishment is not covered under the Act and the provisions of the Act do not apply to it for the reason that it had never engaged twenty or more employees in the restaurant; that Inspector of the respondent Corporation had already made inspection of the restaurant in the year 1989 and certified on 24-9-1989 that during the period September, 1982 to March, 1989 the total strength of the employees working in the restaurant was less than twenty and, therefore, no liability accrued under the Act for the period 1-9-1982

to 31-3-1989.

It is the further case of appellant that another Inspector Mr. Malani inspected record of the restaurant from April, 1989 to June, 1993 and certified that at no point of time during this period the strength of employees working in the appellant establishment was 20 or more. A plea of limitation was also raised by appellant that the demand is barred by time because on 3-2-1995, which is the date of first notice, demand for the period preceding five years to the notice only could have been made u/s 77(1-A) (b) of the Act.

The respondent/corporation filed its reply before the ESI Court and justified its stand on the ground that the appellant establishment is covered under the provisions of the Act and the claim as made is not barred by time. It was also submitted that appellant earlier also filed a case challenging the demand for the year 1981 -82 which was dismissed.

The ESI Court framed following issues:

(i) Whether the order of recovery issued by the Corporation from September, 1982 to 31-10-1993 is illegal ?

(ii) Relief and cost ?

Both the parties adduced oral and documentary evidence in respect of their rival claims. The ESI Court by the impugned order has rejected the application of the appellant.

In this manner the present appeal has been filed by the appellant assailing the impugned order passed by ESI Court.

The contention of Shri Ashish Shrotri, learned Counsel for the appellant is that R.N. Ojha, Inspector of the Corporation, inspected the establishment of the appellant in the year 1989 and certified that during the period September, 1982 to October, 1989 the strength of employees in the restaurant was below twenty persons and, therefore, the restaurant may be treated as uncovered during the period 1-9-1982 to 31-3-1989 and, therefore, the demand which has been made for this period should not have been allowed. In the inspection held on 14-6-1993 vide Exh. D-2 it was found by the Inspector that from April, 1989 to June, 1993 the strength of employees was not exceeding twenty or more and, therefore, the demand which has been made is illegal. By inviting my attention to the statement of Murlidhar, partner of the appellant, it has been argued that for the period 1982 to 1989 the strength of the employees in the restaurant was below twenty and the same was also less than twenty between the period 1989 to 1993. It has also been argued by learned Counsel that vide notification dated 19-3-1977 issued by the State Government in exercise of power u/s 1(5) of the Act it was directed that the act would apply to the specified establishment if there are twenty or more employees employed by it at any particular day during the preceding twelve months. Since at any point of time the employees were never 20 or above during the period September, 1982 to March, 1989, therefore,

the demand which is made is contrary to the law. By inviting my attention to Exhs. P-7 and P-8, dated 9-8-1995 and 5-1-94 issued by Dy. Director, Industries and Director, Industries, respectively it has been argued that cooking gas is not included as "power" in terms of Factories Act, 1948 and since the word "power" envisaged under this Act shall have the same meaning which is defined in the Factories Act, therefore, the use of cooking gas cannot be said to be use of "power" for the purpose of this Act and hence establishment of appellant would not cover under the definition of Factory envisaged under the ESI Act.

Lastly it has been argued by learned Counsel that the demand which has been made by the Corporation is ex-jack barred u/s 77(1-A) (b) of the Act.

On the other hand, Shri T. Burrows, learned Counsel for respondent No. 1, submits that the demand which was made by Corporation cannot be said to be barred by limitation and in support of his contention he has placed reliance on the decision of the Supreme Court E.S.I.C. Vs. C.C. Santhakumar, , and also the decision of Madras High Court Standard Literature Co. (P) Ltd. Vs. Employees' State Insurance Corporation Ltd. and Another, . By inviting my attention to Section 1(6) of the Act it has been argued that the said provision is applicable retrospectively and, therefore, the demand which has been made from the appellant is in consonance to the said provision.

Having heard learned Counsel for the parties, I am of the view that this appeal deserves to be allowed in part.

Before considering the rival contentions of learned Counsel for the parties, it would be appropriate to see the definition of Factory as envisaged u/s 2(12) of the Act. It would be relevant to mention here that before 20-10-1989 the definition of "Factory" under the Act stood as under:

2(12) "Factory" means any premises including the precincts thereof 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 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.

The above said definition of Factory was later on amended on 20-10-1989 and the definition which is now prevailing is as under:

2. (12) "Factory" means any premises including the precincts thereof-

(a) 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 without 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.

It would be relevant to mention here that the date when the definition of "Factory" was amended, on the same date, i.e., 20-10-1989 new Sub-section (6) to Section 1 was also added by amendment which reads as under:

1. (6) A factory or an establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under this Act or the manufacturing process therein cases to be carried on with the aid or power.

The contention of learned Counsel for the respondent that the amendment in Section 1(6) of the Act is made applicable retrospectively, cannot be accepted because on going through Section 1(6) which I have quoted herein above, it cannot be said that the said provision which was amended on 20th October, 1989 is made applicable retrospectively. There is no express or implied provision in the amended Section 1(6) of the Act in order to indicate that the Act will have retrospective effect. I am of the view that it would apply only prospectively looking to the language of the section itself. In this context, I may profitably rely the decision of Gauhati High Court Employees State Insurance Corporation and Another Vs. Steel Engineers and Another, . The Union Parliament and State Legislatures have plenary powers of legislation within the fields assigned to them and subject to certain constitutional and judicially recognised restrictions can legislate prospectively as well as retrospectively. Competence to make a law for a past period on a subject depends upon present competent to legislate on that subject. By retrospective legislation, the Legislature may make a law which is operative for a limited period prior to the date of its coming into force and is not operative either on that date or in future. The power to make retrospective legislation enables the Legislature to obliterate an amending Act completely and restore the law as it existed before the amending Act. It is a cardinal principle of construction that every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is "deemed to be prospective only *"nova constitutio futuris formam imponere debet non praeteritis"*. In the words of Lord Blanesburg, "provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment". Every statute, it has been said", observed Lopes, L.J., "which takes away or impairs vested rights acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a

retrospective effect". As a logical corollary of the general rule, that retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implication (see Principles of Statutory Interpretation by Justice G.P. Singh, Tenth Edition Pages 473 to 475). Since Section 1(6) of the Act is not made applicable retrospectively, therefore, I am of the view that the demand made earlier to 20-10-1989 by the Corporation cannot be sustained in the eyes of law and the same is hereby quashed.

The question now for consideration is whether after coming into force amended Section 1(6) of the Act which came into force w.e.f. October 20, 1989, any contribution was required to be made by the appellant ? On behalf of appellant one Murlidhar was examined and he stated that in the year 1979 or 1980 he obtained licence for 21 employees but the same was got cancelled by him. No such order of cancellation has been filed in the ESI Court by the appellant. On the contrary it has been specifically admitted by him that earlier also the establishment of appellant challenged the recovery of the year 1981 by filing application before ESI Court but it was dismissed and in compliance to the demand made by the Corporation the amount was deposited and the receipts of deposit are Exhs. P-12 and P-13. On going through these two receipts, it is gathered that the amount of Rs. 6,415/- was deposited against recovery notice dated 12-7-1994 for the period 1-4-1981 to 27-3-1982 vide Exh. P-12 and against recovery notice dated 8-8-1994 for the period 28-3-1982 to 16-7-1982 a sum of Rs. 2,199/- was deposited vide Exh. P-13. On going through these two receipts it is gathered that employer's code has been allotted to the appellant establishment and the same employer's code in the subsequent demand notice has been mentioned. It has also been admitted by Murlidhar, partner of the appellant, that he deposited the ESI contribution of the year 1993 vide Exh. P-6 through old code number only. Hence, it is established that the provisions of the Act were applicable to the establishment of the appellant earlier also and the establishment was being governed by the Act. In this view of the matter, after October 20, 1989 according to Section 1(6), the Act and its provisions shall be applicable on the establishment of appellant and it shall continue to be governed by the Act notwithstanding the number of persons employed in the establishment at any time falls below the limit specified by or under this Act or manufacturing process therein ceases to be carried on with the aid or power.

Earlier also the establishment of appellant was inspected and it was directed to contribute the ESI contribution. The appellant challenged the same by filing application before the ESI Court but the same was dismissed in default on 8-4-1994. The appellant has filed copy of the order dated 8-4-1994 passed by ESI Court in Case No. 29/84 (M/s Manohar Dairy and Restaurant v. ESI Corporation). Thereafter appellant also deposited the amount towards ESI contribution vide receipts Exhs. P-12 and P-13. In this view of the matter, I am of the view that from 20th October, 1989 appellant is liable to pay ESI contribution.

So far as the question of limitation is concerned, it stands concluded by the decision of the Supreme Court C.C. Santhakumar (supra), wherein it has been specifically held that the prescription of limitation u/s 77 (1 -A)(b) of the Act has not been made applicable to the adjudication proceedings u/s 45A by the legislature, since such a restriction would restrict the right of the Corporation to determine the claims u/s 45A and the right of recovery u/s 45B and, further, it would give a benefit to an unscrupulous employer. The Supreme Court has further clarified that the proviso to Clause (b) of Section 77(1-A) of the Act, fixing the period of five years for the claim made by the Corporation will apply only in respect of claim made by Corporation before the ESI Court and not to other proceedings and, therefore, the demand made by the Corporation against the appellant was also not barred.

For the reasons stated herein above, the appeals stands allowed in part. The appellant is not required to pay ESI contribution earlier to 20th October, 1989. However, appellant is liable to pay ESI contribution from 20-10-1989. If the appellant has deposited ESI contribution earlier to 20th October, 1989, respondent Corporation shall return the said amount deposited by the appellant. The appellant shall be free to file application in that regard before ESI Court. However, if the ESI contribution has not been deposited, the appellant is hereby directed to deposit the said contribution w.e.f. 20th October, 1989. Looking to the facts and circumstances, parties are directed to bear their own costs.