

(2010) 10 DEL CK 0085

In the Delhi High Court

Case No : FAO 4 of 2006

Mohd. Arif

APPELLANT

Vs

Employees State Insurance Corp.

RESPONDENT

Date of Decision : 25-10-2010

Acts Referred:

Employees State Insurance Act, 1948 — Section 75, 82(2)
Factories Act, 1948 — Section 2, 2(10), 2(12), 2(14AA)

Citation : (2010) 173 DLT 719 : (2010) 127 FLR 1114 : (2011) 2 LLJ 543 :
(2011) LLR 91

Hon'ble Judges : Mool Chand Garg, J

Bench : Single Bench

Advocate : Mohd. Abid, for the Appellant; K.P. Mavi and Saurabh Dhawan, for the Respondent

Judgement

Mool Chand Garg, J.—The issues involved in this appeal filed by the appellant u/s 82(2) of the Employees State Insurance Act, 1948 (hereinafter referred to as "the Act") against judgment and order dated 11.08.2005 passed by the ESI Court dismissing the petition bearing No. 39/1999 u/s 75 of the Act are:

- i. Whether the establishment of the appellant, which is admittedly only a guesthouse/lodging house without any kitchen, is coverable under the ESI Act even if it has only 11 employees?
- ii. Whether the use of refrigerator with the aid of power in the establishment of the appellant amounts to manufacturing process rendering the establishment coverable under the Act?
- iii. Whether the learned ESI Court was right in ignoring the judgment of the Madras High Court cited as 1956 Mad 600 which clearly says that the mere use of refrigerator with power does not amount to a manufacturing process?
- iv. Whether the letter obtained by the Inspector of the ESIC from the Manager of the establishment with a request to cover the establishment under the ESI Act is

sufficient for coverage even when the establishment is not legally coverable under the Act?

2. Before the ESI Court, it was pleaded on behalf of the appellant that he was running a lodging house under the name and style of Hotel Orchid at G-4, NDSE, Part-I, New Delhi which was having 18 rooms and was strictly meant for lodging purposes. No tea, coffee, food or eatable items etc. were prepared/manufactured or provided in the hotel/lodging house. It was also pleaded that the customers/guests/staff have to make their own arrangements for the same from outside. There was no kitchen in the hotel for manufacturing/preparation of any food or beverages items nor any power is being used for any such purposes. It was also stated that in fact, the terms of license issued by the Commissioner of Police as well as by the MCD expressly prohibited preparation and serving of any eatables or beverages in the hotel/lodging house. It was pleaded that on 01.12.1997 one Inspector of the respondent visited the hotel and asked for production of complete record relating to employee in the hotel for inspection purposes. Since the appellant was not present in the hotel, the Manager at the dictation of the Inspector gave in writing, the names of 11 persons who were working in the hotel at that time. The inspector also got one Form-01 filled up from the Manager. Thereafter, the appellant received a communication dated 02.06.1999 threatening prosecution of the appellant and proposing to receive a sum of `40,898/- as dues under the Act and it was on that account, the appellant filed a petition u/s 75 of the Act before that he also wrote a letter dated 06.07.1999 informing the respondent that the hotel was not covered under the Act and also informing that he has deposited `10,107/- towards contribution without prejudice to his rights and under protest. It was thus, pleaded that the establishment of the appellant could not have been covered under the Act inasmuch as the number of employees employed in the hotel being less than 20 and the hotel being not involved in any manufacturing process could not have been termed as a factory so as to bring it within the ambit of the Act.

3. The claim of the appellant was denied by the respondent. It was submitted that coverage of the appellant's hotel was based upon the information given by the Manager of the Hotel at the time of survey. The hotel was also having a deep freezer which was a power using unit and as such the hotel of the appellant was covered under the manufacturing unit and thus, was covered under the Act as they were having 11 employees also and in addition to having been involved in manufacturing process and that the refrigerator was being used by the Hotel run by the appellant for storing cold drinks and water which used to be supplied to the customers.

4. The ESI Court framed the following issues:

1. Whether the impugned demand is illegal and as such is liable to be set aside?
2. Relief.
5. After considering the evidence which came on record as led by the appellant

comprising of two witnesses and one witness of the respondent, who stated that on the date of inspection he found that 11 employees were working in the hotel and that a deep freezer was also being used in the hotel with the aid of electric power. The ESI Court dismissed the petition filed by the appellant by holding that in terms of the survey report Ex.RW-1/1 the hotel of the appellant was using a deep freezer with the aid of electric power and there were 11 employees working in that hotel for the purpose of serving cold drinks/mineral waters in the hotel and further that a letter was written by the Manager of the Hotel for covering the establishment of the appellant under ESI scheme holding that the petition as filed by the appellant was without any merits. The reasons given by the ESI Court besides relying upon the survey report of the appellant are as under:

Ex.RW1/1 is the survey report duly signed by the Manager of the petitioner hotel. Ex.RW1/3 is a Form under Rule 10-B giving the number of employees in the year 1997 from January to December.

When Manager of the petitioner hotel himself asked for coverage and request for allotment of the Code and the ESI accedes to the request then ESIC cannot be blamed for coverage later on.

Secondly, the only option to the petitioner is to apply under the proper provision of de-coverage and keeping in view the resultant order if there is any grievance petitioner should approach the Court.

Thirdly, the stand of the petitioner is that Ex.RW1/1 to RW1/3 were written under duress and compulsion. The kind of duress and compulsion extended by the Insurance Inspector has not been explained. There is no cross of RW1 also and the evidence of PW1 and PW2 is not able to prove that there was duress and compulsion by the insurance inspector to Sh. A.D. Ramesh, Manager of the petitioner hotel. Fourthly, Insurance Inspector found a deep freezer in the hotel using electric power. PW1 and PW2 states that there is a refrigerator in the officer for personal use. Since there is no cross of RW1, it is proved on record that deep-freezer was used for the purpose of running the hotel and for supplying the cold drinks and mineral waters to the customers.

6. Before this Court the appellant has assailed the order of the ESI Court basically relying upon the judgment of Madras High Court delivered in the case of New Taj Mahal Caf? Ltd., Mangalore v. Inspector of Factories, Mangalore AIR 1956 Mad 600 V 43 C 190 Nov. where a restaurant using refrigerator was not considered as factory for the purpose of covering it under the ESI Act specifically came up for consideration. In the said case, the Court made the following observations:

The other relevant finding by the respondent, of the Chief Inspector was that a "Frigidaire" that is a refrigerator was in use in that restaurant. These two findings are certainly not enough in my opinion, to sustain a conclusion, that that restaurant is a factory as defined by the Factories Act of 1948.

No doubt a Frigidaire is worked by electric power, but every place where a Frigidaire is used will not become a factory, even if the requisite number of persons are engaged in work on the premises where a refrigerator is in use. If a refrigerator was the only appliance driven by power that was used in the restaurant, what the statutory authorities had to decide was whether any manufacturing process was carried on with the aid of that refrigerator, that is, with the aid of the power that was needed to work that refrigerator. That aspect of the case does not appear to have been considered at all.

Normally a refrigerator is used for the purpose of storage. Even in a restaurant articles are kept in the refrigerator till they are required for sale. Mere storage as such will not be part of the manufacturing process as defined by Section 2(k), Factories Act of 1948: it will not even amount to treating or adapting any article with a view to its sale or disposal. If, however, a refrigerator is used for treating or adapting any article with a view to its sale, then the test required by Section 2(k) would be satisfied.

Let me illustrate the point by taking the example of ice cream, which is often sold in restaurants, and which is kept in cold storage till the sale is effected. If the ice-cream is made with the aid of a refrigerator like a "Frigidaire", then the Frigidaire would have been used for making or otherwise treating or adapting the article for sale.

Similarly, in the case of beverages, mere storage will not form part of the manufacturing process. But if the beverage is treated or adapted for sale by the use of a refrigerator, then that might amount to manufacturing process as defined by Section 2(k).

7. In the aforesaid judgment, apart from making the aforesaid observations, the Court further observed:

11. What the refrigerator, the Frigidaire, in the petitioner's restaurant, the Central coffee House and Lodging, was used for is not clear either from the order of the Chief Inspector or from the affidavit or counter-affidavit. That was one of the points the Inspector had to decide. The Inspector had to decide as a question of fact, what was the manufacturing process that was carried on in the restaurant with the aid of power? Any use of the power on the premises is not enough. The power must be used in aid of "manufacturing process" as defined by Section 2(k).

12. If the use of the "Frigidaire" is really the deciding factor in any given case, whether an establishment is a mere restaurant or is a factory, it is for the Government to decide whether the interests of the public will not be better served by exempting such an establishment from this provision of the Factories Act.

13. I have pointed out that preparation of food stuffs in the kitchen for sale in the restaurant would satisfy the test that a manufacturing process was carried on

in a part of the premises. If such a manufacturing process carried on in a part of the premises. If such a manufacturing process is carried on without the aid of any power, the minimum number of workers that would make the premises a factory is 20. But they should all be "workers" as defined by Section 2(k), Factories Act of 1948.

8. Relying upon the judgment it is submitted by the appellant that in the case of the appellant at the relevant time, the refrigerator found by the Inspector who came for survey was simply used as a storage and therefore the establishment of the appellant admittedly being a guest house/lodging house would not have come within the definition of Factory in terms of Section 2(12) of the Act which defines "Factory" as under:

2. Definitions:

(12) "factory" means any premises including the precincts thereof whereon ten or more persons are employed or were employed on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on 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.

9. It was further submitted that for the aforesaid purpose one may also go to the definition of manufacturing process as defined u/s 2(14AA) of the Act which defines such process as the process shall have the meaning assigned to it in the Factories Act, 1948.

10. Now, coming to the provisions of the Factories Act, 1948, we find that manufacturing process has been defined u/s 2(k) which expression has also been used in the Madras High Court judgment cited above. The definition reads as under:

2. INTERPRETATION:

(k) "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; [Ira-6] [Ira-7 or Ira-7]

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; (Inserted by the Factories (Amendment) Act, 1976, w.e.f. 26-10-1976.)

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

11. Despite addition of Sub-clause (vi) it has been contended on behalf of the appellant that merely because there was a refrigerator which is plied with the aid of the power and was being used for the purpose of storage of cold drinks and water, it would not mean that hotel of the appellant is involved in a manufacturing process within the definition of Section 2(k) of the Act. In this regard, the appellant has also relied upon a judgment of Bombay High Court delivered in the case of Ritz Hotel (Vegetarian), Pune Vs. E.S.I.C., Pune, In this judgment the precise question as to whether storing of milk or curd in a refrigerator amounts to storing of article in cold storage has been discussed by the Bombay High Court for the purpose of defining the expression "manufacturing process" prescribed by Section 2(k) of the Factories Act, 1948 relevant for the purpose of invoking Section 2(14AA) of the Act. The relevant paragraph of the judgment which are relevant are reproduced for the sake of reference:

6. This appeal involves a substantial question of law as to interpretation and application of the above referred notification dated 19th November 1976 and the provisions of law contained in Section 2(k) of the Factories Act, 1948 and particularly Section 2(k)(i) and Section 2(k)(iv) of the said Act.

7. In my opinion, the trial Court committed a substantial error of law while holding that the establishment of the appellant was covered under the Employees' State Insurance Act, 1948.

8. The first question which is required to be decided by the Court in this appeal is as to the interpretation of Sub-clause (vi) of Section 2(k) of Factories Act, 1948. It is not disputed that the said definition is incorporated in the Employees' State Insurance Act, 1948 for the purposes of the said Act also.

9. The learned Counsel for the appellant has rightly invited the attention of the Court to the judgment of High Court of Madras in the case of New Taj Mahal Cafe Ltd., Mangalore v. Inspector of Factories, Mangalore, AIR 1956 Mad 600. In that case the writ petitioner company owned eight restaurants in the city of Mangalore and the question before the Court was as to whether the restaurant using refrigerator could be considered as a factory. It may be clarified here and not that at that time Section 2(k) of the Factories Act, 1948 was not amended as done by the Legislature subsequently by incorporating Sub-clause (vi) therein by Act 94 of 1976. Since Mr. Jayakar, the learned Counsel for the respondent has mainly relied on Section 2(k)(iv) of the Act, and not on Section 2(k)(iv) of the Act, this case appears to be relevant and useful for deciding this appeal even though it interprets unamended provisions of the Act. It was held by Rajgopalan, J. in this case that every place where refrigerator is used will not become a factory even if the requisite number of persons were engaged in work on the premises where a refrigerator is in use. Merely because refrigerator is used with the aid of power, it does not follow that a manufacturing process is carried on in the establishment with the aid of power and the hotel or restaurant amounts to a "factory". In this case it was held by the Court that the mere storage of articles

in refrigerator will not be part of the manufacturing process as defined by Section 2(k) of the Act as it then stood. In this case Rajgopalan, J. *inter alia* observed as under:

Normally a refrigerator is used for the purpose of storage. Even in a restaurant articles are kept in the refrigerator till they are required for sale. Mere storage as such will not be part of the manufacturing process as defined by Section 2(k), Factories Act of 1948; it will not even amount to treating or adapting any article with a view to its sale or disposal. If, however, a refrigerator is used for treating or adapting any article with a view to its sale, then the test required by Section 2(k) would be satisfied.

This decision is not directly on the point but is helpful to some extent to the learned Counsel for the appellant for development of his submission to the effect that the establishment of the appellant is not covered under the Act.

10. Section 2(k)(iv) of the Act applies where a business is carried on of preserving or storing article in cold storage. It is common knowledge that there are several business concerns or companies owning cold storage equipments which are approached by others for preservation or storage of their articles in the cold storage apparatus of the owner. Perhaps it was little doubtful prior to amendment of Factories Act, 1948 as to whether the business of mere preservation or storing of articles in cold storage could be considered as a factory or whether the process of such storage could be considered as manufacturing process or not. To my mind, the definition of "manufacturing process" was extended by Amending Act 94 of 1976 from this point of view. The expression "cold storage" used in Section 2(k)(iv) of the Factories Act cannot be interpreted literally and mechanically *de hors* the object of the Act. If preservation or storage of an article in a domestic refrigerator is to be treated as preservation or storage of an article in cold storage, it would be doing violence to the language. The definition of "manufacturing process" is liable to be interpreted in business sense of the term having regard to the meaning of the words in common parlance and the usage of the trade. If the test is to be applied, it shall become clear that the trial Court was not right in treating a small refrigerator in the restaurant or the hotel as a place of cold storage.

11. There is one another angle which must be considered for interpretation of the above referred notification. Restaurants and hotels are separately provided for in column 3 of the said notification. If the restaurants and hotels do not employ for wages 20 or more persons, the restaurants or hotel is not covered by column 3 of the said notification. The question to be asked is as to whether the restaurant or hotel can be treated as covered by column 1 if it carries on its business with the aid of power where it employs more than 10 and less than 20 employees. If the restaurant or hotel employs more than 10 and less than 20 employees it can perhaps be covered by category 1 if it carries on its manufacturing activity with the aid of power. It has been held in several cases that even preparation of food in the kitchen of a large club can be treated as a "manufacturing activity" and if

requisite number of employees are employed by the establishment, it can be treated as covered by and under the provisions of the Act. It is not the case of the respondent Corporation here that the kitchen in this case was operated with the aid of power.

12. The learned Counsel for the respondent has argued that storage of milk in the refrigerator for purpose of preparation of tea for the customers and the storage of curd in the refrigerator for preparation of buttermilk and kadi for the customers would amount to manufacturing process within the meaning of Section 2(k)(i) of the Act. I am not convinced. The learned Counsel for the appellant has given an illustration in support of his submission in rebuttal of the above referred plea. The learned Counsel for the appellant submits that the medical practitioners keep drugs and medicines in refrigerators and the said medicines are at times used for preparation of mixtures. The learned Counsel for the appellant submits that if the submission of the learned Counsel for the respondent were to be accepted, it would lead to many complications and the legislative intention would not be fulfilled by stretching the interpretation that far. It think that the learned Counsel for the appellant is right.

13. In the result, the appeal succeeds. The findings of the trial Court on all the issues are set aside. The order under appeal is set aside. Application (ESI/LCP) No. 3 of 1980 is allowed.

12. All the aforesaid observations made by the learned Single Judge of the Bombay High Court in the aforesaid case squarely applies to the controversy involved before this Court.

13. The view taken by the Bombay High Court in the case of Ritz Hotel (Supra) has also been followed by another judgment delivered by the Nagpur Bench of the Bombay High Court in the case of Hotel Shree Vaibhav Vs. Employees State Insurance Corporation, In that case also despite use of LPG Cylinder and a fridge, water cooler and air-conditioner, it was held that the Hotel was not covered within the meaning of Factory u/s 2(12) of the Act and the hotel was held not 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 and the appeal filed by the hotel was allowed.

14. It would be of benefit to also take note of another judgment of the Hon^{ble} Supreme Court on the issue delivered in the case of Hotel New Nalanda Vs. Regional Director, E.S.I. Corporation, Some observations made in the aforesaid judgment which also crystallizes the issue are reproduced hereunder for the sake of reference:

18. For holding an establishment to be a `factory" within the meaning of Section 2(12) of the Act it must first be established that some work or process is carried on in any part of the establishment that amounts to `manufacturing process" as defined u/s 2(k) of the Factories Act, 1948. In case the number of persons employed in the establishment is less than twenty but more than ten then it

must further be established that the manufacturing process in the establishment is being carried on with the aid of power.

19. Further, the use of power in the manufacturing process should be direct and proximate. The expression "manufacturing process being carried on with the aid of power" in Section 2(12) of the Act does not mean a very indirect application of power such as use of electric bulbs for providing light in the work-area.

20. Unless the links are established, that is to say, it is shown that some process or work is carried on in the establishment which qualifies as "manufacturing process" within the meaning of Section 2(k) of the Factories Act and the manufacturing process is carried on with the aid of power, the mere presence of a refrigerator and a grinder there, even though connected to the main power line may not necessarily lead to the inference that the establishment is a factory as defined u/s 2(12) of the Act.

15. Applying the principles laid down by the Bombay High Court and Hon'ble Supreme Court to the facts of this case, it cannot be said that merely because the hotel/lodging house belonging to the appellant was using a refrigerator which was being used with the aid of electricity, the said hotel was engaged in the manufacturing process for the purpose of bringing it within the definition of "Factory" u/s 2(12) of the Act so as to cover the said hotel under the provisions of the Act as was sought to be done by the respondents.

16. Consequently, the order passed by the ESI Court is set aside and the appeal filed by the appellant is allowed. All the issues raised and mentioned in paragraph 1 of this judgment are decided in favour of the appellant taking into consideration that the number of employees admittedly employed in the said hotel/lodging house were less than 20.

17. No costs.

18. LCR be sent back.

C.M. 126/2006 (stay)

The application is disposed of as having become infructuous.