
(2013) 11 MP CK 0145

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 2105 of 2009

M/s. Hotel Ambassador

APPELLANT

Vs

Employees State Insurance Corporation and Another

RESPONDENT

Date of Decision : 01-11-2013

Acts Referred:

Citation : (2014) 140 FLR 682 : (2014) LabIC 304

Hon'ble Judges : Subhash Kakade, J

Bench : Single Bench

Advocate : S.P. Verma, for the Appellant; Sajid Akthar, for the Respondent

Final Decision : Disposed Off

Judgement

Subhash Kakade, J.—This appeal is directed by the appellant (in short "the proprietor"), Shri Kuldeep Singh Khanuja, Proprietor of M/s. Hotel Ambassador (in short "the establishment"), Guru Nanak Market Russel Chowk, Jabalpur u/s 82 of Employees' State Insurance Act (34 of 1948) (in short "the Act") being aggrieved by the order dated 18.04.2009 passed by the learned E.S.I. Court-cum-Labour Court, Jabalpur in Case No. 2/04/E.S.I. Act, maintaining the validity) of the notice dated 09.04.2003 issued by the Respondent No. 1 against the proprietor for recovery of Rs. 33,450/- imposed on account of falling in depositing the contribution towards E.S.I., within prescribed period by the proprietor and turned down his prayer to the effect that the provisions of the Act does not apply to his establishment. The facts giving rise to this appeal in short are that:--

(A) The appellant being the proprietor to the establishment is involved in hotel business. The Respondent No. 1 vide notice dated 09-04-2003 of recovery regarding contribution of E.S.I., alleging that the contribution is due on the proprietor from 01-04-1993 to 31-12-1996 and from 01-01-1997 to 30-09-1997 amounting Rs. 33,450/-.

(B) Against this notice the proprietor filed an application under the provisions of

Section 75 of the Act before the learned E.S.I., Court.

(C) Following grounds raised by the proprietor that:--

(i) The establishment is not a factory as per provisions of Section 2(12) of the Act, because in any part of the establishment no manufacturing process is being carried out with the aid of power.

(ii) By virtue of Section 1(4) of the Act provisions are applicable to all factories. However as per definition clause of Section 2(12) of the Act the provisions will apply to that factory only which will include where more than 10 or 20 employees are working.

(iii) Duly appointed officers under various Acts time to time inspected the statutory record of the establishment and duly countersigned verification. They have never found that the establishment had engaged 10 or more persons for applicability of the Act.

(iv) The proprietor has not given any opportunity of hearing before initiation and action under the Act. Any inspection report was not given to him if any carried out by the Respondent No. 1.

(v) It is also pleaded that the establishment of the appellant is a seasonal one.

Therefore, initiation of recovery action of contribution towards the E.S.I., is totally illegal.

2. On behalf of respondents reply was filed with following pleadings:--

(A) The hotel and restaurant establishment has been covered under the purview of the Act as per notifications issued u/s 1(5) of the Act; therefore, provisions of the Act and its regulations are applicable on the establishment of the proprietor. Hotel establishment are under purview of definition of factory as kitchen facility which provided in hotel for which power is used, which is a manufacturing process.

(B) At the time of surprise visit of Vigilance team on 07.10.1993 more than 10 employees i.e. 12 to 13 were found working in the establishment. The proprietor himself gave the details of these employees.

(C) The proprietor has suppressed the material facts of various communications, notices, inspection notices and other procedure requirements was continuously communicated to the proprietor and finally recovery proceedings were initiated by the competent officers after adopting legal procedure and providing fair opportunity.

(D) The respondent specifically denied this fact that the establishment of the appellant is a seasonal establishment because lodging boarding facilities are provided to occupant of the rooms of the establishment therefore, provisions of the Act applicable.

3. In view of pleading of the parties issues were framed and extended the opportunity to the parties for adducing the evidence. The proprietor Kuldeep Singh examined himself as PW/1 and produced documents Ex.P-1 to Ex.P-16. Shri K.N. Govindan, Shri A.S. Chouhan were examined as DW/1 and DW/2 on behalf of the respondent and also filed copy of inspection report Ex.D-1(C).

4. On appreciation of evidence learned E.S.I. Court rejected the application, hence, this appeal.

5. Thus the question, which needs to be determined is that:--

Whether the provisions of Section 2(12) read with Section 1(4) of the Act does not apply to the establishment of the proprietor, if yes, result?

6. Learned counsel for the parties referred various provisions of the Act as well as Employees' Regulation, 1950, (in short the regulation) and notifications which will be reproduced at the time of their requirement with submissions made by them.

7. After going through the evidence produced by the parties following facts are not in dispute:--

(1) The establishment having 20 rooms out of them 8 to 10 rooms having coolers operated by electricity.

(2) On dated 07.10.2009 surprise visit by Vigilance Officer Shri K.N. Govindan (DW/1) with one departmental officer Shri A.S. Chouhan (DW/2) were conducted at the establishment.

(3) In this surprise visit the officers of the revenue found 12-13 employees were working.

(4) On the basis of surprise visit an inspection report Ex.D-1 were prepared by Shri Govindan (DW/1).

8. Shri Govindan (DW/1) and Shri Chouhan (DW/2) found fridge in the kitchen of the establishment but, admitted that they have not inspected that what dishes were preparing in the kitchen, but, both officers stated that there was use of electrical power.

9. Going through the above facts and circumstances, it is proved that at the time of surprise visit on dated 07.10.1993 inspection report Ex.D-1 were prepared and 12 to 13 employees were found working. Use of fridge in kitchen and coolers in the rooms also goes to prove that these appliances were used by the electrical power.

10. Shri R.P. Verma, learned counsel for the appellant has contended that it is not proper to interpret that use of fridge or coolers by electricity means that there is manufacturing process is going on in the establishment, sense means the last product. It is further submitted that supply cold water or drinks to the customers or provided Air Conditioning facilities to customers occupying the

rooms of the establishment is not last product therefore, cannot be termed as manufacturing. He further submitted that it is not legally established by reliable and satisfactory evidence that use of fridge alone would amount to manufacturing process in the establishment in order of attract the establishment as a factory under the Act.

11. Before proceeding further it will be fruitful to reproduce the provisions of Section 2(12) of the Act which reads as under:--

2. Definitions.--In this Act, unless there is anything repugnant in the subject of context. [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 with the aid of power or is ordinarily so carried on, or

(b) whereon twenty or more person 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 or a railway running shed.

12. The definition of the factory is defined u/s 2(m) of the Factories Act, 1948 which reads as under:--

(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)

(Explanation (I)--For computing the number of workers for the purposes of this clause all the workers in (different groups and relays) in a day shall be taken into account;)

(Explanation (II)--For the purposes of this clause, the mere fact that an Electronic Data Processing Unit or a Computer Unit is installed in any premises or part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof;)

13. The definition of "power" in Section 2(g) of the Factories Act, 1948, it is clear that it may be electrical energy or any other form of energy, which is mechanical

transmitted and is not generated by human or animal agency. Therefore, from the definition it makes clear that if the electrical energy is used to create cooking effect, it would come within the meaning of transmitting power, and thereby, attract the provisions of Section 2(12) of the Act.

14. Learned counsel for the appellant first time referring to the State notification vehemently argued that the provisions of Section 2(12) of the Act are not applicable in this case, because at any point of time more than 20 employees never acted, served in the establishment.

15. The State notification reads as under:--

Notification No. 1639- 14902-XV1 dated the 19th March, 1977

In exercise of powers conferred by subsection (5) of Section 1 of the Employees' State Insurance Act, 1948 (No. 34 of 1948), the State Government having already given six months notice as required thereunder vide this department's notification No. 3999-7420-XVI, dated the 17th June, 1976 published in the "Madhya Pradesh Rajpatra" dated the 30th July, 1976 hereby extend all the provisions of the said Act to the classes of establishments as specified in column (1) of the Schedule annexed hereto to the 17 centres with effect from the dates indicated in column (2) of the Schedule:--

16. After hearing learned counsel for the parties and perusing material available on record couple with the State amendment by way above mentioned notification, it is clear that there is no dispute that under the Act liability to pay contribution towards E.S.I., arises only when 20 or more persons are employed for wages.

17. The Act applies to all factories or an establishment with 20 or more persons and the benefit is intended to be given to organizations with more than such number of employees. It is not the contention of the counsel that because the legislation is beneficial, it should not apply to the factory or establishments with less than 20 employees. If that be so, persons who do not satisfy the definition of employee as per Section 2(9) of the Act cannot be taken into account for the purpose of fixing the statutory minimum.

18. In view of the aforesaid facts and circumstances of the case, it is also found that the State Notification No. 1639 was not brought in the knowledge of the respondent before learned E.S.I. Court. By filing State Notification No. 1639 at this appellate stage, the proprietor put up the respondent in surprise. It is also pertinent to mention here that there was nothing pleaded in the application filed by the proprietor before learned E.S.I. Court. In the interest of justice, it is demand of natural justice that the respondent should be given equal and free opportunity to oppose the validity, applicability of State Notification No. 1639 and also to produce evidence to rebut it.

19. Therefore, the impugned order dated 18.04.2009 passed by the learned E.S.I. Court is hereby set aside. Because, the above facts came on record at this

appellate stage, therefore, case is remanded back to learned E.S.I. Court, who after giving due and proper opportunity to both the parties the parties in a free and fair manner, without being influenced or prejudiced by his previous judgment, shall decide the matter afresh in accordance with law. With the aforesaid observations, this appeal is disposed of with no order as to costs.