

(2017) 11 RAJ CK 0016
In the Rajasthan High Court
Case No : 559 of 2017

M/s. Hotel Sunrise

APPELLANT

Vs

The Employees State Insurance Corporation

RESPONDENT

Date of Decision : 02-11-2017

Acts Referred:

[Employees State Insurance Act, 1948](#), [Section 75](#), [Section 82](#) - Matters to be decided by Employees Insurance Court - Appeal

Citation : (2017) 11 RAJ CK 0016

Hon'ble Judges : Arun Bhansali

Bench : SINGLE BENCH

Advocate : J. Gehlot, M.R.Pareek

Final Decision : Dismissed

Judgement

1. This appeal under Section 82 of The Employees' State Insurance Act, 1948 ("the Act, 1948") is directed against the judgment dated 4/11/2016 passed by Senior Civil Judge (Employees' Insurance Court), Jodhpur Metro, whereby, the application filed by the appellant under Section 75 of the Act has been rejected.
2. The application under Section 75 of the Act was filed by the appellant inter alia with the submissions that he is having a Hotel and in the establishment only 6-7 employees on different salaries were employed; an alleged inspection was conducted on 26/7/2006 by the Inspector and a visit note was prepared indicating that 13 employees were working in the Hotel i.e. 9 in

the Hotel and 4 in the restaurant; the said aspect was sought to be disputed. A notice dated 21/8/2006 was issued along with a demand of Rs.64,350/- as contribution. It was also indicated that an FIR was lodged against the officer of the respondent for preparing a false and forged visit note. It was prayed that on the facts alleged, it be held that the appellant establishment is not covered under the provisions of the Act.

3. A response was filed on behalf of the Corporation denying the averments contained in the application. It was indicated that 13 employees were working at the establishment which included 04 employees working at the restaurant, which restaurant was on contract, allegations made regarding the preparation of false visit note was denied and it was submitted that in relation to FIR lodged by the appellant, FR has been given by the police.

4. The ESI Court framed four issues, on behalf of the appellant two witnesses were produced and 16 documents were exhibited, on behalf of the respondent Corporation one witness was produced and six documents were exhibited.

5. After hearing the parties, the ESI Court came to the conclusion that at the time of visit by the Inspector to the appellant establishment there were 09 employees in the Hotel and 04 employees in the restaurant and in all there were 13 employees, whose names, father's name along with salary were specifically indicated and in view thereof the direction to deposit the contribution from the month of July, 2008 to September, 2009 cannot be said to be illegal. The issue pertaining to refund of amount deposited was consequently decided against the appellant and the application was rejected.

6. It is submitted by learned counsel for the appellant that the ESI Court committed an error in dismissing the application filed by

the appellant. It was submitted that as the number of employees in the Hotel were below the statutory limit for application of the provisions of the Act, the ESI Court committed error in holding the same applicable to the appellant establishment. It was submitted that the employees working on contract in the restaurant cannot be clubbed with the employees working at the Hotel and, therefore, on account of wrong clubbing, the provisions have been made applicable which are beyond the provisions of the Act and, therefore, the judgment impugned deserves to be quashed and set aside.

7. Reliance was placed on the judgment of Hon"ble Supreme Court in Managing Director, Hassan Co-operative Milk Producer's Society Union Ltd. Vs. Assistant Regional Director, Employees State Insurance Corporation : 2010 DNJ 9 (SC) 552.

8. Learned counsel appearing for the ESI Corporation supported the judgment impugned.

9. I have considered the submissions made by learned counsel for the appellant and have perused the material available on record along with the record of the ESI Court.

10. In the visit note dated 26/7/2006 (Ex.D/1) prepared by the Inspector, it was indicated that the establishment pertains to Hotel (for lodging) and restaurant for making available refreshment; the restaurant was on contract to Ravindra Singh and the food, on being demanded by the guests of the Hotel, is served in the rooms. The Inspector noted 09 employees at the Hotel and 04 employees in the restaurant, engaged by the contractor and gave their names, father's name, position held by them and their salaries. In Ex.1 dated 6/10/2006 written by the appellant in response to the notice it was indicated by the appellant that the Inspector has indicated 13 employees in the Hotel, whereas, there

are 07 employees only. It was also indicated in the report that in restaurant of the hotel, for the customers staying in the Hotel, refreshment is made available, there are no separate employees of the restaurant and same has not been given on contract as per the report. Another response dated 28/7/2008 (Ex.9) was given indicating that the appellant had no relation with the restaurant and that the restaurant is not being operated by him. In the application under Section 75 of the Act, the pleas taken in various responses made by the appellant were reiterated.

11. The ESI Court based on the evidence on record, came to the conclusion that the contents of the visit note were duly proved and that there were as many as 13 employees working at the Hotel at the time of visit by the Inspector. The finding recorded by the ESI Court regarding the number of employees does not give rise to any substantial question of law. The issue raised by the counsel for the appellant regarding clubbing of the employees working on contract at the restaurant and the employees working in the Hotel requires consideration.

12. The definition of "employee" as contained in Section 2(9) of the Act inter alia reads as under:

"(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 services;"

13. A bare look at the above definition would reveal that under

clause (ii) the word "employee" in its sweep includes a person 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.

14. Similar issue was examined by the Hon"ble Supreme Court in Royal Talkies, Hyderabad & ors. vs. Employees State Insurance Corporation : (1978) 4 SCC 204, wherein, the issue pertained to inclusion of the employees engaged in a canteen and cycle stand within the theatre premises and the canteen & cycle stand were leased out to contractors under the instruments of lease and it was laid down as under:

"18. Therefore, we move down to Section 2(9)(ii) . Here again, the language used is extensive and diffusive imaginatively embracing all possible alternatives of employment by or through an independent employer. In such case, the "principal employer" has no direct employment relationship since the "immediate employer" of the employee concerned is some one else. Even so, such an employee, if he works (a) on the premises of the establishment, or (b) under the supervision of the principal employer or his agent "on work which is ordinarily part of the work of the establishment or which is preliminary to the work carried on in or incidental to the purpose of the establishment", qualifies under Section 2(9)(ii) . The plurality of persons engaged in various activities who are brought into the definitional net is wide and considerable; and all that is necessary is that the employee be on the premises or be under the supervision of the principal employer or his agent. Assuming that the last part of Section 2(9)(ii) qualifies both these categories, all that is needed to satisfy that requirement is that the work done by the employee must be (a) such as is ordinarily (not necessarily nor statutorily) part of the work of the establishment, or (b) which is merely preliminary to the work carried on in the establishment, or (c) is just incidental to the purpose of the establishment. No one can seriously say that a canteen or cycle stand or cinema magazine booth is not even incidental to the purpose of the theatre. The cinema goers ordinarily find such work an advantage, a facility, an amenity and some times a necessity. All that the statute requires is that the work should not be irrelevant to the purpose of the establishment. It is sufficient if it is incidental to it. A thing is incidental to another if it merely appertains to

something else as primary. Surely, such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either. Much depends on time and place, habits and appetites, ordinary expectations and social circumstances. In our view, clearly the two operations in the present case, namely, keeping a cycle stand and running a canteen are incidental or adjuncts to the primary purpose of the theatre.

19. We are not concerned with Section 2(9)(iii) nor with the rest of the definitional provision.

20. Shri Chitale tried to convince us that on a minute dissection of the various clauses of the provision it was possible to exclude canteen employees and cycle stand attendants. May be, punctilious sense of grammar and minute precision of language may sometimes lend unwitting support to narrow interpretation. But language is handmaid, not mistress. Maxwell and Fowler move along different streets, sometimes. When, as in Section 2(9), the definition has been cast deliberately in the widest terms and the draftsman has endeavoured to cover every possibility so as not to exclude even distant categories of men employed either in the primary work or cognate activities, it will defeat the object of the statute to truncate its semantic sweep and throw out of its ambit those who obviously are within the benign contemplation of the Act. Salvationary effort, when the welfare of the weaker sections of society is the statutory object and is faced with stultifying effect, is permissible judicial exercise.

21. In this view we have no doubt that the findings assailed before us are correct and that the conclusion reached deserves to be affirmed. We do so."

15. In view of the above principles laid down by the Hon''ble Supreme Court and the fact that the restaurant in the present case is within the premises of the establishment and caters to the guests staying in the Hotel, the principles laid down would apply with all force to the facts of the present case.

16. So far as the judgment in the case of Hassan Co-operative Milk Producer's Society Union (supra) cited by learned counsel for the appellant is concerned, in the said case the issue pertained to the persons engaged in loading & unloading of goods in the transport vehicles engaged on contract and therein, the Hon''ble Supreme Court found that as the presence of the employees at the premises was casual or occasional and they were not working under the supervision of the principal employer, the provisions of

Section 2 (9) (ii) would have no application.

17. On the facts of the present case, the judgment in the case of Hassan Co-operative Milk Producer's Society Union (supra) has no application and as discussed, the judgment in the case of Royal Talkies (supra) would apply.

18. In view of the above discussion, the plea sought to be raised by the appellant has no substance.

19. Consequently, the appeal is dismissed.