

(2014) 01 BOM CK 0191
In the Bombay High Court
Case No : First Appeal No. 583 of 2004

M/s. Omarkhayyam Bar and Restaurant	APPELLANT
Vs	
Deputy Regional Director	RESPONDENT

Date of Decision : 23-01-2014

Acts Referred:

Employees State Insurance Act, 1948 — Section 1 1(4) 2(12) 2(12)(a) 75
Factories Act, 1948 — Section 2(12)(a) 2(k)

Citation : (2014) 4 ALLMR 597 : (2015) 1 BomCR 825 : (2014) 142 FLR 54 :
(2014) 141 FLR 1044 : (2014) 3 LLJ 360 : (2014) 3 MhLj 419

Hon'ble Judges : S.B. Shukre, J

Bench : Single Bench

Advocate : P.H. Gulhane, for the Appellant; M.P.M. Pillai, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Shukre, J.—This appeal is directed against the order passed on 31st July, 2004 in Application (ESI) No. 2 of 1994 by the Employees' State Insurance Court, Nagpur. The appellant carries on business of Restaurant and Bar at Nagpur. The Insurance Inspector of the respondent had conducted a survey and drawn a preliminary inspection report of the establishment of the appellant on 21.4.1993. Thereafter, on 25.9.1993 he visited the establishment of the appellant and submitted his report stating that the establishment was covered under the provisions of the Employees' State Insurance Act, 1948 (hereafter referred to as "State Insurance Act"). By the report, the Inspector recommended for coverage of state insurance contribution by the appellant with effect from 20th October, 1989. The appellant was served with the demand note dated 12.11.1993 calling upon it to pay Rs. 34,537/- as the amount of insurance coverage within 15 days of the receipt of the notice. The appellant made a representation explaining that its establishment was not covered by the provisions of the State Insurance Act. However, it was rejected and further demand notes dated 28.2.1994 and 6.4.1994, asking for payment of said amount of Rs. 34,537/- within stipulated period were issued to the appellant. The

appellant made a representation against the said demand notes which were also rejected by the respondent. The appellant, therefore, preferred an application before the Employees' State Insurance Court at Nagpur u/s 75 of the State Insurance Act challenging the demand notes. The application was resisted and contested on merits by the respondent. The respondent submitted that the establishment of the appellant was squarely covered under the provisions of the State Insurance Act and, therefore, it was liable to pay the coverage amount as demanded from it.

2. After considering the evidence available on record and hearing of both sides, the Employees' State Insurance Court, Nagpur, by its order passed on 31st July, 2004 dismissed the application, finding that even though during the relevant period there were less than 20 employees engaged by the appellant-establishment, on facts, it was established that it was a factory within the meaning of Section 2(12) of the State Insurance Act and as such it attracted the provisions of the State Insurance Act.

3. Not satisfied with this order, the appellant is before this Court in this appeal.

4. This appeal has been admitted by this Court on 19th January, 2005 on substantial questions of law. The substantial questions of law that arises for my consideration are as follows:

1. Whether the appellant is covered by Clause 3 of the Schedule in the Government Notification dated 19.11.1976?

2. Whether the appellant is covered by Section 2(12) of the Employees' State Insurance Act, 1948?

5. I have heard Mr. P.H. Gulhane, learned counsel for the appellant and Mr. M.P.M. Pillai, learned counsel for the respondent and with their assistance I have carefully gone through the memo of appeal, impugned order and the documents filed along with the memo of appeal.

6. It is submitted by the learned counsel for the appellant that the provisions of the State Insurance Act would be applicable to the appellant under sub-section (5) read with sub-section (4) of Section 1 of the State Insurance Act only if the appellant is a factory within the meaning of Section 2(12) of the State Insurance Act. He submits that the State Government has issued a notification on 19th November, 1976 bearing No. ESI/1875/800/PH 15, in exercise of the powers conferred upon it under sub-section (5) of section 1, by which the operation of the said Act has been extended to various establishments as mentioned in the notification. He further submits that so far as Hotels and Restaurants are concerned, same are covered in entry 3 of the said notification and according to this entry, only the Hotels and Restaurants where 20 or more persons are employed during the relevant period are covered by the provisions of the said Act. He further submits that admittedly, the appellant had employed only 16 persons during the relevant period and, therefore, as per the said notification,

the appellant is excluded from the application of the provisions of the said Act. Therefore, according to him, on the basis of such a report, it cannot be said that there was any manufacturing process being carried on within the precincts of the establishment of the appellant and as such, the appellant would not be a factory and thus would be out of insurance coverage under the State Insurance Act.

7. Mr. Pillai, learned counsel for the respondent has submitted that even though there is a notification issued by the State Government on 19th November, 1976 extending the operation of the State Insurance Act to Hotels and Restaurants employing 20 or more persons, by virtue of sub-section (4) of Section 1 read with Section 2(12) of the State Insurance Act, the establishment of the appellant would squarely fall within the provisions of State Insurance Act. He submits that the notification issued under sub-section (5) of Section 1 covering those Hotels and Restaurants as mentioned therein cannot be taken to mean that the State Insurance Act does not apply to any other Hotels and Restaurants employing more than 10 persons, but less than 20 persons and which are covered under sub-section (4) of Section 1 of the said Act.

8. In order to deal with the arguments so advanced on behalf of both sides, it would be necessary to refer to the Government notification and also the relevant provisions contained in the State Insurance Act and the Factories Act, 1948 (hereinafter referred to as "the Factories Act"). The said notification dated 19.11.1976 is re-produced in the judgment rendered by the learned Single Judge of this Court in the case of Ritz Hotel (Vegetarian), Pune Vs. E.S.I.C., Pune, . It can be seen therefrom that the notification has been issued by the Government of Maharashtra in exercise of powers conferred upon it under sub-section (5) of Section 1 of the State Insurance Act. By this notification, the operation of the said Act to the various classes of establishment mentioned in column 1 of the Schedule appended to it in the areas specified in column 2 of the schedule has been extended. Entry 3, in the column 1, shows that operation of the State Insurance Act has been extended by the State of Maharashtra to, amongst others, Hotels and Restaurants, wherein 20 or more persons are employed on any day of the relevant period. The relevant period is the period preceding 12 months.

9. It is clear from this notification that only those Hotels and Restaurants, apart from the other establishments as mentioned in the Schedule, wherein 20 or more persons are employed on any day of the preceding 12 months, which would attract the provisions of the State Insurance Act. So, the question that arises in this case is whether by virtue of this notification the establishment of the appellant, which is admittedly a Restaurant and Bar, can be said to be not covered by the provisions of the State Insurance Act. According to the learned counsel for the appellant it is not covered as during the relevant period, the appellant had employed only 16 persons, well below the requisite number of 20. But, learned counsel for the respondent submits that even though the appellant-establishment is not covered by entry 3 in the schedule to the said notification, it

is covered by sub-section (4) of section 1 read with Section 2(12) of the State Insurance Act.

10. Upon perusal of this provision relied upon by the learned counsel for the respondent and also the said notification, I find that he is right. Since the appellant had employed only 16 persons during the relevant period and the notification covered establishments employing 20 or more persons, the appellant was surely out of area of operation of said notification. But, considering the nature of provisions contained in sub-section (4) of Section 1 read with Section 2(12) of the State Insurance Act, the number of persons employed and the activities carried on by the appellant, it is clear, these provisions did cover the establishment of the appellant. At this juncture, it would be appropriate to refer to sub-sections (4) and (5) of Section 1 of State Insurance Act.

For the sake of convenience, they are re-produced as under:-

1. Short title, extent, commencement and application.-

(1) This Act may be called the Employees State Insurance Act, 1948.

(2)

(3)....

(4) It shall apply, in the first instance, to all factories (including factories belonging to the Government) other than seasonal factories;

[Provided that nothing contained in this sub-section shall apply to a factory or establishment belonging to or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.]

(5) The appropriate Government may, in consultation with the Corporation and [where the appropriate Government is a State Government, with the approval of the Central Government], after giving [one months"] notice of its intention of so doing by notification in the Official Gazette, extend the provisions of this Act or any of them, to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise.

[Provided that where the provisions of this Act have been brought into force in any part of a State, the said provisions shall stand extended to any such establishment or class of establishments within that part if the provisions have already been extended to similar establishment or class of establishments in another part of that State.]

(6)....

11. Section 1 of the State Insurance Act is about the title, extent, commencement and application of the Act. Having regard to the language in sub-section (4) and (5) which particularly deal with the application of the State Insurance Act, it would be clear that both these provisions would have to be read

together so as to consider the applicability of the State Insurance Act to various establishments. Sub-section (4) lays down that the said Act shall apply, in the first instance, to all factories other than seasonal factories. Sub-section (5) provides that the appropriate Government may, by following procedure prescribed thereunder, extend the provisions of this Act or any of them to any other establishment or class of establishments. This power of the State Government to extend application of the provisions of the State Insurance Act is with regard to "any other" establishment or class of establishments and it would then mean that these establishments would be the establishments other than those mentioned in the previous provision which is sub-section (4). The scheme of section 1 is such that at the first blush it applies by a legislative mandate under sub-section (4) to all factories as mentioned therein and secondly by a Government notification issued under subsection (5) to such other establishments as may be mentioned in the notification. Power of appropriate government under sub-section (5) is, in its nature, supplementary to the provision of sub-section (4) as the object of the said Act is to provide benefits of insurance coverage to the employees and obviously to, as far as possible, maximum number of them. By exercising this power, the appropriate government can enlarge the sphere of applicability of the said Act and not constrict it. Therefore, if a State Government has, by notification, extended the provisions of the State Insurance Act to the establishments mentioned in the notification, it would not mean that other establishments not mentioned in the notification are excluded from the applicability of the provisions of the Act, if they otherwise qualify for the same under sub-section (4) of Section 1. Placing any other interpretation on the nature of power under sub-section (5) would amount to frustrating the object of State Insurance Act.

12. Learned counsel for the appellant has argued that if the Restaurant and Bar employing more than 10 persons, but less than 20 persons, like the establishment of the appellant, is taken as covered by the provisions of the State Insurance Act, there would have been no occasion for the State of Maharashtra to issue a notification and apply the provisions of the said Act to Hotels and Restaurants employing 20 or more persons during the relevant period and, therefore, he further submits that the case of the appellant as regards the applicability of the State Insurance Act, has to be decided only with reference to the notification issued by the State of Maharashtra on 19.11.1976. According to the learned counsel for the respondent, the provisions of sub-sections (4) and (5) of Section 1 themselves show that the State Insurance Act in the first instance applies to all the factories and then to other establishments, to whom it is made applicable by notification and, therefore, issuance of a notification applying the provisions of the said Act to some other establishments would have no adverse impact on sub-section (4) mandate.

13. I have already dealt with the nature of power under sub-section (5) and held that it is a power which is conferred upon the appropriate Government to enlarge and expand the field of applicability of the provisions of the Act by issuing a

notification to the establishments not covered under sub-section (4). It is not a power which exists dehors the mandate of sub-section (4). It is only an augmentative and supplementary power. Had it not been so, the Parliament would not have laid down that the State Insurance Act shall apply, in the first instance, to all the factories. After making such a declaration, the Parliament has also given power to the appropriate Government to apply the provisions of the Act to "any other" establishments. Such an additional power has been given as the Parliament has thought in it's wisdom that identification of establishments for application of the provisions of State Insurance Act in one go may neither be appropriate nor practicable and, therefore, it left the matter to the best of the judgment of the appropriate government, while dealing with some core establishments by itself. It then follows that if any establishment is a factory within the meaning of sub-section (4) of Section 1 read with Section 2(12) of the State Insurance Act, irrespective of the fact that it is not covered by the Government of Maharashtra notification dated 19.11.1976, it would fall under the coverage of the State Insurance Act. Therefore, I see no substance in the argument of the learned counsel for the appellant in this regard.

14. Now, it has to be seen whether the appellant is a factory as defined u/s 2(12) so as to attract the provisions of the State Insurance Act in terms of Section 1(4). Section 2(12) of the State Insurance Act, as it stood prior to its substitution by the Employees' State Insurance (Amendment) Act, 2010 (18/2010), with effect from 1.6.2010 reads as under:

Section 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 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;

15. In this case, there is no dispute that during the relevant period the appellant had employed 16 persons. This would mean that the case of the appellant has to be examined in the light of the provisions of clause (a) of Section 2(12) of the State Insurance Act. If the other condition regarding manufacturing process with the aid of power is seen to be fulfilled in this case, the appellant would be a factory as defined Section 2(12)(a).

16. Learned counsel for the appellant has submitted that there was no manufacturing process with the aid of power being carried on and there is no evidence on record to prove this fact. Learned counsel has invited my attention to the admissions given by the Inspector-Govind Motiram Manapure (Exhibit-18)

and which have been discussed in the impugned judgment in paragraph 13 and has submitted that with such evidence on record, the learned judge of the Employees' State Insurance Court, Nagpur ought not have recorded a finding that on facts the respondent had proved that the manufacturing process was being carried on with the aid of power in the establishment of the appellant and, therefore, the appellant was a factory. On the other hand, learned counsel for the respondent has submitted that there have been admissions also given by Sanjay Wasudeorao Deshmukh (Exhibit-16), the witness examined by the appellant, and they relate to use of LPG Gas for preparation of meals and deep-freezer for preservation and chilling and these admissions, he further submits, would sufficiently establish that the manufacturing process as defined u/s 2(k) of the Factories Act, 1948 and that too with the aid of power was being carried on in the premises of the appellant.

17. From the impugned judgment, one can see that some admissions have indeed been given by the Inspector-Govind Motiram Manapure. He has admitted that he did not mention in his report that electric power was being used by the appellant for manufacturing process, that he did not enter into the insides of the Hotel to see the manufacturing process, that he did not enter into the kitchen of the Hotel and that he did not mention in inspection report anything about the manufacturing process. But, it can also seen from the impugned judgment that these admissions have been considered by the learned judge in the light of the entire evidence available on record and upon such an appreciation of the evidence that the learned judge has recorded his finding that the manufacturing process was being carried on in the premises of the appellant and, therefore, the appellant was a factory within the meaning of Section 2(12)(a) of the State Insurance Act and as such covered by this Act.

18. The above finding of fact is based upon appreciation of the entire evidence available on record and since this is an appeal on a substantial question of law it would not be permissible for this Court to interfere with this finding unless the finding is shown to be perverse as not having been based upon the evidence on record or as based upon some extraneous material, which is not the case here. The learned judge has considered the admissions given by the appellant's witness, Sanjay Wasudeorao Deshmukh, in his cross-examination and these admissions indicate that in the kitchen, meals and snacks were being prepared and LPG Gas was being used for preparing them. They further show that there was a deep-freezer for preservation and chilling of food articles kept in the precincts of the appellant. The contents of the observation sheet, as admitted by said witness, have been counter-signed by Bharat Yadav, the Manager of the appellant and that the contents of the observation sheet were agreed to by the Manager. These admissions make it clear that food was being prepared in the kitchen by means of LPG gas which is one of the forms of heat energy and, therefore, a power. Matter does not end here. Deep-freezer was also admittedly being used for preservation and chilling of food articles and it is nobody's case that a deep-freezer runs without the aid of electric power. The preparation of

food in a kitchen is a manufacturing process as what goes therein is a bundle of myriad activities such as washing, cleaning, cutting, ponding, grinding, breaking up the raw food items, mixing and treating them with some other substances, and cooking or frying them leading to alteration of original form of raw food articles and finally serving them with ornamentation or garnishing. All these activities fall well within the definition of the "manufacturing process" as given u/s 2(k) of the Factories Act.

19. In the case of Ritz Private Limited and others vs. V. Shivraman and another, reported in (1993) 4 SCC 364 referred to me by the learned counsel for the respondent, Hon"ble Supreme Court has affirmed the view of the High Court that the activities in the form of cooking and preparing of the food being carried on in a kitchen of the hotel constitute manufacturing process. Similar view has been taken by the Bombay High Court and Delhi High Court in the cases of (1) Poona Industrial Hotel Ltd. vs. I.C. Sarin and another, reported in 1980 LAB I.C. 100, (2) Poona Hospital and Research Centre Vs. Employees" State Insurance Corporation and Others, and (3) Kanwarji Bhagirathmal Vs. The Employees State Insurance Corporation, referred to me by the learned counsel for the respondent.

20. In the case of Employees" State Insurance Corporation, Bangalore Vs. Bhagatram and Sons, Bangalore and another, referred to me by the learned counsel for the respondent, the Karnataka High Court has taken a view that the gas is also one of the forms of power within the meaning of State Insurance Act.

21. From the above decisions, it is clear that the preparation of food in a kitchen of the Hotel is a manufacturing process within the meaning of the State Insurance Act. I have already found that the facts of this case have shown that food was being prepared in the kitchen and that it was being made by means of LPG Gas, which is a form of power. In addition, the evidence has also shown that there was a deep-freezer being used for chilling and preservation purposes. A deep-freezer requires electric power for its operation and, therefore, for this additional reason, it can be said that the manufacturing process was being carried on with the aid of electric power and this would make the appellant as susceptible to the application of the provisions of the State Insurance Act.

22. Learned counsel for the appellant has submitted that in the case of Ritz Hotel (Vegetarian), Pune Vs. E.S.I.C., Pune, this Court has taken a view that merely because a small refrigerator is used with the aid of power, it cannot be said that the manufacturing process is carried on in the establishment with the aid of power. There can be no quarrel about this proposition. However, there is a difference in a refrigerator and a deep-freezer. A refrigerator is an appliance used for preserving perishable articles and beverages by keeping them cool for a short period of time. A deep-freezer or deep-freeze is an appliance which is used for storing food articles and beverages at very cold temperatures, usually -17°C or so with a view to preserve them for a longer period of time and, it would be generally used in a commercial establishment. Difference between these two appliances can be seen from their meanings described in the New International

Webster's Comprehensive Dictionary of the English language (Deluxe Encyclopedic Edition), First Indian Reprint, 2001, by CBS Publishers and Distributors, New Delhi. The dictionary defines the term "refrigerator" (P. 1060) as "A box cabinet, room, rail-road car etc. equipped with apparatus for preserving the freshness of perishable foods etc. by means of ice or other refrigerant." It defines "deep freeze"(P. 335) as "a refrigerator in which foods may be kept for long periods of time at temperatures approximating 0°F." It may be clarified here that on conversion, the temperature of 0°Fahrenheit comes to approximately - 17.77°Celsius. The deep-freezer used in this case, therefore, cannot be equated with a small refrigerator. The learned judge of the Employees' State Insurance Court, Nagpur has, therefore, rightly distinguished the facts of the present case from the facts of Ritz Hotel (Vegetarian), Pune (supra) and rightly found that its ratio cannot be applied to the instant case.

23. In view of above, I find that even though the appellant was not covered by clause (3) of the Schedule in the Government notification dated 19.11.1976, the appellant was covered by Section 1(4) read with Section 2(12) of the State Insurance Act and, therefore, the provisions of the said Act applied to it. Both the substantial questions of law are answered in these terms. There is no merit in this appeal and it deserves to be dismissed.

24. The appeal stands dismissed. In the circumstances of this case, parties to bear their own costs.