

(2016) 10 RAJ CK 0083
In the Rajasthan High Court
Case No : Civil Misc. Appeal No. 43 of 1999

M/s. Perry Ice Cream Factory	Vs	APPELLANT
Employees' State Insurance Corporation		RESPONDENT

Date of Decision : 06-10-2016

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(9), Section 75

Citation : (2017) 1 WLN 310

Hon'ble Judges : Mr. Arun Bhansali, J.

Bench : Single Bench

Advocate : Mr. G.R. Bhari, Advocate, for the Respondent; Mr. Anil Vyas, Advocate, for the Appellant

Final Decision : Allowed

Judgement

Mr. Arun Bhansali, J. - This appeal under Section 82 of the Employees' State Insurance Act, 1948 ("the Act") has been filed by the appellant aggrieved against the determination made by the Employees' Insurance Court ("the Court") under Section 75 of the Act vide order dated 7/11/1998, whereby, it has held that the appellant factory was covered under the provisions of the Act and was liable for making payment of contribution under the Act.

2. The appellant is engaged in the manufacturing of ice candy and ice cream. On 2/6/1992, inspection for the period April, 1992 to 2nd June, 1992 was undertaken by the Inspector of the Employees' State Corporation ("the Corporation"). Based on the said inspection, several notices were issued, which were responded to by the appellant, determination of contribution was made under Section 45A of the Act on 5/6/1995 by the Assistant Regional Director of the Corporation ("the ARDC") and ultimately demands dated 26/7/1995 were raised.

3. Aggrieved against the said demands, the present application under Section 75 of the Act was filed by the appellant inter alia challenging the applicability of the

Act. It was inter alia claimed that the appellant factory was a seasonal factory and, therefore, the provisions of the Act are not applicable; the persons, who were purchasing the goods from the appellant and were selling the same have been wrongly included in the number of employees; the appellant was not provided adequate opportunity of hearing and, therefore, the demand impugned was bad in law.

4. The application was resisted by the respondent Corporation and it was inter alia submitted that the appellant was provided adequate opportunity of hearing and, thereafter, the determination has taken place. It was further submitted that the claim regarding the applicant factory being a seasonal factory was baseless and that the persons engaged in sale of products of the factory are liable to be included in the number of employees for the purpose of applicability of the Act and, therefore, the application deserves to be dismissed.

5. The court framed six issues, on behalf of the appellant three witnesses were produced and on behalf of respondent one witness was produced, several documents were placed on record by both the parties.

6. After hearing the parties, the court observed that the main issue for determination was whether the persons, who were selling ice cream on commission basis can be treated as employees. While determining issue nos.1, 2 and 3 together, the court came to the conclusion that five persons were engaged in manufacturing of the ice cream and six persons used to fill the ice cream in the trolleys and at the end of the day were getting their wages or commission; an attempt has been made to show by way of bills that goods have been sold to the salesmen, which cannot be accepted, and salesmen fall within the definition of employees. Based on the above findings, the application filed by the appellant was rejected.

7. It is submitted by learned counsel for the appellant that the court committed an error in ignoring the documentary and oral evidence available on record; the court decided three issues together, which has resulted in recording of incorrect determination and incorrect finding without referring to the material available on record; it is proved on record that six persons, who were shown as salesmen were mere purchasers of ice cream/ice candy from the appellant and used to fill the same in the trolleys provided by the appellant and, therefore, they cannot be termed as employees. It was submitted that under the provisions of Section 2(9) of the Act even under the extended definition, said persons, who purchased ice cream from the appellant, cannot be termed as employees. Further submissions were made that as the appellant factory was a seasonal factory and was not working beyond seven months in a year, the Act is not applicable, which aspect has not at all been adverted to by the court and, therefore, on that count alone the judgment impugned deserves to be set aside.

8. Learned counsel appearing for the respondent Corporation duly supported the judgment impugned. It was submitted that from the material available on record,

the inspection undertaken by the Inspector, it is apparent that six persons were getting commission/wages for the purpose of selling/marketing the ice cream/ice candy manufactured by the appellant and, therefore, they have to be included in the number of employees as they fall within the definition of "employee" under Section 2(9) of the Act. Further submissions were made that from the material it was evident that the factory was working for extended period beyond seven months and, therefore, it cannot claim itself to be a seasonal factory so as to seek exemption from the applicability of the Act and, therefore, the appeal deserves to be dismissed.

9. I have considered the submissions made by the counsel for the parties and have perused the material available on record.

10. The inspection report dated 2/6/1992 (Ex.1) was prepared by the Inspector of the Corporation, wherein, it was indicated that on 23/5/1992 five persons were present in the factory and names of six salesmen along with their bill numbers dated 23/5/1992 were indicated; as on 2/6/1992 also salesmen were six in number, who were all identical to the salesmen as on 23/5/1992. It was further indicated that the factory workers were paid salary/wages through salary register and payment to salesmen is based on the sales undertaken by them and they were paid 25% as commission; the information has been provided by Rajendra Kumar, who is son of proprietor, and supervisor, a copy whereof has been given to him.

11. Based on the said report, proceedings were initiated, wherein, after issuing several notices, order dated 5/6/1995 (Ex.D15) under Section 45A of the Act came to be passed by the ARDC. It was inter alia held that the Inspector on 23/5/1992 found five employees and six salesmen, who were paid by the employer. The salesmen were paid 25% of the sales as commission, which was confirmed by Rajendra Kumar, supervisor and, therefore, it cannot be accepted that the salesmen take the goods after making payment. The trolleys belong to the factory and no charges were taken from the salesmen and they were employees of the factory and relationship of workmen and employer is proved and consequently confirmed the demand of Rs.5,990/- along with interest.

12. Section 1(4) of the Act provides that the Act shall apply to all factories other than seasonal factories and term "factory" as defined under Section 2(12) of the Act inter alia 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.

13. Section 2(19A) defines "seasonal factory" to inter alia mean a factory which is exclusively engaged for a period not exceeding seven months in a year. The definition of "employee", which is relevant to the present controversy, under Section 2(9) of the Act provides 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 service;.

and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment or any person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961, and includes such person engaged as apprentice whose training period is extended to any length of time but does not include-

(a) any member of the Indian naval, military or air forces ; or.

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government a month:

Provided that an employee whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period;"

(emphasis supplied)

14. A bare look at the above definition reveals that a person employed for wages in connection with work of the factory, who is directly employed by the principal employer, who is employed by or through an immediate employer or whose services are temporarily lent or let on hire to the principal employer and includes any person employed for wages on any work inter alia connected with distribution or sale of the products of the factory or establishment are included in the definition of "employee".

15. The wages have been defined under Section 2(22) of the Act to mean all remuneration paid or payable in cash to an employee in terms of the contract of employment, expressed or implied.

16. The entire basis of the determination made by the ARDC vide order dated 5/6/1995 was the report of the Inspector. When the Inspector entered the

witness box as DW.1 and was extensively cross examined, he inter alia indicated that on Ex.2 to Ex.7, which were sales book of the appellant, sales tax has been paid; indicated the names of persons, who had purchased the goods; he did not record the statements of the persons, whose names were indicated; he has assumed those persons as salesmen; he certified those persons as salesmen based on their names indicated on the bill; he did not make any inquiry from the said six persons; the record of sales by the salesmen was through the bill book and that he has indicated the salesmen based on the bills Ex.2 to Ex.7 and that the factory has paid the sales tax.

17. A bare look at the statement of the Inspector clearly indicates that he based his findings regarding six persons merely on assumption based on the fact that goods were sold to them and they were using the trolleys provided by the appellant factory. Nowhere the said Inspector, either in his report dated 2/6/1992 or the statement, indicated anything so as to indicate any payment being made by the appellant to the said salesmen. The only indication made in the report dated 2/6/1992 pertained to payment of commission of 25%. Hon"ble Supreme Court in the case of Managing Director, Hassan Co-operative Milk Producer's Society Union Ltd. v. Assistant Regional Director, Employees State Insurance Corporation : AIR 2010 SC 2109 after referring to the definition under Section 2(9) of the Act held as under:-

"17. We shall assume, to test the validity of the contention, in favour of the E.S.I. Corporation that workers engaged by the contractor (immediate employer) for transportation of milk have been employed in connection with the work of the principal employer and these employees, thus, qualify under first substantive part of Section 2(9). But as stated in Royal Talkies that merely being employed in connection with the work of an establishment, in itself, does not entitle a person to be an "employee"; he must not only be employed in connection with the work of the establishment but also be shown to be employed in one or other of the three categories mentioned in Section 2(9). Are these workers covered by any of these categories?

18. It is not the case of any of the parties nor there is any evidence to show that the persons who did loading and unloading were directly employed by the appellants. Section 2(9)(i) is, therefore clearly not attracted as it covers the workers who are directly employed by the principal employer. As a matter of fact, the thrust of the arguments centred round clause (ii) of Section 2(9). This clause, requires either (a) that the person to be an employee should be employed on the premises of the factory or establishment, or (b) that the work is done by the person employed under the supervision of the principal employer or his agent on work which is ordinarily part 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. The expression "on the premises of the factory or establishment" comprehends presence of the persons on the premises of the factory or establishment for execution of the principal activity of the industrial

establishment and not casual or occasional presence. We shall again assume in favour of the E.S.I. Corporation that for the purposes of loading and unloading the milk cans, the truck driver and loaders enter the premises of the appellants but mere entry for such purpose cannot be treated as an employment of those persons on the premises of the factory or establishment. We are afraid, the said expression does not comprehend every person who enters the factory for whatever purpose. This is not and can never be said to be the purpose of the expression. It has to be held that the persons employed by the contractor for loading and unloading of milk cans are not the persons employed on the premises of the appellants' establishment"

18. Besides, the above aspect of requirement of engagement on the premises of the factory having not been adverted to, further the fundamental requirement of terming any person as employee, by the very definition, is employment of any person for wages. The said aspect is totally missing in the present case, which is not even asserted by the respondent. The fact as to whether the payment of commission @ 25% was being made to the said persons, which is sought to be indicated as equivalent to wages, from the statement of Inspector (DW.1), it is apparent that nowhere it has been the case of the appellant that the said persons were being paid commission. In the cross examination of Thanwar Das (P.W.1), owner of the factory, he specifically denied payment of any commission. Further, admittedly, the Inspector did not examine the salesmen in this regard. As the goods are being sold by the appellant to the persons who are selling the same in the market by using the trolleys provided by the appellant and they have the right to deal with the product in the manner they desire, it cannot be said that the said persons were being paid wages in connection with the distribution or sale of the products of the factory so as to fall within the definition of "employee". In view thereof, the finding of the court in this regard cannot be sustained.

19. So far as the plea raised by the appellant regarding the factory of the appellant being a seasonal factory is concerned, the appellant itself has produced the documents Ex.8 to Ex.19, which is the attendance register of the factory, which pertained to the period January, 1992 to December, 1992 and the attendance register indicate the presence of 4, 5 or 3 persons throughout the year, who admittedly are the employees of the appellant. Even in the cross examination, P.W.1-Thanwar Das indicated that the factory works for 7-8 months and further fortified the same by indicating that the work starts from February and continues till one month prior to "Deepawali". In view thereof, it cannot be said that the appellant factory was working for less than seven months a year. This is besides the fact that no plea was raised by the appellant before the authorities, as is evident from the order passed by the ARDC (Ex.D-15).

20. In view of the above discussion, though the plea raised by the appellant regarding the appellant being a seasonal factory cannot be accepted. However, in view of the fact that six persons, who were sought to be included in the number

of employees allegedly working at the premises of the appellant by showing them as salesmen/employees under the extended definition under Section 2(9) of the Act cannot be sustained, therefore, as the number of employees are less than 10 during the relevant period, the Act would not be applicable to the appellant factory and consequently the determination made by the ARDC dated 5/6/1995 (Ex.D/15) cannot be sustained.

21. In view of the above discussion, the appeal filed by the appellant is allowed, the judgment impugned dated 7/11/1998 passed by the Employees' State Insurance Court and the order dated 5/6/1995 passed by the Assistant Regional Director (Ex.D/15) as well as consequential demands raised against the appellant are quashed and set aside. Any amount deposited by the appellant under Section 75 (2B) be refunded back to the appellant.

No order as to costs.