

(1997) 02 MAD CK 0124
In the Madras High Court
Case No : C.M.A. No. 172 of 1988

M/s Udipi Hotel Sudha

APPELLANT

Vs

Employees State Insurance Corporation

RESPONDENT

Date of Decision : 14-02-1997

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(22), 2(9), 45A

Citation : (1997) 2 LLJ 219

Hon'ble Judges : Govardhan, J

Bench : Single Bench

Advocate : M. Subramaniya Rao, for the Appellant; G. Desappan, for the Respondent

Judgement

1. This appeal is against the order passed by the E.S.I. Judge, Madras dated October 12, 1987 in E.S.I. O.P. No. 70/1985.

2. The petitioner in his petition contends as follows : By notification dated April 3, 1976 and December 22, 1976, the provisions of the Employees' State Insurance Act (hereinafter called as "the Act") has been extended to Hotels, Restaurants and other establishments, where there are more than 20 persons employed. The petitioner is covered under the same. A code number has been allotted to the petitioner and they were asked to implement the provisions of the Act with effect from January 16, 1977. The respondent has issued a show cause notice dated April 6, 1984 demanding payment of contribution for the period from January 16, 1977 to December 31, 1977 on ad hoc basis and on the basis of the Inspector's Report. The petitioner has sent a reply to the same. The copy of the report of the Inspector has not been provided to the petitioner in spite of his request. The additional remuneration paid to the employees for the period from January 1978 to January 1979 are not wages as defined u/s 2(22) of the Act. Security staff deployed by the Security Agency are not employees and they fall outside the purview of the Act. The car drivers, and the Security Officer cannot be considered as employees of the petitioner's establishment. But,

rejecting the explanation offered by the petitioner, the respondent has made a demand for Rs. 8,585-40 as payable by the petitioner. The impugned order is erroneous and hence the petition.

3. The respondent in his objection contends as follows : The insurance coverage has been extended to the petitioner institution since the petitioner has employed more than 20. The persons employed under the Act are not casuals in the strict sense of its terms. The coverage was decided on the information furnished by the employer in the Statutory Form 01 under Regulation 10B of the ESI Regulations as well as the report of the Insurance Inspector. The petitioner's contentions that the casuals were employed by him are not true and they are denied. The petitioner is not entitled to a copy of the report of the Inspector which is an inter-departmental correspondence. The essence of the report has been communicated to the petitioner as already. The order passed u/s 45-A of the Act is proper and in accordance with law.

4. On the above pleadings, the E.S.I. Judge held an enquiry and gave a finding that the petitioner establishment is covered by the provisions of the Act and the order passed by the Corporation is proper and dismissed the application.

5. Aggrieved over the same, the petitioner has come forward with this appeal.

6. The learned counsel appearing for the appellant has argued that the E.S.I. Judge has committed an error in holding that the employees employed by the petitioner institution as casuals are also employees of the respondent's institution and it has overlooked the documentary evidence produced under Exs. P-1 to P-9 which would show that the appellant's establishment was less than 20. There is no dispute that the establishment whose employment strength exceeds 20 or more, is covered under the Act. The petitioner has produced Form 01 to the Regional director under Regulation 10-B giving the name of the workers. The report of Insurance Inspector also contains the name of the workers. The proprietor of the petitioner establishment examined as P.W.1 has stated that in Ex. P-1 Register, it has been recorded even on April 23, 1977, that there are 18 employees working under the petitioner establishment and apart from these eighteen there are seven casuals. P.W.1 has stated that they make appointment of persons which is required for their establishment and pay them wages and it is only these people who are the employees and in order to manage the sudden rush of customers, they used to engage some casuals for cooly and they would be waiting outside their establishment. It is also stated by him that they used to get these casuals through Catering Contractor and these people who come and serve food would go away after receiving their cooly. According to P.W.1 these coolies are not paid either daily or on weekly basis. It is further stated by him that it cannot be stated that one man will be coming always on work as casuals. But the name of these people are in Exs. P-2 to P-4. In spite of the fact that the petitioner has contended that their names will not find a place in the Registers, the name of the casuals are also in the Registers is not in dispute. The Statutory Form furnished by the petitioner in Form 01 under Regulation 10B,

the report of the Insurance Inspector and the entry of the name of these so called casuals in the Registers would go to show that the version of the appellant that there are only 18 people employed permanently and 7 are working as casuals and therefore the provisions of the Act cannot be extended to their institution is not a tenable one.

7. Accordingly to the learned counsel, sometimes payment is made to extract work by way of incentive and the incentive paid as additional wages, does not come under the definition of the word wages and payment made to the Security people who have no nexus to the manufacturing process carried on in the petitioner institution cannot be considered as employees and the payment made to them also cannot be considered as wages to attract the provisions of the Act. The stand taken by the learned counsel appearing for the appellant, people who are employed as casuals do not come under the definition of the word employee and the payments made to them cannot be, considered as wages paid to them is not a tenable contention in view of the decision reported in Regional Director, Employees' State Insurance Corpn., Madras Vs. South India Flour Mills (P) Ltd., . Similarly, as per the decision reported in Harihar Polyfibres Vs. Regional Director, ESI Corporation, the term "wages" as used in the Act will include incentive allowance among other allowances like House Rent Allowance, Night Shift Allowance etc. These remunerations paid under the terms of the contract of employment at intervals not exceeding two months, is to be considered as wages. The Regional Director has rightly held that the actual employees are called as casual employees and the petitioner-establishment is able to pay contribution for all the employees in the establishment including casual employees.

8. The learned counsel appearing for the appellant would argue that the principles of natural justice has been violated, and an opportunity has to be given to petitioner to explain their position. It is to be noted that before passing the impugned order, a show cause notice has been issued to the petitioner and he has also sent a reply to the so same. There is no enquiry by recording evidence oral and documentary as contemplated u/s 45-A of the Act. The proviso to Section 45-A provides that no order shall be passed by the Corporation u/s 45-A unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard. In fact this proviso has been introduced by the Amendment Act of 1989 with effect from October, 1989 only. The period for which the contribution is demanded is for the period from January 16, 1977 to December 31, 1977 viz., anterior to the amendment introduced in the year 1989. The show cause notice has been issued before the amendment is introduced, and the petitioner has also sent a reply to the same. In the above circumstances, the argument of the learned counsel appearing for the appellant that principles of natural justice if violated an opportunity may be given to the petitioner to prove before the Regional Director that their institution is not covered under the Act by remanding the matter to the Regional Director, is in my opinion not a tenable one. In that

view, I am of opinion that this appeal is without merits and is liable to be dismissed.

9. In the result, the appeal fails and is dismissed. No costs.