(2024) 12 JH CK 0065

In the Jharkhand High Court

Case No : Miscellaneous Appeal No.215 Of 2009

Rajesh Kumar Sharma — APPELLANT

Vs

Employees' State Insurance Corporation through its Director — RESPONDENT

Date of Decision : 16-12-2024

Acts Referred:
Employees State Insurance Act, 1948 — Section 2(12), 2(14AA), 2(15C), 44, 45A, 45B, 45C, 45I, 75, 75(1)(a)(g), 82(2)

Citation : (2024) 12 JH CK 0065

Hon'ble Judges : Subhash Chand, J

Bench : Single Bench

Advocate : Nipun Bakshi, Ashutosh Anand

Final Decision : Allowed

Judgement

Subhash Chand, J

1. This miscellaneous appeal has been directed under section 82(2) of Employees State Insurance Act, 1948 on behalf of the appellant/petitioner Rajesh Kumar Sharma against the Employees State Insurance Corporations and others dissatisfied with the order dated 17.06.2009 passed by the Presiding Officer of Labour Court-cum-Employees Insurance Court, Ranchi in E.S.I Case No. 10 of 2002 whereby the appellant/petitioner’s case instituted under section 75 of Employees State Insurance Act challenging the order dated 02.06.2000 under section 45A of Employees State Insurance Act has been dismissed.

2. The brief facts leading to this miscellaneous appeal are that appellant/ petitioner Rajesh Kumar Sharma has filed an application under section 75(1)(a)(g) of Employees State Insurance Act, 1948 before the Presiding Officer of Labour Court, Patna after creation of Jharkhand State filed the same application before the Presiding Officer, Labour Court, Ranchi with these averments that the petitioner Rajesh Kumar Sharma is the proprietor of restaurant at Main Road, Ranchi. The said restaurant is run by the name and style Marwari Kalewalaya.

The snacks, meals are prepared and are sold and served therein to the customers. The said establishment is duly registered under the provisions of Bihar Shops and Establishment Act right from the year 1966 and in lieu of such registration Labour Department, Ranchi had granted and renewed the registration certificate time to time under the said Act. The registration certificate under the said Act has been renewed upto 01.12.1998 and the petitioner's application for renewal of the same thereafter was pending with the Labour Department, Ranchi.

2(i). It was also further stated that petitioner Rajesh Kumar Sharma had received notice on 15/23.02.1999 from the Manager, E.S.I Corporation, Kokar PS Sadar District Ranchi in which the petitioner was asked to show cause why the proceeding against him be not instituted for non-registration and non-compliance of the Provisions of E.S.I Act. The reply of the very notice was also given by the petitioner Rajesh Kumar Sharma on 09.03.1999 enclosing therewith the copy of registration certificate under the Bihar Shop and Establishment Act and also the photo copy of the attendance register showing therein the number of employee to be nine (9).

2(ii). Further it has been submitted that E.S.I Inspector, ESI Corporation, Kokar District Ranchi alongwith other officers of the E.S.I Corporation had made a surprise inspection of the establishment of the petitioner Rajesh Kumar Sharma time to time. They never found more than eight (8) employee at the establishment. Even on 29.06.2000 during inspection the eight (8) employees in the said establishment were found and the attendance-cum-wages register was also counter-signed by the Inspector in which eight employees were found working. Petitioner Rajesh Kumar Sharma never received any other notice except the notice dated 15.02.1999 issued by the Manager, E.S.I Corporation, Kokar PS Sadar District Ranchi. All of a sudden he received an order dated 06.06.2000 passed by the Deputy Director, E.S.I Corporation, Panchdeep Bhawan, District Patna wherein it has been held inter-alia that no record was produced before him to show the number of employee while at the time admitting receipt of the petitioner's representation dated 09.03.1999 the ex-parte order under section 45A of the E.S.I Act, 1948 levying dues to the tune of Rs.37,180/- in addition to the interest of Rs.9,056/- for the period of 01.09.1997 to December, 1998. The said order is wholly arbitrary, illegal and is high handed manner. On 29.06.2000 the petitioner Rajesh Kumar Sharma appellant herein pointed out to E.S.I Inspector, E.S.I Corporation, Kokar District Ranchi that at the adjoining restaurant were number of shops and establishment having similar number of employee but the respondent no.3 and his higher authorities were not proceeding against them and were picking out only the petitioner discriminating him from the others.

2(iii) It has been further stated that the Manager, E.S.I Corporation, Kokar District Ranchi had himself admitted having received the petitioner's representation on 09.03.1999 alongwith annexure attendance-cum-wages register and also the registration certificate of the establishment under Bihar Shops and establishment Act still the respondent no.1 Deputy Director, E.S.I Corporation, District Patna had acted in a rash and high handed manner in passing the impugned order on 02.06.2000. Unless and until the E.S.I authorities comes to the conclusion that what is the exact number of the employees in the establishment their salaries and wages etc. as an employee, no levy of any amount can be imposed upon the establishment of the petitioner appellant herein. Since the number of employee never reach ten (10) therefore the provision of E.S.I Act would not be applicable upon the establishment of the petitioner i.e. Marwari Kalewalaya.

3. On behalf of the opposite party Deputy Director, E.S.I Corporation and others have filed the reply before the Labour Court Patna in which this plea was taken by E.S.I Corporation that the main application under section 75(1)(g) of E.S.I Act of the petitioner Rajesh Kumar Sharma is not maintainable both in fact and law as well. The petitioner has got no locus standi to file this application. The petitioner is barred by the principle of limitation, estoppel, waiver and acquiescence as well. After giving opportunity of being heard to the petitioner the authorized officer demanded the contribution alongwith interest from the petitioner. On 30.09.1997 survey was conducted by the Area Insurance Inspector after prior intimation and confirmation of the employer and during survey it was found power using unit because the power was being used to run different electrical appliances for production/preparation of various food items meant for the sale in the establishment. On the date of survey on 30.09.1997 the workers who were found therein in the premises were the ten (10). List of the same was signed by R.K. Sharma, Advocate himself to whom the employer has introduced his son. On the very basis of the survey report the demand of contribution was made.

4. The learned Presiding Officer, Labour Court, Ranchi on the basis of pleading of the parties framed altogether three issues:

(i) Whether the Petition u/s 75 of E.S.I Act is maintainable?

(ii) Whether the establishment of the petitioner is rightly covered by the E.S.I. Corporation?

(iii) Whether petitioner is entitled to get any relief?

5. On behalf of petitioner in oral evidence examined altogether three witnesses; AW1 Rajesh Kumar Sharma, AW2 Suresh Mahto, AW3 Mukesh Kumar Singh and in documentary evidence filed Exhibit-1 photo copy of registration, Exhibit-2 office copy of registration, Exhibit-2 office copy of reply dated 09.03.1997, Exhibit-3 to 3A Attendance-cum-wages register, Exhibit-4 Signature of E.S.I. Inspector A.K. Pal, Exhibit-4/a Signature of D.L.C. Ranchi, Exhibit-5 Order dated 02.06.2000, Exhibit-6 Affidavit dated 28.11.2002, Exhibit-7 &7/A Two photo copies of the cheques, Exhibit-7/b Office copy of forwarding letter, Exhibit-8 to 8/d five registered Advocate clerk card.

6. On behalf of opposite parties examined only one witness Mr. Krishna Das and in documentary evidence filed Exhibit-A Preliminary inspection with report, Exhibit-B Letter dated 23.02.1999, Exhibit-B/1 Letter dated 29.07.1999, Exhibit-B/2 Letter dated 05.10.1999, Exhibit-C Form C-18, Exhibit-D Letter dated 29.12.1997, Exhibit-E Report of observation (Photo copy), Exhibit-F Letter dated 06.09.2000.

7. The learned Presiding Officer, Labour Court, Ranchi after hearing the rival submission of the parties passed the impugned order on 17.06.2009 whereby the application of petitioner Rajesh Kumar Sharma under section 75(1)(g) of E.S.I. Act had been rejected on contest.

8. Aggrieved from the impugned order dated 17.06.2009 the instant appeal has been preferred on behalf of the appellant Rajesh Kumar Sharma.

9. I have heard learned counsel for the parties and perused the material on record.

10. The learned counsel for the appellant has submitted that the appellant Rajesh Kumar Sharma has challenged the order dated 02.06.2000 passed under section 45A of E.S.I Act before the learned Presiding Officer of Labour Court Ranchi under section 75 of Employees State Insurance Act, 1948. The substantial question of law which involved after passing the impugned order are that the learned Presiding Officer, Labour Court had not taken into consideration the deposition of the Advocate Clerk who has clearly stated that he was not employee in the establishment rather he was the Advocate Clerk. In the restaurant itself wherein the small sweets and the meals were served by way of Thali does not come within the definition of factory under section 2(12) of the Employees' State Insurance Act read with provisions of the Factories Act. The learned court below relied upon the inspector's report and the order under section 45A. Both were the one sided, arbitrary and illegal wherein no opportunity of hearing and representation was given to the petitioner/appellant. The very assessment of the dues is based on the inspector's report. Admittedly the copy of which was never supplied to the appellant and same is in contraventions of Principles of Natural Justice. From the evidence on record nothing is proved that in the establishment of the appellant there were ten (10) or more employees. The establishment of the petitioner is neither covered with the definition of Factories nor with the definition of Establishment. Indeed the restaurant of the petitioner is registered under the Bihar Shop Establishment Act way back from 1966 and there has always been less than 10 workers. The learned court below has also arbitrarily disbelieved the statement of AW2- Suresh Mahto, AW3- Mukesh Kumar Singh as well and passed the impugned order which is based on the perverse finding. In view of the above contended to allow the appeal and to set aside the impugned judgment.

11. Per-contra on behalf of the respondents learned counsel vehemently opposed the contentions made by the learned counsel for the appellant and contended

that the restaurant of the appellant comes within the definition of factory and establishment as well wherein the sweets of various qualities were being manufactured and thus various kind of meals were also prepared and at the time of inspection itself ten (10) persons were found working who were employee in the very establishment and the survey report of the Inspector was also signed by the appellant Rajesh Kumar Sharma then Advocate who was the son of the employer. As such the appellant admits having signed on the survey report that at the time of inspection the ten (10) persons were the employee and the demand of the levy and demand of the contribution which was levied upon the appellant is just and upright and the impugned order passed by the learned court below bears no infirmity and contended to dismiss the appeal.

12. For disposal of this miscellaneous appeal, the following points of determination are being framed:

(I) Whether Marwari Kalewalaya which was earlier in the proprietorship of Mr. Sampat Kumar Sharma and thereafter is in the proprietorship of Rajesh Kumar Sharma is a 'Factory' under the Factories Act, 1948 or an 'establishment' under the Employees State Insurance Act if so its effect?

13. Prior to disposal of this point of determination the certain statutory provisions of the Employees' State Insurance Act, 1948 which are relevant are being reproduced as under:

"Section-1: Short title, extent, commencement and application: (1) This Act may be called the Employees' State Insurance Act, 1948.

(2) It extends to the whole of India.

(3) It shall come into force on such date or dates as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and [for different States or for different parts there of].

(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) A factory or an establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under this Act or the manufacturing process therein ceases to be carried on with the aid of power.]

Section 2 (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 (52 of 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 :

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;]

Section 2(12): "factory" 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, and in any part of which a manufacturing process is being carried on 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;”

Section 2(14-AA): "manufacturing process" shall have the meaning assigned to it in the Factories Act, 1948;

Section 2(15-C): "power" shall have the meaning assigned to it in the Factories Act, 1948.

Section 45A: Determination of contributions in certain cases:-

(1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 on any d[Social Security Officer] or other official of the Corporation referred to in sub-section (2) of section 45 is [prevented in any manner] by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under section 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment.

[Provided that no such order shall be passed by the Corporation 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.] [Provided further that no such order shall be passed by the Corporation in respect of the period beyond five years from the date on which the contribution shall become payable.

(2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation under section 75 or for recovery of the amount determined by such order as an arrear of land revenue under section 45B [or the recovery under section 45C to section 45-I.]

Section 75: Matters to be decided by Employees' Insurance Court: (1) If any question or dispute arises as to-

(a) whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution, or

(b) the rate of wages or average daily wages of an employee for the purposes of this Act, or

(c) the rate of contribution payable by a principal employer in respect of any employee, or

(d) the person who is or was the principal employer in respect of any employee, or

(e) the right of any person to any benefit and as to the amount and duration thereof, or [(ee) any direction issued by the Corporation under section 55A on a review of any payment of dependent's benefits, or]

(g) any other matter which is in dispute between a principal employer and the Corporation or between a principal employer and an immediate employer, or between a person and the Corporation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues payable or recoverable under this Act, or any other matter required to be or which may be decided by the Employees' Insurance Court under this Act],

such question or dispute [subject to the provisions of sub-section (2A)] shall be decided by the Employees' Insurance Court in accordance with the provisions of this Act.

(2) ………………..”

14. From the bare perusal of Section-1 of the Employees' State Insurance Act, 1948 it is well evident that the provision of this Act is applicable upon all the factories including factories belonging to the government other than seasonal factories and to any other establishment class of establishment, industrial, commercial, agricultural otherwise. It is also relevant herein that in view of section 1(6) a factory or establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of the persons employed therein at any time falls below the limit specified by or under the Act.

15. On behalf of the appellant/petitioner in oral evidence has been examined altogether three witnesses.

15.1 AW1- Rajesh Kumar Sharma in his examination-in-chief by way of affidavit has stated that the shop run by the name Marwari Kalewalaya was previously owned and run by late Banwari Lal Sharma who was his uncle and after his death he is running the said shop. The vegetarian meals are prepared and sold to the customers in this shop and this shop is duly registered under the Bihar Shops & Establishments Act from the year 1966. The maximum permissible number of employees is shown in the registration certificate and in its renewals from time to time. The photo copy of the registration certificate under the B.S. Act (Bihar Shops and Establishment Act) is annexed with this affidavit. E.S.I Department had issued notice to show cause to get the shop register under the E.S.I Act. His deceased uncle late Banwari Lal Sharma who was proprietor at that time has given his written explanation on 09.03.1999 the photo copy of which is annexure of this affidavit. Several times an inspection were made by the E.S.I officials and on all such visits they were never found more than eight (8) persons working in the shop Marwari Kalewalaya. Even on 29.06.2000 the respondent no.3 inspected the shop physically saw employee working in the shop and he also inspected the attendance wage register in which it was found there was never more then eight (8) persons at any point whatsoever. The copy of the attendance registers is made annexure of this affidavit. The attendance-cum-wage register were also inspected by the officers and never found more than eight (8) persons.

The order under section 45A of the E.S.I Act in which dues to the tune of Rs.37,180/- and interest of Rs.9,056/- was purportedly determined is also exhibit of this affidavit. Survey report was never made available to him or to the deceased uncle of the deponent and it was signed by him on the preliminary inspection report. However no copy of the same was provided to him. In the said report name of five employees were of him and name of two of the employees were left out who were Alakhdeo Singh and Naresh Kumar. The five (5) employees were Raju, H.N. Upadhyaya, Prabhu, Nawal and Jawahar. The food which is prepared in the Marwari Kalewalaya by using the coal and gas. No electric power was used for working any of the food items. The inspection report is signed by Mr. A.K. Pal on 29.08.1997. Employee Alakhdeo Singh had also given affidavit on 28.11.2002 which is Exhibit-6. The undue dues were recovered from his uncle by way of two cheques. After death of his uncle he is proprietor of Marwari Kalewalaya. It has been running since 1966. The licence are being renewed under the Bihar Shops and Establishments Act. The licence is Exhibit-1. He maintains the wage and attendance register. In his shop the meal is prepared on the coal-stove and now is being prepared on the gas-stove. The electric fan, bulb are there and generator facility of 1½ -2 Kilowatt. The electric is being consumed.

15.2 PW2- Suresh Mahto in his examination-in-chief says that he is Advocate Clerk since 1982 and till 2001 he worked as an Advocate clerk with Advocate Sampat Kumar Sharma. On 30.09.1997 he had gone to meet his advocates Sampat Kumar Sharma at Marwari Kalewalaya but he was not there and after some time Inspector came there and inspected Marwari Kalewalaya. He asked his name and he told him his name. He has wrongly under taken him to be the employee of Marwari Kalewalaya.

In cross-examination this witness says that he has no knowledge that any employee named Suresh was in Marwari Kalewalaya.

15.3 AW3- Mukesh Kr. Singh in his examination-in-chief says that he is cook. Whenever he is called for any work in a marriage ceremony, birthday party or any other ceremony he does work therein. On 30.09.1997 he had gone to Marwari Kalewalaya. He never worked in Marwari Kalewalaya. On 30.09.1997 the Inspector asked his name and he told his name.

In cross-examination this witness says that he goes to hotel to Marwari hotel and Churuwala hotel also if there is any work for him. On the date of inspection he was not employee of Marwari Kalewalaya.

16. From the very perusal of Exhibit-1 it is found that Marwari Kalewalaya is registered as a hotel of which proprietor was Banwari Lal Sharma. This registration was renewed till 08.08.1998. It is under the Bihar Shops and Establishment Act, 1953. Exhibit-2 is the copy of the reply notice given by Banwari Lal Sharma. In reply of notice dated 15/23.02.1999 in which it is stated that in his establishment only seven (7) persons were employed. The attendance-

cum-wage register was also with him. Exhibit-3 is the order under section 45A passed by the Deputy Director, A.P. Tripathi in which the contribution totaling Rs.37,180/- is shown and interest is shown Rs.9,056/- which was demanded as contribution amount for the employees. Exhibit-6 is the affidavit notarized by Public Notary, Ranchi on behalf of Alakhdeo Singh who had told himself to be the employee of Marwari Kalewalaya. In his affidavit he has shown the seven (7) employees including himself.

17. On behalf of the opposite party Krishna Das has been examined as DW-1 who has stated that on 30.09.1997 he has inspected Marwari Kalewalaya. He inspected the record from 15.09.1997 to 24.09.1997. He found elder son of Proprietor Banwari Lal Sharma therein. On that day the name of ten (10) employees were told to him. In the inspection memo Rajesh Kumar Sharma also put his signature. No other documents were shown to him. The inspection report is Exhibit-A.

18. Herein it is also pertinent that the monthly attendance register of the Marwari Kalewalaya are Exhibit-3 and 3/A. From the perusal of this attendance register, it is found that there are seven (7) employee Raju Singh, Jawahar Sah, Naresh Kumar, Alakhdeo Singh, H.N. Upadhyaya, Prabhu and Nawal, it is the attendance register of April, 1997. The salaries of these seven employees also shown and the employees have put their signature on the stamp. In the like way in month of March, 1997 there are also seven (7) employees and their salary is shown to be received by them. In the like manner in month of June, 1997, July, 1997, August, 1997, September 1997, October 1997, November 1997 and December 1997 the seven (7) employees are shown and their salary which was given alongwith working days done by them. This register in month of July, 1997 was also signed by the Deputy Labour Commissioner, Ranchi. It is pertinent to mention herein in the month of September, 1997 there was no signature of any inspecting authority. Thereafter in the year of 1998, from January 1998 upto the December 1998 in all the months the attendance of the seven (7) employees and worked done by them and their salaries received by them are mentioned.

18.1 The Exhibit-3 is also the attendance and wage register of the year 1999 in which there are seven (7) employees. Their name and work done and salaries are shown by them. Thereafter upto February, 1999 there were seven (7) employees but in month of April, 1999 and May, 1999 are shown nine (9) employees. In this register from January, 1999 to December 1999 the number of employees fluctuated eight (8) and nine (9). Their names and worked done by them and salaries received by them is also mentioned in the attendance register. Likewise of the year 2000 in this register there are total eight (8) employees till December, 2000 wherein their names and salaries are also shown and in month of May the Insurance Inspector of Employees State Insurance Corporation, Ranchi A.K. Pal has put his signature.

18.2 Taking into consideration the definition of factory and the manufacturing process as well the very Marwari Kalewalaya of the appellant does not come in the definition of factory. It is also pertinent to mention herein that because in factory ten (10) and more persons are required to be employee. From the oral evidence and documentary evidence this fact is proved that in Marwari Kalewalaya there were seven (7) employees and in the year 1997 and thereafter in the year 1999 and 2000, the employees became eight (8) and upto nine (9). Employees were the eight (8) and in few months there were nine (9) employees. So far as the inspection report dated 30.09.1997 is concerned in that the one month attendance for the September, 1997 is recorded to have been seen by the Inspector. While from the very original attendance register Exhibit-3, it is found that in September, 1997 there is no signature of the Inspector. Wherein the name of seven (7) employees are shown who are Raju Singh, Jawahar Sah, Naresh Kumar, Alakhdeo Singh, H.N. Upadhyaya, Prabhu and Nawal but in the inspection report the names of ten (10) employees are shown in which the name of Suresh, Mukesh, Abhimanu, Gopal, Narayan have shown as the new employee. The name of these employee is nowhere mentioned in the attendance and wage register of Marwari Kalewalaya from the year January, 1997 to December 2000. There is no documentary evidence how the names of ten (10) employees were shown in the inspection memo by the inspector even if it bears the signature of Rajesh Kumar Sharma it does not mean that the employees were the ten (10).

18.3 It was incumbent upon the Inspector at the time of inspection to inspect the wage register and to put signature thereon. Though in inspection memo it is stated that he inspected the wage register of the month September, 1997 but neither the attendance and wage register was seized nor the photo copy of the same were taken in his custody by the Inspector. As such this inspection memo cannot be relied upon that at the time of inspection the ten (10) employees were the employee of Marwari Kalewalaya. Herein it is also pertinent that AW2-Suresh Mahto has been examined on behalf of the petitioner/appellant who has stated that he was the Advocate clerk of Mr. Sampat Kumar Advocate and he has gone to meet him to Marwari Kalewalaya on the date of inspection and the Inspector asked his name he told his name as Suresh Mahto and he has mentioned Suresh. Who is Suresh he is not aware but he is Advocate clerk since 1982 to 2000 and he was never the employee of Marwari Kalewalaya. Moreover AW3 Mukesh has been examined he has also told that though he was a cook but he occasionally went to several hotels for the job but he never remained the employee of the Marwari Kalewalaya and he has told that on that day he had gone to Marwari Kalewalaya and his name was asked by the Inspector but he did not tell him that he was employee of Marwari Kalewalaya.

18.4 In view of the documentary and oral evidence this inspection memo cannot be relied upon. The entries made in this inspection report are not based on any documentary evidence. Therefore there being the number of employees below the ten (10), this Marwari Kalewalaya also does not come within the definition of establishment.

18.5 Herein it would be pertinent to mention the notification of Ministry of Labour and Employment Notice No. S.O. 616(E), dated March 23, 2011 published in the Gazette of India, Extra., Part II, Section 3(ii), dated 23rd March, 2011 which reads as under:

Whereas, by a notification of the Government of India in the Ministry of Labour and Employment, published in the Gazette of India, Extraordinary, Part II, Section 3, sub-section (ii), vide number S.O. 148(E), dated the 29th November, 2010, the Central Government, in consultation with the Employees' State Insurance Corporation, gave notice of its intention to extend the provisions of the Employees' State Insurance Act, 1948 (34 of 1948) to certain classes of establishments specified in the Schedule to the said notification after one month from the date of that notification;

And whereas the copies of the said notification were made available to the public on the 24th day of November, 2010;

And whereas, no objections and suggestions have been received within the said period of one month in respect of the said notification;

Now, therefore, in exercise of the powers conferred by sub-section (5) of Section 1 of the Employees' State Insurance Act, 1948 (34 of 1948), the Central Government, in consultation with the Employees' State Insurance Corporation, hereby extends with effect from the 1st day of April, 2011, the provisions of the said Act to the classes of establishments specified in column (1) and situated within the areas specified in column (2) of the Schedule annexed hereto, namely-

SCHEDULE

Description of establishments

(1)

Areas in which the establishments are situated (2)

The following establishments wherein ten or more persons are employed, or were employed, on any day of the preceding twelve months, namely-

(i) shops;

(ii) hotels;

(iii) restaurants;

(iv) road motor transport establishments;

(v) cinemas including preview theatres;

(vi) newspaper establishments as defined in clause (d) of Section 2 of the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 (45 of 1955); (vii) educational institutions (including public, private, aided or partially aided) run by an individual, trust, society or other organisation;

(viii) medical institutions (including corporate, joint sector, trust, charitable and private ownership hospitals, nursing homes, diagnostic centres, pathological labs).

All areas in the National Capital Territory of Delhi where provisions of the Employees' State Insurance Act 1948 have already been brought into force under sub- section (3) of Section 1 of the Act.

18.6 In view of this notification it is established that the provision of Employees' State Insurance Act, 1948 which is applicable to the classes of establishment also only if the description of establishment is such wherein 10 or more than 10 persons are employed or were employed on any date of proceeding 12 months. As such Marwari Kalewalaya is an establishment but the employee therein being below 10. The provision of State Insurance Act, 1948 would not be applicable thereof.

18.7 During argument the learned counsel for both the parties also admitted that in view of the previous notification also on the date of inspection the provisions of Employees' State Insurance Corporation would be applicable only if in the establishment there are 10 or more than 10 employees.

18.8 From the documentary evidence attendance and employee register adduced on behalf of the appellant and also the testimony of AW2 Suresh Mahto, AW3 Mukesh Kr. Singh and also taking into consideration the testimony of AW1 Rajesh Kumar Sharma; in the Marwari Kalewalaya upto September, 1997 and onward month also of year 1997 there were only seven (7) employees. Though in the subsequent year 1998 or 1999 the number of figure became eight (8) or nine (9) also but it never was ten or more. The very inspection report cannot be relied upon in view of the testimony of witness Krishna Das. He has stated that he has inspected the attendance and wage register of employees of Marwari Kalewalaya but in no where in the original attendance register he had put his signature. Even he did not take the photo copy of that inspected paper of the attendance and wage register which he has inspected. As such the very testimony of opposite party witness Krishna Das is belied.

19. Taking into consideration the ocular and documentary evidence adduced on behalf of the appellant, therefore, the Marwari Kalewalaya of which the appellant is the proprietor is an establishment but the employee thereof being below ten (10), the provisions of Employees' State Insurance Act, 1948 will not be applicable on this establishment. Therefore this point of determination is decided in favour of the appellant and against the respondent.

20. In view of the critical appreciation of evidence on record, oral and documentary, I am of considered view that the impugned order passed by the learned court below is based on perverse finding and needs interference. Accordingly, this miscellaneous appeal deserves to be allowed.

21. The Miscellaneous Appeal is hereby allowed and the impugned order passed by the Presiding Officer of Labour Court-cum-Employees Insurance Court, Ranchi in E.S.I Case No. 10 of 2002 is hereby set aside.

22. Let the record of learned court below be sent back alongwith copy of the judgment.

