

(2001) 04 KAR CK 0054

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 4788 of 1999

Regional Director, Employees" State Insurance Corporation,
Bangalore and Another

APPELLANT

Vs

Malekopmath Metal Forms Private Limited, Gadag

RESPONDENT

Date of Decision : 09-04-2001

Acts Referred:

Employees State Insurance Act, 1948 — Section 45 A

Citation : (2001) 6 KarLJ 139

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : V. Narasimha Holla, for the Appellant; V.S. Naik, for the Respondent

Final Decision : Allowed

Judgement

1. This appeal preferred by the Regional Director, Employees" State Insurance Corporation, Binny Fields, Binnypeth, Bangalore, u/s 82(2) of the Employees" State Insurance Act, 1948 (hereinafter referred to as the "Act" for short) against the order dated 10th September, 1999 passed in ESI No. 16 of 1997 before the ESI Court, Hubli, raises an interesting question as to the applicability of the provisions of the Act in respect of an establishment, which establishment admittedly at a given point of time had engaged the services of as many as 12 persons and if the applicability can be avoided by the subsequent dispute raised as to the actual number of employees employed in the establishment.

2. The brief facts leading to the above appeal are that, the 1st respondent, a private limited company is an establishment, which undertakes fabrication job of making shutters on the orders placed by its customers. The respondent-company has also obtained registration certificate under the Shops and Establishments Act from the Labour Inspector, Gadag and the said certificate certifies that a maximum of 9 employees were being employed.

3. It appears, the Inspector of the appellant-organization visited this

establishment on 10-1-1996. He had occasion to verify the registers and also noticed that, at the relevant point of time, 11 persons were actually working in the establishment. The Inspector was also informed that, one of the employees was on leave as informed by the Director. The Director of the respondent-company was available at the spot at the time of said visit by the Inspector of the appellant-organization. At the request of the Inspector, the Director furnished a list containing the names of persons who are actually working there and other employee who was on leave. The list furnished by the Director also gave information as to the designation of the employee and amount of pay that each workman was being paid. The Inspector received the said list from the Director which was actually given under the seal and signature of the Director (Copy of the same is marked as Ex. R. 1 before the ESI Court). The Inspector submitted a report in this regard to the Regional Office of the appellant-organization (Copy of the report is also marked as Ex. R. 2 before the ESI Court). It is not in dispute that the respondent-organization was using power in the course of its activities and was also an establishment to which the provisions of the Act would apply if it had employed 10 or more persons. In this view of the matter, the appellant-organization issued a notice after allotting a code number as per Ex. R. 4 and called upon the respondent-establishment to make contributions as provided for u/s 39 of the Act.

4. Though a show-cause notice had been issued to the respondent-organization before demanding the contribution amount to be remitted for the purpose of affording an opportunity on the question of applicability of the Act, it appears that the respondent had not availed of the same inasmuch as notice issued had been returned without being claimed and. had been refused by the respondent.

5. Respondent disputing the applicability of the Act and liability to make contributions, preferred an application u/s 75 of the Act before the ESI Court, Hubli. The appellant-organization filed their objections to the said application and in view of the pleadings of the parties, the ESI Court framed the following three issues,--

1. Whether the applicant proves that he had employed less than 10 employees and ESI Act is not applicable?

2. Whether the respondent proves that order u/s 45A of the ESI Act is proper and legal?

3. What order?

6. The ESI Court having answered the 1st issue in favour of the respondent and the 2nd issue against the appellant-Corporation and having allowed the application holding that the respondent-establishment cannot be covered by the provisions of ESI Act as number of employees engaged by the respondent does not exceed 9 in number, the appellant-Corporation is in appeal before this Court.

7. Sri Narasimha Holla, learned Counsel appearing for the appellant-Corporation

has vehemently urged that the findings recorded by the ESI Court are contrary to the evidence on record. That it is a total misreading of the cogent and convincing material that was available before the ESI Court and the ESI Court had misapplied a principle of law in holding that the ruling of our High Court rendered in the case of *Subraya Adiga v Employees' State Insurance Corporation*, is attracted to the facts of the case and on applying the ratio of the case, it must be held that the proceedings of the appellant-Corporation in relying upon the report of the Inspector is vitiated and as such, the application should be accepted.

8. It is submitted by Sri Narasimha Holla, learned Counsel that the Director of the respondent-establishment had furnished the list of employees, their names, nature of work and the salary paid to them. The information is signed by the Director himself who was present at the time of inspection. The information of this nature has been signed by a responsible officer namely, Director of the Company, cannot be characterised as one which has been obtained under threat and coercion nor such an information could have been either fabricated or made up by the Inspector inasmuch as the Inspector could not have come up with names, designations and salary of such persons which aspect is not disputed by the employer.

9. The ESI Court accepting the stand of the establishment that, Director had been pressurised to give such a list and information and purporting to apply the law laid down by this Court referred to above has held that the appellant-Corporation has not proved that the establishment has actually engaged 12 persons in its establishment as on the date of inspection.

10. The explanation that has been offered by the establishment in this regard was that, though in reality 11 persons were admittedly working in their establishment at the time of visit of the Inspector, some of them were not the employees of their establishment but who had been visiting their establishment from the neighbouring units and as such, they could not have been construed as the employees of the respondent-establishment. It was also the case of the respondent-establishment that in all the registers maintained by them for the purposes of compliance, with the relevant provisions of different enactments the number of employees were only at 9 and in the light of such documentary evidence, holding that the establishment had employed 12 persons on the suspect report of the Inspector is clearly bad in law and as such, the provisions of the Act are not applicable to the establishment. This version of the establishment had found favour with the ESI Court and the ESI Court has held that, there are only 9 persons who are employed in the services of the respondent-establishment and as such, the Act is not applicable and when once the Act is not applicable, the question of respondent making contributions does not arise.

11. Smt. Manjula Kulkarni, learned Counsel appearing on behalf of the respondent has sought to support the order of the Labour Court and has also

pointed out that the reliance placed by the Labour Court on the decision of the High Court is fully justified and the Inspector having not complied with the requirements for making a proper report, no reliance should be placed on the report indicating engagement of 11 persons in the establishment on the date of the Inspector's visit and as such, the appeal of the Corporation is liable to be dismissed.

12. The question that arises for consideration and answer by this Court is as to whether the ESI Court was right in holding that, 9 persons were employed in the organisation and as such, the Act is not applicable. I am of the view that the entire approach of the ESI Court is totally wrong and the Court has applied wrong principles in examining the issue of this nature, In the first instance, 11 persons working in the establishment on the date of the visit and one person being on leave is not disputed by the employer. It is only sought to be explained by saying that some of them are not their employees, having come from neighbouring units. If the employer is setting up such a defence and calling in aid such an explanation, the onus is heavy on the employer to make it home. On the contrary, I do not find any effort in this regard by the employer. This apart, the ESI Court holding that no credence can be given to the report of the Inspector as the Inspector had not prepared the list of employees by himself but had merely relied upon the list given by the Director is also clearly erroneous. A Director of a Company is a very responsible person and is part of the management. A statement or information given by a Director indicating the vivid particulars of employees cannot be brushed aside. If a Director furnishes such an information, I do not find any infirmity in the Inspector adopting the same and submitting report based on such information furnished by the Director himself. It is also difficult to believe the theory that the Director was coerced into giving such an information. The conduct of the employer does not lend credence to this, inasmuch as the establishment which was admittedly furnished with a copy of the report has not raised its little finger against the same nor it had at any time earlier or at the first available opportunity has pointed out that the Director had been pressurised to give some information as per the dictates of the Inspector. The version of the establishment that the Director was pressurised to give such information coming at a very belated stage, does not carry conviction but is clearly an afterthought and at any rate, it cannot be a circumstance to discard the report of the Inspector. I am of the clear view that the report of the Inspector does not suffer from the infirmity as pointed out by the ESI Court.

13. In this regard, the decision relied upon by the respondent-organization and referred to by the ESI Court is not applicable to the facts of the present case. Circumstances clearly show that the information of engaging 12 persons was not one, which had been elicited under threat or coercion, but an information, which had been provided by a responsible officer of the establishment. There is nothing wrong in accepting that information. In this regard, holding that the documentary evidence indicating engagement of only 9 persons in the establishment should be given weightage over the report of the inspector is

really begging the question. An inspection is carried out under Sections 44 and 45 of the Act only to verify if an employer has been engaging any number of persons over and above that is declared or what is indicated in the books and documents. It is common knowledge that the engagement of 10 persons will attract the provisions of the Act and it is because of this reason alone, the inspection is required to be carried out periodically by the Inspectors and verify the establishment's strength. In a matter of this nature to say that documentary evidence shows that only 9 persons were engaged is to simply render the whole exercise of inspection and efforts to cover under the Act, establishments, who by giving incorrect declaration are avoiding the applicability of the Act nugatory. The reasoning given by the ESI Court in this regard is not acceptable to hold that, only 9 persons were engaged in the services of the respondent-establishment.

14. The material on record clearly indicates that 11 persons were actually working in the establishment on the date of the Inspector's visit and another person was on leave as admitted by the management. Working of this number of employees has not been got over by the management by any proper explanation or material indicating to be contrary. If that is so, the provisions of the Act are clearly attracted and the order passed by the appellant-Corporation covering the establishment and calling upon the employer to make contributions u/s 39 of the Act, cannot be found fault with. The ESI Act is a piece of labour welfare legislation meant for providing medical facilities to employees. While considering an application u/s 75 of the Act, endeavour of the Court should not be to exclude the establishment from the applicability of the Act by placing a wrong onus on the functionaries under the Act by calling-in-aid legal principles not applicable to the fact situation but to objectively assess the material before the Court to determine the question of applicability or otherwise of the Act.

15. Accordingly, this appeal is allowed. The order impugned is set aside and the application filed by the respondent u/s 75 of the Act is rejected. The respondent-establishment is one which is covered under the provisions of the Act and which is required to make contributions in accordance with the provisions of the Act. No costs.

16. At the conclusion of this judgment, learned Counsel for the respondent prays that the respondent may be granted some time to make the contributions.

17. The liability is under the provisions of the Act and question of staying the operation of the same and the liability towards the contribution by this Court does not arise. However, having regard to the circumstances and that the matter was pending dispute regarding coverage itself, the appellant-organization may not take coercive steps for a period of two months from today for the realisation of the contributions and it is made clear that the respondent should ensure to clear the contributions within this period failing which, the appellant-Corporation is at liberty to proceed in accordance with law.