(2010) 12 MAD CK 0259

In the Madras High Court

Case No : C.M.A. No. 492 of 2003

Regional Director Employees' State Insurance Corporation Ltd.	APPELLANT
Vs	
Ambika Offset	RESPONDENT

Date of Decision : 23-12-2010

Acts Referred:
Employees State Insurance Act, 1948 — Section 45A

Citation : (2011) LLR 726

Hon'ble Judges : R. Sudhakar, J

Bench : Single Bench

Advocate : C. Monika and S. Vaidyanathan, for the Appellant; Muthu Kumar, for Lakshmi Sriram, for the Respondent

Final Decision : Allowed

Judgement

R. Sudhakar, J.—this civil miscellaneous appeal is filed challenging the award and decree dated 10.9.1999 made in ESIOP No. 9 of 1995 on the file of the Principal District Judge, Salem.

2. The Employees'' State Insurance Corporation has filed this appeal challenging the order of the E.S.I. Court setting aside the order passed u/s 45A of the E.S.I. Act 1942 as amended.

3. The brief facts of the case are as follows:

(i) One Ambika Offset situated at A-1, Salem Industrial Co-operative Estate Limited, Salem, is engaged in printing business and another company viz., M/s. Indukala Printers is engaged in lamination work. On 26.5.1991, Mr. S.R. Radhakrishnan, Inspector of E.S.I. Corporation inspected Ambika Offset at D. No. A-1, Salem Industrial Co-operative Estate Limited, Salem. At the time of inspection, the Inspecting Officer verified the General Ledger from April 1987 onwards and found that M/s. Indukala Printers has been doing lamination work on job work basis to the Principal employer viz., Ambika Offset. M/s. Indukala Printers raises job work bills entirely on Ambika Offset. At the time of Inspection, the attendance register and general ledger were verified and found that 13 workers were working in Ambika Offset and 7 workers were working with the immediate employer M/s. Indukala Printers totalling 20 in number. This fact is supported by the Attendance Register, which is not in dispute. In the report of the Inspecting Officer, it has been clearly stated that two units have separate TNGST Number, Sales Tax registration and income tax assessment.

(ii) M/s. Ambika Offset is the partnership firm consisting of Mr. S.A.P Angannan, Mr. Shanmuga Sundaram and Smt. P. Janaki and the manager is Mr. Selvamani, S/o. Veerabadran. Insofar as M/s. Indukala Printers, is concerned, the partners are Mrs. Indirani, w/o Angannan and Mrs. Kalarani, W/o Shanmugasundaram. In effect, the two brothers are the partners of M/s. Ambika Offset and the respective spouses are the partners of M/s. Indukala Printers. It is also not in dispute that at the time of inspection in May 1991, M/s. Indukala Printers factory was found on the back yard of M/s. Ambika Offset engaged in lamination work and there were six employees namely (1) Varadarajan, (2) Venkatachaiam, (3) Mohan, (4) Raja, (5) Rajendran and (6) Mahalingam and this was confirmed by the Manager-Mr. Selvamani of Ambika Offset. It is also recorded that one employee by name Tyagarajan had left service in April 1991. The general ledger of M/s. Indukala Printers was available from 1987-88 to 1989-90 and for the year 1990-91, it was incomplete. The Inspecting Officer has recorded that the account books of both the units were produced by the Manager of M/s. Ambika Offset.

(iii) It is also recorded that the Managing partner of M/s. Ambika Offset has stated that from April 1987, M/s Indukala Printers is functioning in the same premises of M/s. Ambika Offset as the suitable accommodation was not available. It is also recorded that a sum of Rs. 300 is paid by M/s. Indukala Printers to the owners of the premises M/s. Ambika Offset and this is revealed by the general ledger entry. It is further recorded that no separate electricity supply is available in the name of M/s. Indukala Printers. The electricity power supply is common for both the units and it is in the name of M/s. Ambika Offset.

(iv) It is further recorded in the Inspection report that the labour bills raised by M/s. Indukala Printers on M/s. Ambika Offset show that the work done in favour of M/s. Ambika Offset is exclusive. The bill numbers have also been verified and indicated in the report. Hence, the Inspecting Officer was of the view that M/s. Ambika Offset is the principal employer employing 13 persons and M/s. Indukala Printers is the immediate employer employing 7 persons and together, they employ 20 persons and therefore, they are covered under the provisions of the E.S.I. Act. The report also shows that M/s. Indukala Printers had paid wages from 1987-88 to 1989-90 to their workers. The fact that both the units are functioning in one common roof from the date of commencement though for the purpose of sales tax and income tax different addresses were shown, has not been refuted by the Respondent by way of proper record. On this basis, a show cause notice dated 13.11.1991 was issued calling upon them to show cause as to why contribution should not be recovered from the employer. The said show cause notice was served on the Respondent, the principal employer and it appears that on 21.4.1992, a reply was submitted with certain records. The authority passed an order, on 10.11.1994 holding that the principal employer is liable to pay the contribution as determined in the order and one of the reasons stated therein was that the principal employer has not shown any cause to the notice. This order came to be challenged in the proceedings before the Special Court.

4. Before the Special Court in ESIOP No. 9 of 1995, on behalf of the Respondent S.P.A. Angannan was examined as P.W.1 and he deposed on behalf of the Ambika Offset and Thiru P. Venkatesan was examined as P.W.2 and he was the manager of M/s. Indukala Printers. Exs. A1 to. A19 were marked on behalf of the Petitioner and on behalf of the Appellant Inspecting Officer, Radhakrishnan was examined as R.W.1 and his report dated 25.5.1991 was marked as Ex.B1.

5. The E.S.I. Court framed the following issue for consideration. Whether Indukala Printers or M/s. Ambika Offset are one and the same and the Petitioner is not liable to pay the contribution amount?

6. P.W.1 Mr. Angannan, partner of M/s. Ambika Offset, in his evidence, stated that prior to 1987, the factory was covered under E.S.I. Act and on 16.5.1995, an inspection was done and thereafter, it is stated that they need not pay contribution. According to him, from 1.4.1987, the factory did not come under the E.S.I. Act. However, from April 1991, the factory was covered under the E.S.I. Act and he has remitted the contribution.

7. Insofar as the show case notice dated 13.11.1991 is concerned, it is stated that it is not correct to state that M/s. Indukala Printers is functioning in the same place, a that of the Ambika Offset. According to him, the two units are at different places. One in Gugai area and the other is in Udayapatti, which is 15 kms. away from Gugai. The employers are different and the account books are different. It is also the case of the Petitioner/Respondent herein that M/s. Indukala Printers are doing lamination work not only for M/s. Ambika Offset but also others. In the cross examination of P.W.1 has accepted that his wife name is Indirani and his brother''s wife name is Kalarani. P.W. 2, an important witness is the manager of M/s. Indukala Printers said to be situated at D. No. 210 Trichy main road, Gugai, Salem. He states that six employees were working in that place. He has also stated that there is no relationship between M/s. Ambika Offset and M/s. Indukala Printers and there is no inter relationship between the employers. It is further stated that M/s. Indukala Printers is having separate sale tax registration. It is pertinent to note that those documents were marked by the manager of M/s. Indukala Printers. E.S.I. Inspector was examined as R.W.1 and he gave the details of the inspection and emphasised that both the units are not separate units and are running in the same premises with common electricity service connection though a sum of Rs. 300 is collected as rent by M/s. Ambika Offset.

8. Based on the plea taken by the Respondent that they are totally different entity, the Court below gave the findings as follows:

The mere fact that the account books of M/s. Indukala Printers were found in the same premises does not prove that both the firms are one and the same. The firms are two different partnership firms. Admittedly, the sale tax and income tax assessment are separate. This goes to show that two are independent firms though the partners are related to each other. The very fact that two separate firm has been registered and separate accounts are being maintained shows that they are doing independent business. Admittedly Indukala Printers paying rent to Ambika Offset Press. From the evidence of P. Ws. 1 and 2, it is proved that Indukala Printers were doing lamination work for Ambika Offset Press and also for others. Therefore, merely because the account books are found in the premises of Ambika Offset press, it cannot be said that Indukala Printers is part of Ambka Offset. Such a conclusion cannot be arrived at. Therefore, the two firms are different legal entities. Hence, the demand of contribution clubbing both the firms is not legal and valid. If they are liable to pay E.S.I. contribution a separate demand notice has to be issued and collected. The notice issued as such is not maintainable and it is not valid and legal Hence, the petition is allowed and the order dated 10.11.94 passed by the Respondent is set aside,

9. Since the order passed u/s 45A of the E.S.I. Act was set aside, the present appeal has been filed. The learned Counsel appearing for the Appellant submitted that the evidence on record and the inspection report clearly goes to show that both the units are one and the same (i.e.)a single establishment. There is functional integrality and mutuality of interest between both the units and the Indukala Printers is doing work exclusively for and on behalf of the Ambika Offset press. The partners of Indukala Printers are the spouses of the partners of Ambika Offset press. The electricity supply connection is common for both the units and both the units are functioning in the same premises. It would clearly goes to show that both the units are not distinct and separate but one establishment and the sales tax and income tax records will not change their character. The records, viz., attendance register, general ledger, which were also found at the premises of the principal employer viz., Ambika Offset press clearly establishes that they are not separate and distinct entities as pleaded.

10. In order to appreciate the Petitioner plea, the decision of the Apex Court in Sumangali Vs. Regional Director, E.S.I. Corporation, , particularly, in paragraph 18 to 20 and 22, was pointed out and it is as follows:

The High Court noted that ESI Corporation was justified in clubbing Jos Cut-Piece Centre with Jos Textiles, Jose Brothers Silk and Sarees. and M/s. Jos Associates with M/s. Rose Fabrics and M/s. Jos Silk and Sarees, M/s. Gents Fabrics, M/s. Jacobs and M/s. Jose Brothers Trades and Investments with M/s. Sumangali and treating Jos Textiles, M/s. Rose Fabrics and M/s. Sumangali as "single establishments" for the purpose of coverage under the ESI Scheme as there was functional integrality, unity in management financial unity, geographical proximity, unity in supervision and control and general unity of purpose. Even if each unit was an establishment having separate registration under the Sales Tax Act, the Shops and Establishments Act and the income tax Act, all the units were interdependent and were supplementary and complementary to each other for the sake of their textile business.

19. So far as the factual aspects are concerned the High Court noted as follows:

On verification of the records it was further found that there were 34 employees working in the three units as on 2.4.1990. M/s. Rose Fabrics and M/s. Jos Annexe Building and they were having a common signboard and a common entrance. The activities of all the three units were administered by Shri K. Joseph Francis. The biling counter, cash counter and delivery counter were common for all the three units. M/s. Jose Brothers Silk and Sarees was an exclusive showroom for sarees whereas M/s. Rose Fabrics was dealing with items other than sarees. M/s. Jos Associates Was dealing with the sale of furnishing cloth. According to EST Corporation all the three units were different sections of a composite textile shop and the customers were at liberty to purchase whatever they wanted from the three units and they need to make payment at the common cash counter. It was further found that there was only one electric connection: and the electricity charges were paid by M/s. Rose Fabrics. The standby generator was also common to all the units. According to EST Corporation there was unity in ownership, geographical unity, unity in administration, functional unity, financial unity and interchargeability of employees in all the three units and hence ESI Corporation decided to club all the three units for the purpose of ESI coverage under the ESI Scheme.

20. In Associated Cement Companies Ltd: v. Workmen, it was, inter alia, observed as follows:

''The Act not having prescribed any specific tests for determining what is ''one establishment'', in considering the question whether a cement factory and the adjacent limestone quarry supplying limestone to it, are one establishment, one must fall back on such considerations as in the ordinary industrial or business sense determine the unity of an industrial establishment, having regard no doubt to the scheme and object of the Industrial Disputes Act and other relevant provisions of the Mines Act, 1952, or the Factories Act, 1948. It is perhaps impossible to lay down any one test as an absolute and invariable test for all cases. The real purpose of these tests is to find out the true relation between the parts, branches, units, etc. If in their true relation they constitute one integrated whole, the establishment is one; if on the contrary they do not constitute one integrated whole, each unit is then a separate unit. How the relation between the units will be judged must depend on the facts proved, having regard to the scheme and object of the statute which gives the right of unemployment compensation and also prescribes a disqualification therefor. Thus, in one case the unity of ownership, management and control may be the important test; in another case functional integrality or general unity may be the important test;

and in still another case, the important test may be the unity of employment

21...

22. In the instant case factual findings as recorded by the ESI Court and the High Court go to show that there was unity in management, supervision and control, geographical proximity, financial unity, general unity of purpose and functional integrality between the different units and for the sake of ESI coverage, the different units could be treated as "one establishment.

11. Per contra, Mr. Muthukumar, learned Counsel appearing for the Respondent reiterated the order passed by the E.S.I. Court and stated that merely because M/s. Indukala Printers is having a unit behind the same premises, it will not lose its identity. The fact that they are having separate sales tax and income tax registration and different partners makes it clear that both the units cannot be clubbed and stated as one establishment for invoking the provisions of the Act. He relied upon the evidence of P.W.2. and contended that M/s. Indukala Printers is not a dependent of Ambika Offset Printers and they are also doing job works to others also.

12. Having considered the rival plea, the following question of law arises for consideration.

Whether the E.S.I. Court was justified in holding that two units Viz., Ambika Offset press and Indukala Printers are distinct and separate legal entities so as to exclude them from the purview of the provisions of the ESI. Act?

13. The evidence of P.W.1, who is the partner of Ambika Offset, is that the two units are separate from each other at a distance of 15 kms. But no documentary evidence has been produced to prove the above and establish separate identity for the two units. Except sale tax and income tax records, there is no other record. P.W.2, the accountant of Indukala Printers, merely states that they do job works for M/s. Ambika Offset and for others. He has not produced any record to substantiate the plea that they are separate and an independent units and there is no proof of outside job work in addition to work done to Ambika Offset. The inspection report Is not disputed by P.W.1 and P.W.2 as incorrect, which would go to show that what is recorded in the Inspection report that Indukala Printers was functioning in a shed behind Ambika Offset press is a proved fact, This recording of the E.S.I. Corporation officer is further clarified by the evidence of managing partner of Ambika Offset, who also stated that for want of proper accommodation, Indukala Printers are working in the backyard of the Ambika Offset press. The fact that the electricity service connection is drawn from one common service line and used by both the units is also not disputed. If that is the case, then functional integrality of both the units can be discerned. P.W. 2 has hot shown any record that a separate service connection is in favour of Indukala Printers so as to establish that the unit was functioning at 0. No. 210 Trichy main road (i.e.) 15 kms. away from Ambika Offset. There is no record to show that Indukala Printers are doing job work for other customers besides

Ambika Offset press.

14. In the absence of material evidence to prove the contrary, the report of the Inspecting Officer stands unrebutted. The plea that both the units are having separate sale tax assessment and income tax assessment will be of no avail in view of the decision of the Apex Court cited above.

15. In this case, there is a clear evidence of functional integrality, commonality of management (i.e.) by spouses, geographical proximity because both the units are functioning in one premises (i.e.). Ambika Offset press. The functional integrality is evident from the fact that employees are working in the common premises doing the work of printing'' and lamination for producing the end product. There is general unity of purpose in the business of both units. The supervision and control also apparent by the production of records by the manager Indukala Printers-P.W.2. The facts of the present case clearly proves that two units should be treated as one establishment for the purpose of ESI Act and they cannot claim independent existence more than one of the several test indicated in the Apex Court decision cited above is attracted to the facts of this case.

16. The Court below has come to an erroneous conclusion that Indukala Printers is doing job work for others as well and that finding is without any basis. The finding of the Court below that the sales tax and income tax assessments are separate and they are doing work separately under different partnership and therefore, they are two separate and independent units will be of no avail in the light of the decision of the Apex Court, which has clearly held that necessary parameters to decide the question of one establishment does not rest merely on sales tax and income tax records.

17. In the present case, the order of the Court below based merely on the two records without supporting material evidence is erroneous on the contrary the inspection report and evidence on record supports the case of the department. This Court is clearly of the view that the Court below erred in setting aside the order of the department bringing the establishment under the purview of the Act. The Order of the Court below is liable to be set aside and accordingly set aside. The question of law raised is answered in favour of the Appellant. This civil miscellaneous appeal is allowed. In the facts and circumstances of the case, there will be no order as to costs.

