
(1990) 02 KL CK 0049
In the High Court Of Kerala
Case No : M.F.A. No. 493 of 1984

Regional Director, ESI Corpn.

APPELLANT

Vs

Vijayamohini Mills

RESPONDENT

Date of Decision : 28-02-1990

Acts Referred:

Employees State Insurance Act, 1948 — Section 13, 2(9), 40, 42(9)

Citation : (1990) 2 LLJ 464

Hon'ble Judges : U.L. Bhat, J;Balanarayana Marar, J

Bench : Division Bench

Advocate : C.S. Rajan, for the Appellant; U.K. Ramakrishnan and E.K. Madhavan, for the Respondent

Final Decision : Allowed

Judgement

Bhat, J.—Regional Director, E.S.I. Corporation, Trichur has filed this appeal against the order of the E.S.I. Court in I.C. No. 81 of 1982.

2. Respondent mill is a unit of the National Textile Corporation. With a view to expand the activities of the mill, work of extension of the new spinning shed was undertaken and work was awarded to a contractor by order dated 7th August 1979. The work was completed on 27th April 1982 and Rs. 9,63,984.04 was paid to him. The consultant was also paid consultation fee. According to the respondent, contractor did the work with his own employees and mill employees were never employed in the work. The Deputy Regional Director of the Corporation conducted inspection of the records on 28th October 1981 and by order dated 19th November 1981 required the respondent to pay contribution for the amount of Rs. 10,17,875.07 alleging that it represented wages paid to the employees. Respondent was also directed to register the employees and to pay contribution as per Section 40 of the Employees State Insurance Act. Respondent filed case before the E.S.I Court challenging this order alleging that the amount was not paid as wages, there was no employer-employee relationship between the respondent and the employees of the contractor and the amount paid

included conveyance charges, profit etc. The claim was opposed by the Corporation but was allowed by the Court. Hence this appeal.

3. P.W.1 is the Accounts Officer of the respondent and P.W.2 is the Managing Director of the consultant company. Their evidence shows that the construction work was for the expansion of the new spinning shed and money was paid to the contractor as per bills checked by RW.2. Their evidence also shows that employees for the construction work were employed by the contractor. The Inspecting Officer examined as DW-1 stated that the construction work was for the administration block and humidification plant as disclosed by the respondent. The E.S.I. Court accepted that construction work was for the extension of the new spinning shed. The E.S.I. Court took the view that employees for the construction work were admittedly not employed by the, respondent and were not employed for the work which is ordinarily part of the factory pr which is preliminary to the work carried on or incidental to the purpose of the factory and therefore they do not attract definition of "employee" of Section 2(9) of the Act and to arrive at this conclusion, reliance was placed on the decision of the Madras High Court in Employees" State Insurance Corporation Vs. Sri Sakthi Textiles (P) Limited,

4. The Madras High Court in the above case held that casual workers employed for wages for the additional construction in a spinning mill cannot be regarded as employees as defined in Section 2(9) of the Act as the work was not incidental or preliminary and unconnected with the work of the factory. It has to be noticed that the above decision has been reversed by the Supreme Court in Regional Director, Employees" State Insurance Corpn., Madras Vs. South India Flour Mills (P) Ltd.,

5. We are concerned in this case with the definition of "employee" in Section 2(9) (ii) of the Act. Relevant part of the definition reads:

"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

xx xx xx

(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."

The definition contemplates the following ingredients:.

(1) Person employed for wages in or in connection with the work of a factory to which the Act applies, and

(2-a) who is employed by or through an immediate employer on the premises of the factory, or

(b) who is employed by or through an immediate employer under the supervision of the principal employer or his agent, and

(3) in relation to Clause (ii), the employment must be on work which is ordinarily part of the work of the factory or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment.

6. The above provision was considered in *Regl Director v. South India Flour Mills (P) Ltd.* referred to above which reversed the decision in *State Insurance Corporation v. Sakthi Textiles Pvt. Ltd.* (supra), though that related to a case u/s 2(9)(i) of the Act which also requires the work to be work of the factory or work incidental or preliminary to or connected with the work of the factory provided the person is directly employed under the principal employer. The Supreme Court observed (pp.308-309):

"It seems that any work that is conducive to the work of the factory or establishment or that is necessary for the augmentation of the work of the factory or establishment will be incidental or preliminary to or connected with the work of the factory or establishment. In the instant cases, the additional buildings have been constructed for the expansion of the factories in question. It is because of these additional buildings that the existing factories will be expanded and, consequently, there will be increase in the production, that is to say, increase in the work of the factories concerned. So the work of construction of these additional buildings has a link with the work of the factories. It cannot be said that the construction work has no connection with the work or the purpose of the factories. So it is difficult to hold that the work of construction of these additional factory buildings is not work incidental or preliminary to or connected with the work of the factories.

The Act is a piece of social security legislation enacted to provide for certain benefits to employees in case of sickness, maternity and employment injury. To hold that the workers employed for the work of construction of buildings for the expansion of "the factory are not employees within the meaning of Section 2(9) of the Act on the ground that such construction is not incidental or preliminary to or connected with the work of the factory will be against the object of the Act"

The Supreme Court thereafter referred to the decision in *Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation*, and concluded as follows (P- 309)

"In our opinion, the work of construction of additional buildings required for the expansion of a factory must be held to be ancillary, incidental or having some relevance to or link with the object of the factory. It is not correct to say that such work must always have some direct connection with the manufacturing process that is carried on in the factory. The expression "work of the factory" should also be understood in the sense of any work necessary for the expansion of the factory or establishment or for augmenting or increasing the work of the factory or establishment. Such work is incidental or preliminary to or connected

with the work of the factory or establishment."

7. In *Silver Jubilee Tailoring House and Others Vs. Chief Inspector of Shops and Establishments and Another*, a case under the Shops & Establishments Act of Andhra Pradesh, a question arose whether there was relationship of employer and employee between tailors employed in a tailoring shop and shop owner. Tailors generally attend the shop every day if there is work and different rates are fixed for them according to their skill and their work is checked men even though there may be no regular hours of work and there is no obligation to attend every day and they could take the work home. It was held that there was relationship of employer and employee between the tailoring shop and tailors. It was indicated that in recent years the control test as traditionally formulated has not been treated as an exclusive test and it is relevant to consider right of termination of the incumbent. In *B.M. Lakshmanamurthy Vs. The Employees' State Insurance Corporation, Bangalore*, appellants are partners of a firm which owns a factory. There is another factory situated near the appellants' factory. Granite stones from the quarry are brought to the factory of the contractors and cut and dressed in the said factory and thereafter they are sent to the factory of the appellants where they are designed, polished and exported. The question arose whether the employees employed to cut and dress the materials in the contractors' factory are employees of the appellant. The Supreme Court held that even though the two factories are separate, the work in the two places had an intimate correlation and was a piece of an integrated whole, that the work undertaken by the contractors is preliminary or incidental to the work in the principal employer's factory turning out the finished product for export and the work by the contractors through their labour is ordinarily part of the work of the principal-factory. Therefore the employees engaged by the contractors were held to be employees of the principal-factory for the purpose of the E.S.I. Act.

8. The construction workers in this case were employed in the work of expansion of new spinning shed. The work no doubt has no direct connection with the spinning process that is carried on in the factory. But as indicated by the Supreme Court in the aforesaid decision, the work of construction of additional buildings required for the expansion of the factory must be held to be ancillary or incidental or preliminary or connected with the work of the factory.

9. The further question which arises for consideration is whether in view of the fact that the work of construction was given on contract the construction workers will not attract the definition u/s 2(9)(ii). Undoubtedly these construction workers are persons employed for wages in work which is preliminary to the work carried on in or incidental to the purpose of the factory. They are employed in the premises of the factory through an intermediate employer. "Immediate employer" as defined in Section 2(13) in relation to employees employed by or through him, means a person who has undertaken the execution, on the premises of a factory or an establishment on which this Act applies or under the supervision of the principal employer or his agent of the whole or any part of any

work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in or incidental to the purpose of any such factory or establishment. The contractor in this case is undoubtedly the immediate employer. In these circumstances, we hold that the E.S.I. Court was in serious error in holding that the construction workers are not employees of respondent u/s 2(9)(ii) of the Act. They are employees under the respondent and wages paid to them will have to be reckoned for the purpose of computing contribution payable.

10. Learned counsel for the respondent urged that the Corporation has calculated contribution on the entire amount paid to the contractor and that is illegal. If the entire amount paid to the contractor has been taken into consideration to arrive at the contribution, that is clearly unsustainable. Ordinarily the amount paid to the contractor may include cost of materials, charges for the use of his equipment, if any, his profit and the like. Contribution cannot be levied on all these items. It is also argued that if any employee draws wages at the rate of over Rs. 1,600 per month, wages paid to him cannot be reckoned. The statutory authority will have to ascertain the wages paid to the eligible employees and levy contribution accordingly. For this purpose, the matter has to be considered afresh by the statutory authority.

11. In the result, we set aside the impugned order and direct the appellant to determine the contribution payable under the Act in accordance with law and in the light of the observations contained in this judgment? The appeal is thus allowed, but in the circumstances without costs.