

(2002) 07 KL CK 0073
In the High Court Of Kerala
Case No : M.F.A. No. 1095 of 1996

Regional Director, E.S.I. Corporation

APPELLANT

Vs

Mookken Devassy Ouseph and Sons

RESPONDENT

Date of Decision : 04-07-2002

Acts Referred:

Employees State Insurance Act, 1948 — Section 1(6), 2(12)

Citation : (2003) 96 FLR 1133 : (2002) 3 ILR (Ker) 459 : (2003) 1 LLJ 94

Hon'ble Judges : P.R. Raman, J

Bench : Single Bench

Advocate : T.V. Ajayakumar, for the Appellant; M.V. Joseph, for the Respondent

Final Decision : Allowed

Judgement

P.R. Raman, J.—The Regional Director, Employees" State Insurance Corporation, is the appellant herein.

2. The first respondent is an establishment by name "Mookken Devassy Ouseph & Sons" which is engaged in the business of General Merchants & Commission Agents. The respondent herein filed an application before the E.I. Court as I.C. 17 of 1992 challenging Ext. P12 order dated 3.3.1992 of the appellant claiming contribution to the tune of Rs. 21,649/- from the respondent.

3. The respondent herein was an establishment covered under the Employees" State Insurance Act by virtue of the notification issued by the Government on 29.3.1975. In addition to the establishment at Kochi, they got branches at various places within the State. Though the coverage itself was based on the total strength of Cochin Establishment and other branches, according to the respondent applicant, even this position changed and from 20.4.1989 the strength of employees in the establishment came down to 20 including the strength at Cochin establishment and branches together. Despite that the coverage continued for some more time and there was no objection by the opposite party regarding the quantum remitted by the respondent/applicant. But

on a subsequent inspection, the authorities found that contributions were not paid on certain items such as allowances to the employees, repairs and maintenance charges and miscellaneous charges and hence for the period from 1.4.1987 to 31.7.1988 a sum of Rs. 10,766/- was sought to be recovered as additional contribution. According to the applicant, allowances paid to the employees was accounted as "veettu pattu" and that is the amount spent for boarding and lodging expenses of workers coming outside the station and working in the Cochin establishment. Regarding the repairs and maintenance charges, it is contended that only a lesser amount was paid as wages and only 25% of that amount will be wage element. The amount paid by way of commission and tips to agents of the purchasers for boosting the business was accounted as "miscellaneous charges and brokerages" which according to the respondent-applicant is not wages on which contribution is payable. It is the total of the various claims as aforesaid that an amount of Rs. 21,649/- was claimed from the applicant by way of contribution.

4. In the written statement the appellant contended that it was found on verification of various records that on an amount of Rs. 2,98,604.15 no contribution was paid. Regarding the reduction of employment strength from April, 1989 inclusive of all the branches, it is their case that as per the return of contribution submitted by the applicant for the period from 1.4.1989 to 30.9.1989 the employment strength in Cochin establishment itself was 20 whereas it was six in their branch at Kozhikode. The allowance (veettupattu), repairs and maintenance charges etc. are entries taken from the account book and the details were also given in the written statement totalling to Rs. 2,98,604.15 on which also contribution was demanded for the period from 1.4.1987 to 31.3.1990. According to them, veettupattu was paid at the rate of Rs. 20/- to 25/- to an employee as reported by the ESI Inspector which is in addition to the monthly wages and since this was paid in cash, it will attract the definition of wages. It was also their contention that there is evidence to show that miscellaneous charges represent commission or brokerage paid by the applicant.

5. According to the applicant, the amount paid by them for the period from 1.4.1989 is by mistake and since the employment strength fell below 20 as on that date, whatever that is paid for the subsequent period has to be refunded and also sought for a declaration that the establishment will not be continue to be covered from 1989 onwards and that they have no liability to pay the amount of contribution now demanded as per Ext. P12.

6. The Court below found that the plea of refund of the amount cannot be sustained in any manner. A mistake said to have been committed is held to be not a ground for refund of the contribution already paid. As regards the liability of the applicant/respondent to continue the coverage of the establishment after 20.10.1989 it took the view that as on the date of coming into force of Section 1(6) of the E.S.I. Act the establishment stood outside the coverage and hence

the provision will not apply. Based on Ext. P2 register of employees for the period from 27.1.1985 to 31.3.1992, the E.I. Court found that in the beginning of the year 1985 there were 20 employees which continued till 30.9.1985 and as on 1.4.1989 there were 22 employees, including the employees working in the branches at North Parur, Malipuram, Ernakulam, Bombay and Kottayam. According to the applicant, on 31.3.1989 two of the employees by name K.R. Antony and P.L. Devassy left service and out of the remaining 20 employees 5 were employees of the branches. Six of them were receiving more than Rs. 1,000/- per month and they are outside the coverage limit. Thus, the strength as on that date is below the minimum required and hence stood outside the coverage. But the contention that some of them were receiving salary of more than Rs. 1,000/- and hence stood outside the coverage was repelled by holding that the salary ceiling to come out of coverage is Rs. 1,600/- per mensem, since the amendment to Section 2(9) of the E.S.I. Act enhancing salary limit came into force with effect from 27.1.1985. Hence the contention of the applicant in this regard was rejected. After referring to Ext. P4 muster roll it was found that there were only 17 employees including the employees working in the branches at North Parur and Bombay and in April, 1989 there were only less than 20 employees. Hence it concluded that there is no obligation on the part of the applicant to continue the coverage because the total coverable employees were less than the required minimum. Since it was found to be coverable for the period up to March, 1989 the applicant could be made liable to pay contribution for one more year from 1.4.1989 and that the applicant had also paid the contribution upto April 1990. After entering such a finding, the court below held that the amendment brought out as on 20.10.1989 to the effect that notwithstanding any reduction in the employment strength, the establishment will not go out of the coverage, will not apply for the reason that as on 1.4.1989 the employment strength fell below the minimum required, namely, less than 20. It therefore, declared that the establishment went out of coverage and since it was not under coverage as on the effective date of coming into force of Section 1(6) of the ESI Act, there could be no liability on the part of the applicant to continue the coverage beyond 20.10.1989.

7. As regards the additional contribution claimed on the amount spent as "veettu pattu" it was held that the same is not sustainable as it was not considered to be not wages within the meaning of the Act. The claim of repairs and maintenance was found to be sustainable. The ESI Corporation, Thrissur has therefore, come up in appeal.

8. It has to be noted that the important question to be considered in this case is regarding the effect of Section 1(6) of the E.S.I. Act and whether the respondent can be said to be an establishment which is continued to be covered by virtue of the said provision?

9. Before going to Section 1(6) of the E.S.I, Act, it is necessary to refer to the definition of the term "factory" u/s 2(12) of the Act. For the purpose of easy

reference, Section 2(12) is quoted hereunder.

"factory" means any premises including the precincts thereof-

(a) whereon ten or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on, or

(b) whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power or is ordinarily so carried on.

but does not include a mine, subject to the operation of the Mines Act, 1952 (35 of 1952) or a railway running shed."

10. Since the applicant is covered as an establishment by notification issued by the Government, the relevant portion of the notification issued u/s 1(5) is also quoted hereunder:

"In exercise of the powers conferred by Sub-section (5) of Section 1 of the Employees' State Insurance Act, 1948 (Central Act 34 of 1948), the Government of Kerala, in consultation with the Employees' State Insurance Corporation and with the approval of the Central Government, hereby gives notice of its intention to extend the provisions of the said Act to the classes of establishments specified in Schedule annexed hereto on or after 29.3.1975.

Description of Establishments Areas in which the establishments are situated

(1) (2)

The following establishments wherein twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, namely;
1. Trivandrum, Navikulam and Pazhayakunnumel (Kilimanoor) in Trivandrum Dist.

(i) Hotels; (ii) Restaurants; (iii) Shops; 2. Ouilon, Kundara, Chalhannur, Kottarakkara, Punalur and Sasthamcotta in Quilon Dist.

(iv) Road Motor Transport Establishments; (v) Cinemas including preview theatres (vi) Newspaper establishments as defined in 3. Alleppy, Kayamkulam and Sherthalai in Alleppy Dist.

S. (2)(d) of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (45 of 1955). 4. Kottayam town in Kottayam Dist.

5. Ernakulam & Cochin in Ernakulam Dist.

6....7....8....9.

11. Going by the definition of the term "factory it can be seen that the establishment will be covered when there are 20 or more persons are employed

or were employed for wages on any day of the preceding twelve months and in any part of which a manufacturing process is being carried on without the aid of power. Therefore, if in a factory there are twenty employees even for a day, within a period of twelve months the establishment is brought under coverage. Therefore, a factory which is covered will be continued to be covered for 12 months from that day onwards on which there were 20 employees working for wages. In other words, the employment strength of 20 need not be there continuously for the remaining period of 12 months for the continued coverage of the establishment upto 12 months. The same is the definition contained in the notification issued by the Government while extending the provisions of the Act to various establishments as is evident from the notification quoted above. Hence if it is found that an establishment or factory employs 20 or more workmen on any particular day, the factory or establishment will continue to be covered for a period of 12 months irrespective of the fall in number on any day subsequent thereto till the completion of the period of 12 months. In this case, the E.I. Court did not enter any specific finding as to the last day on which 20 or more persons were employed in the establishment. Before advertng to Section 1(6) it is necessary to enter such a finding without which it cannot be said that by virtue of Section 1(6) whether the establishment continued to be covered or not. If as on 1.4.1989, there were 20 employees then upto 1.4.1990 the establishment will be continued to be covered before which the new proviso to Section 1(6) of the ESI Act was brought into force. The effect of such an amendment would be to continue to cover an establishment irrespective of the fall in number. Therefore, when the establishment stood continued to be covered upto 1.4.1990 the amendment brought out will apply to such establishment and by virtue of the amendment such establishment will continue to be covered even thereafter. Hence it is necessary that the court below will enter a finding based on the evidence as to which is the last date on which 20 or more employees were employed in the establishment and consider the question whether within a period of 12 months therefrom the new Section 1(6) was brought into force and decide the question as to whether the establishment continued to be covered irrespective of the fall in number because of the new provision.

12. As regards the finding regarding the claim for contribution on the allowance paid as "veettu pattu", the E.I. Court did not consider the contention as to whether this was paid in cash directly to the employees. If it is a cash payment, the further question as to whether it can be treated as wages within the meaning of the Act has also to be considered. Hence the finding on this issue is also directed to be reconsidered by the court below. The finding regarding the question that "miscellaneous charges" is not wages, there is no evidence to show that such a finding is contrary to the evidence in the case.

In the result, the appeal is allowed and the court below is directed to reconsider questions afresh in accordance with law and subject to what is stated above. In the circumstances, there will be no order as to costs.