

(2024) 07 BOM CK 0016
In the Bombay High Court
Case No : First Appeal No.133 Of 1999

Regional Director E.S.I. Corporation

APPELLANT

Vs

M/S. Pahelvi Bakery

RESPONDENT

Date of Decision : 10-07-2024

Acts Referred:

Employees' State Insurance Act, 1948 — Section 12, 45A, 75, 82
Factories Act, 1948 — Section 2(k)

Citation : (2024) 07 BOM CK 0016

Hon'ble Judges : Arun R. Pedneker, J

Bench : Single Bench

Advocate : Anita Bafna, S.C. Naidu, T.R. Yadav, Abhishek Ingale, Pradeep Kumar, C.R. Naidu & Co.

Final Decision : Dismissed

Judgement

Arun R. Pedneker, J.

1. The present Appeal is filed by the ESIC Corporation under Section 82 of the Employees' State Insurance Act, 1948 (hereinafter referred as 'ESI Act') challenging the order dated 12th March 1997 passed by the Employees' State Insurance Court, Mumbai (hereinafter referred as 'ESI Court') in Application (ESI) No.93 of 1992 filed by the Respondent, whereby the ESI Court was pleased to allow the Application and hold that the Respondent-Establishment was not covered within the provisions of ESIC Act, prior to 12th November 1978 and set aside the order dated 7th February 1991 and 13th February 1991 passed under Section 45-A by the Respondent-Corporation.

2. Brief facts leading to the filing of the Appeal are as under:-

The Respondent-Bakery being an establishment employing 20 or more employees in preceding 12 months was covered under the ESI Act pursuant to the notification issued on 12th November 1978 to the classes of establishments mentioned in the Schedule. The Respondent covered all eligible employees and

deposited contributions payable under section 12 of the Act, w.e.f. 12th November 1978. The ESI Inspector visited the Respondent for verification of records and observed that yeast is one of the ingredients for making bread/pav was stored in the refrigerator and concluded that the bread was manufactured by the use of power. The Insurance Inspector, on verifying records found that the Respondent was employing 20 or more employees and was using power for manufacturing process w.e.f. 4th October 1976. Based on the report of the Insurance Inspector opinion was formed by the ESI that the Respondent-Bakery was covered under the ESI Act w.e.f. 4th October 1976 and called upon the Respondent to pay contribution in respect of the eligible employees for the period from 4th October 1976 to 11th November 1978.

3. The Appellant-Corporation issued show cause notice in From-C-18 calling upon the Respondent to Show Cause as to why an amount of Rs.16,382/- should not be determined under Section 45-A of the ESI Act for the period 4th October 1976 to 11th November 1978. On receipt of reply the Corporation by orders dated 7th February 1991 and 13th February 1991 passed an order under Section 45-A determining the amount of Rs.16,382/- as contribution payable by the Respondent for the period from 4th October 1976 to 11th November 1978 and further interest of Rs.889/-. The said order passed under Section 45-A was challenged before the ESI Court under Section 75 of the ESI Act.

4. By the impugned order dated 12th March 1997 the ESI Court allowed the Application filed by the Respondent under Section 75 of the Act. The ESI Court held that usage of a domestic refrigerator does not amount to usage of power in the manufacturing process of bread/pav and thus held that the Respondent-Establishment was not covered within the ESI Act for the period from 4th October 1976 to 11th November 1978 against which the present Appeal is filed.

5. Ms.Anita Bafna, the learned counsel appearing for the Appellant submits that the substantial question of law arises in this matter as under:-

Whether storage of yeast in the fridge for the preparation of the bread/pav is an integral part of the manufacturing process of bread and thus usage of the fridge (with power) would amount to usage of power in the manufacturing process under Section 2(k) of the Factories Act ?

6. In support of the question of law stated above, the learned counsel for the Appellant submits that yeast is required to be stored in the refrigerator for the purpose of mixing maida for the manufacture of bread/pav. Since the fridge uses electricity there is power utilization by the Respondent in the manufacturing process.

7. The Respondent-Establishment is thus covered within the definition of Section 2(k) of the Factories Act. She further submits that storing and preserving yeast for mixing with flour for the purpose of fermentation in refrigerator at a particular temperature in a bakery amounts to manufacturing process within the meaning of Section 2(k) of the Factories Act. She submits that definition of the

manufacturing process in the Factories Act is wide and it comprehends every possible process of adaptation. The learned counsel submits that word 'treating' in Section 2(k) of sub clause-(i) to show that the legislature did not use the word treating in the sense of chemical treatment. The word otherwise treating suggest any treatment of an article with a view to use for sale, transport and delivery of goods.

8. Per contra Mr.Naidu, the learned counsel submits that the ESI Court has rightly held that the Respondent-Establishment is not covered within the provisions of Employees' State Insurance Act, 1948 for the period mentioned in the notice.

The learned counsel submits that the test has been laid down by this Court in the case of Ritz Hotel (Vegetarian), Pune V/s. ESIC, Pune Decided on 16th August 1994 in the case of First Appeal No.822 of 1980, wherein this Court in a very identical situation has held that the definition of 'manufacturing process' is liable to be interpreted in a business sense of the term having regard to the meaning of the words in common parlance and the usage of the trade. If the test is to be applied, it shall become clear that a small refrigerator in the bakery would not amount to usage of power in the manufacturing process.

9. He further relied upon the judgment of the various High Courts reported as below :-

(i) Hotel Shree Vaibhav V/s. Employees State Insurance Corporation reported in 2007(h) Mh.L.J. 363

(ii) Radhamony V/s. Secretary, Department of Home Affairs passed in M.F.A. No.328 of 1993 in the Kerla High Court on 20th October 1994.

(iii) Gujrat Sweet Mart V/s. Regional Director, Employees State Insurance Corporation reported in 2014 (5) Mh.L.J. 838

(iv) Regional Director, ESI Corporation V/s.Serofie Bernard Vaz, reported in 2008 SCC Online Bom 881.

(v) Mohd. Arif V/s. Employees State Insurance Corporation reported in 2010 SCC Online Del 3692.

10. He submits that the usages of the refrigerator for storage of yeast is only to preserve the raw material. The power is not utilized in the manufacturing process. The yeast as it is can be procured on the day to day basis from the market and used in making bread. The dough is never fermented in the fridge but is always fermented at room temperature. It is also noted by the Tribunal that dough is never fermented in the fridge. He further submits that the fridge is being not used in the manufacturing process of making dough into bread is a finding of fact which cannot be interfered in the Appeal under Section 82 of the ESI Act.

11. Having considered the rival submissions, the question of law arises for

consideration in this case is as under:-

(i) Whether the use of fridge for the purpose of storing yeast by the Respondent-Establishment amounts to manufacturing process being carried out with the aid of power as contemplated under Section 2(12) of the ESI Act ?

12. For the ready reference under Section 2(k) of the Factories Act and 2(12) of the ESI Act is noted below.

"2(k) :- "manufacturing process" means any process for—

(i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal; or

(ii) pumping oil, water, sewage or any other substance; or

(iii) generating, transforming or transmitting power; or

(iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding; 3[or]]

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; 3[or]

(vi) preserving or storing any article in cold storage;"

2(12) :- "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 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 or a railway running shed." (as it stood prior to 1/6/2010).

13. The Tribunal on consideration of the Application has rendered a finding that yeast does not acquire any quality for the purpose of the fermentation because of storage in refrigerator, even if the yeast is directly brought from the market and mixed with the flour it will soon have effect of fermentation. If the yeast is not treated or adapted by the Applicant by storing in the refrigerator, there would be no change in the manufacturing process. The intention of the storing yeast in the refrigerator is to make it usable for long time rather procuring it from the market on day to day basis.

14. It is the contention of the Appellant that mere preservation of yeast in the cold storage, also amounts to manufacturing process. As the fridge is merely of 165 ltr. capacity and the cold storage processes as required under Section 2(k)

(vi) would be a cold storage having capacity not less than 25 cubic ltr, and a mere storage of yeast in small quantity in a fridge would also not amounts to manufacturing process. 'Cold storage' as contemplated under Section 2(k)(vi) of the Factories Act is not defined under the Act. However, notifications issued under Section 3 of the Essential Commodities Act, 1955 by the Central Government, titled as "This order may be called the Cold Storage Order, 1980" defines "Cold Storage" as under:-

"Definitions :-

In this order, unless the context otherwise requires :

(a) "cold storage" means any chamber or chambers insulated and mechanically cooled by refrigeration machinery and used for storing foodstuffs but does not include refrigerated cabinets or coolers having capacity of less than 25 cubic meters;"

15. This Court while dealing with the usages of the fridge in a hotel industries, in the case of Ritz Hotel (Supra) has observed that the usage of the domestic fridge for storage of milk would not be considered as usage of the power for the purpose of manufacturing or for the purpose of treating or storing as included in clause 2k(i) of the Factories Act.

16. This Court in the case of Gujarat Sweet Mart V/s. Regional Director, Employees State Insurance Corporation 2014 (5) Mh.L.J. 838, held that the sweet mart engaged in sale of sweets, lodging business and running restaurant using deep freezer for storage of cold articles, cannot be treated as usage of power in manufacturing process, though it consumes electricity. This Court at paragraph 16 has specifically observed as under:-

"16. Insofar as the question No. 3 as framed above is concerned, there is no dispute that in the appellant-establishment there exists a deep freezer. However, there is absolutely no evidence to establish that the said deep freezer was used for purpose of manufacturing anything. In the case of "Arif (Mohd.)" (supra), one of the questions was whether use of refrigerator with the aid of power in the establishment of the appellant amounts to manufacturing process rendering the establishment coverable under the ESI Act. It was found that the deep freezer in the hotel using the electric power was only meant for the purpose of storage. Applying the principles laid down by the Bombay High Court and Hon"ble Supreme Court in the cases referred to in the case supra, the Delhi High Court held that mere storage as such will not be part of the manufacturing process as defined u/s 2(k) of the Factories Act, 1948. Hence, it was held that merely because the hotel belonging to the appellant was using a refrigerator which was being used with the aid of electricity, it cannot be said that the hotel was engaged in manufacturing process so as to cover the said hotel under the provisions of the ESI Act. I have no hesitation to agree with the said proposition. Therefore, point No. 3 gets answered in favour of the appellant.

17. The Bombay High Court also concluded in the case of Regional Director, ESI Corporation V/s. Serofie Bernard Vaz 2008 SCC Online Bom 881, that the usages of the deep freezer and water cooler (on power) in a hotel and bar to preserve raw materials and for cooling drinks would not amounts to usage of power in manufacturing. This Court in paragraph No.9 has observed as under:-

"9. I have carefully considered rival contentions. The key to the questions posed lies in the definition of "factory" in Section 2 (12) of Employee's State Insurance Act (or even Section 2(m) of Factories Act). The legislature intended to cover establishments where 20 or more persons are employed in a manufacturing process. This limit was reduced to 10 when the process was carried out with the aid of power. Obviously, since use of power reduces the need of work force. The object is to ensure that an establishment does not escape from the applicability of benevolent provisions of these statutes by using power to mechanize processes and reduce work force. Thus if power has been used for performing a task for which labour would have otherwise been required, then such a process aided by power would be relevant. No amount of manpower is likely to achieve preserving articles by cooling them, which a freezer does, or cooling bottles for which a bottle cooler is used. Therefore, use of these gadgets does not bring the establishment within the ambit of Employee's State Insurance Act, so long as it employs less than 20 persons."

18. This Court held that the power used in the manufacturing process should be as such so as to reduces the need of work force in the manufacturing process. If the power has been used for performing a task for which labour would have otherwise been required, then such a process aided by power would be relevant for the purpose of Section 2(k)(v) applying the test laid down in the case of Serofie Bernard Vaz (Supra). The power used in the instance case is not for enhancement or reduction of the layman/work force or so also power is not used for fermentation of the bread/pav. As such the finding by the Tribunal that usage of fridge is not in aid of manufacturing process cannot be faulted.

19. Delhi High Court in the case of Mohd. Arif V/s. Employees State Insurance Corporation 2010 SCC Online Del 3692, held in paragraph 15 as under:-

15. Applying the principles laid down by the Bombay High Court and Hon'ble Supreme Court to the facts of this case, it cannot be said that merely because the hotel/lodging house belonging to the appellant was using a refrigerator which was being used with the aid of electricity, the said hotel was engaged in the manufacturing process for the purpose of bringing it within the definition of 'Factory' under Section 2(12) of the Act so as to cover the said hotel under the provisions of the Act as was sought to be done by the respondents.

20. The Delhi High Court has held that hotel/lodging house using refrigerator with the aid of the electricity, cannot be said to be used in the manufacturing process within the meaning of the Section 2(k) of the Factories Act.

21. The Hon'ble Supreme Court in the case of Hotel New Nalanda V/s. Regional

Director, Employees State Insurance Corporation 2019-14 SCC 558, in paragraph Nos.18, 19 and 20 has observed as under:-

18. For holding an establishment to be a 'factory' within the meaning of section 2(k) of the Act it must first be established that some work or process is carried on in any part of the establishment that amounts to 'manufacturing process' as defined under section 2(k) of the Factories Act, 1948. In case the number of persons employed in the establishment is less than twenty but more than ten then it must further be established that the manufacturing process in the establishment is being carried on with the aid of power.

19. Further, the use of power in the manufacturing process should be direct and proximate. The expression 'manufacturing process being carried on with the aid of power' in section 2(12) of the Act does not mean a very indirect application of power such as use of electric bulbs for providing light in the work-area.

20. Unless the links are established, that is to say, it is shown that some process or work is carried on in the establishment which qualifies as 'manufacturing process' within the meaning of section 2(k) of the Factories Act and the manufacturing process is carried on with the aid of power, the mere presence of a refrigerator and a grinder there, even though connected to the main power line may not necessary lead to the inference that the establishment is a factory as defined under section 2(12) of the Act.

22. The Hon'ble Supreme Court has held that the use of the power in manufacturing process should be direct and proximate. The manufacturing process carried out by the aid of the power could not mean an indirect application of the power.

23. Applying the law laid down in the above discussed cases, that the use of power in the manufacturing process should be direct and proximate to the fact of instant case, where fridge is only used to store raw material and not for fermentation of the dough it cannot be said that the usage of fridge for storage of yeast used in the manufacturing of bread/pav amounts to usage of power in the aid of manufacturing process. The question of law is thus answered as below :-

The use of electric fridge of 165 lt. in a bakery for storage of yeast which is used for making bread/pav cannot be termed as manufacturing process being carried with the aid of the power, as contemplated under Section 2(12) of the ESI Act.

24. As such the answer to the question of law is against the ESI Corporation and the Appeal is accordingly dismissed.