
(2002) 04 GUJ CK 0041
In the Gujarat High Court
Case No : F.A. No. 4075 of 2001

Regional Director, E.S.I. Corporation

APPELLANT

Vs

Patel Printing Press

RESPONDENT

Date of Decision : 02-04-2002

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(22), 39, 40

Citation : (2003) 23 GLH 425 : (2003) 4 GLR 126 : (2003) 3 LLJ 647

Hon'ble Judges : K.M. Mehta, J

Bench : Single Bench

Advocate : B.P. Bhatt, for the Appellant; A.K. Clerk, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Mehta, J.—The Regional Director, E.S.I. Corporation appellant, original opponent, has filed this First Appeal u/s 82 of the Employees' State Insurance Act (hereinafter referred to as "the Act") against judgment and award dated April 27, 2001 passed by the E.I. Court in E.S.I. Application No. 80 of 1989. The learned judge by the impugned judgment quashed and set aside demand letter dated May 4, 1989 claiming Rs. 2,19,245/- Insurance amount on the cost of construction and profit of contractor u/s 2(22) of the Act.

2. The facts giving rise to this appeal are as under:

Patel Printing Press, respondent, original applicant was carrying on business at Ahmedabad. The respondent has its own building where it carries on business of printing press. It is the case of the respondent that it has one building and another it has acquired which was originally rented to the tenant. However, the building was in a dilapidated position and therefore it decided to renovate the same and put up a new construction in this behalf. In view of the same, the respondent has almost constructed a new building and spent about Rs. 2,19,245/-towards cost of construction. The said cost includes value of building including the amount paid to the contractor which necessarily includes a margin

of profit of the contractor also.

Petitioner further submitted that after construction of the said building again the respondent started business of printing in the building. It is the case of the respondent that the officer employed under the provisions of the Act visited the premises of the respondent on January 9, 1989 and thereafter prepared a report. In the said report it was observed that the respondent has paid Rs. 1,36,410.22 to Octava Builders towards labour contractor bills. The respondent has also paid Rs. 30,727.77 ps. to Mohanbhai Bhagirthji Mistry for labour work bill, furniture and fixtures, Rs. 2000/- paid to Jagdish Gordhan Rathod for cabin polishing work, Rs. 5001/- paid to Kaniyalal M. Sharma for tile polishing and fixing labour, Rs. 7,047.70 paid to Mithulal R. Chauhan for plaster of paris work, Rs. 24,140.58 paid to Pal Enterprises towards oil paint, whitewash charges, colour charges, Rs. 10,711/- paid to Paresh Contractor for plumber work, Rs. 3,205.53 paid towards flooring and fitting charges. According to the learned counsel for the E.S.I. Corporation as the said amounts/ wages fall within the provisions of Section 2(22) of the Act paid in connection with the work of the factory, contribution may be recovered.

In view of the said report, the Assistant Regional Director addressed a letter dated May 4, 1989 to the respondent. The respondent has neither paid the dues nor submitted compliance report in this behalf. On October 6, 1989 the Deputy Regional Director has stated that ESI contribution is chargeable on Rs. 2,19,245/- as this amount is utilised for extension/ renovation of premises and also debited to factory account as construction cost which falls u/s 2(22) of the Act. In view of the same, the respondent is directed to pay Rs. 2,19,245/- to ESI Corporation immediately and submit challan in this behalf.

The respondent thereafter replied by its letter dated June 10, 1989 stating that the said amount pertains to cost of building and therefore they are not liable for the same. The entire amount pertains to building cost.

3. Before the authority Shri Rajendra Manubhai, Manager of the respondent was also examined. He has deposed that Rs. 2,19,000/-pertains to cost of raw material, building material and contractor's profit. This is a new building which the respondent is going to use for the first time.

4. On the aforesaid basis the learned judge has examined all contentions including bills of municipal Corporation and necessary plan which are approved by the municipality by which the respondent is decided to use the building. The learned judge, therefore, held that amount of Rs. 2,19,245/- which has been paid to the contractor does not fall within the definition of wages as contemplated u/s 2(22) of the Act. In view of the same, the appellant Corporation has no right to demand amount of contribution and the demand raised by the Corporation is illegal and bad.

5. Being aggrieved and dissatisfied with the said judgment and order of the E.I. Court, the ESI Corporation has filed this appeal u/s 82 of the Act. The appellant

has relied on definition of wages contained in Section 2(22) of the Act. The learned counsel for the appellant submitted that the order of the learned judge is contrary to the provisions of the Act and the demand raised is legal and valid.

6. On the other hand Mr. Clerk, learned counsel for the respondent, has submitted that because the amount is spent towards cost of construction of building, the ESI Corporation has no jurisdiction to demand the said amount from the respondent because it does not fall within the definition of wages, remuneration to be paid or payable in cash to an employee and the same in terms of contract of employment. He submitted that contractor is not working in terms of employment. He submitted that the relation between the respondent and the contractor is not that of master and servant and once that is not so, the provisions of the Act have no application. In view of the same, the demand raised by the ESI Corporation is not legal and valid. He submitted that what is important is that the work of the contractor must be in connection with the work of the establishment. He has referred to the definition of employee contained in Section 2(9) of the Act. He submitted that as per the said definition "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies. He submitted that in common parlance the status of a contractor qua establishment is different from the employee working in the establishment. It may be noted that the contractor is being paid some remuneration for the work which he has done but that work would not involve any change of status and bring him within the definition of "employee". He submitted that in any view of the matter the contractor must be shown to be employed in one or other categories mentioned in Section 2(9) of the Act. As the contractor has not been mentioned in the category mentioned in Section 2(9) of the Act, he does not fall within the definition of "employee" and the amount paid to the contractor would not come in the definition of wages. In support of the above contention the learned counsel for the respondent has relied on the judgment of the Hon"ble Supreme Court in the case of Kirloskar Brothers Ltd. Vs. Employees" State Insurance Corpn., . The Hon"ble Supreme Court has observed thus at p. 1159:

"The principal test to connect the workmen and employer under the Act to ensure health to the employee being covered under the Act has been held by this Court in Hyderabad Asbestos case, i, e, the employee is engaged in connection with the work of the factory. The test of predominant business activity or too remote connection are not relevant. The employee need not necessarily be the one integrally or predominantly connected with the entire business or trading activities. The true test is control by the principal employer over the employee....."

7. The learned counsel for the respondent has further relied on the judgment of the Hon"ble Supreme Court in the case of Rajakamal Transport and Another Vs. Employees" State Insurance Corporation, Hyderabad, in which it is observed as follows at p. 437 of LLJ:

".... It is true as found by the Insurance Court that instead of appellants directly paying the charges from their pocket, they collect as a part of the consideration for transportation of the goods from the customers and pay the amount to the Hamalis. The test of payment of salary or wages in the facts of this case is not relevant consideration. What is important is that they work in connection with the work of the establishment. The loading and unloading of the work is done at their directions and control."

8. I have considered the definition of "employee" and "wages", decisions of the Honb"le Supreme Court and contention of the learned counsel for the parties. In this case the demand raised by the ESI Corporation pertains to building construction. In my view, the construction activity carried out cannot be said to be the work in connection, with the work of establishment and the same is not within the control of the respondent. In view of the same, the employee of the contractor cannot fall within the definition of "employee" as contemplated under the Act. Employees of the contractor are not engaged in connection with the work of the factory. The principal employer has no control over the employees of the contractor. The employees of the contractor have no connection with the sale and distribution of the finished goods of the factory and therefore, by no stretch of imagination they can be considered as employees of the principal employer. Therefore, ESI Corporation has no power and jurisdiction to demand the contribution from the respondent in this behalf. The learned counsel for the respondent has referred to Section 39 of the Act which provides for contributions. He has submitted that Section 40 of the Act provides for the principal employer to pay contributions in the first instance. He further submitted that Sections 39 and 40 of the Act will not apply in this case. In view of the same, the demand raised by the ESI Corporation is illegal, bad and liable to be set aside. Therefore, the view taken by the E.I. Court for quashing and setting aside the demand of the ESI Corporation is legal and correct. Hence, I dismiss the appeal and confirm judgment and order of the EL Court. Record and proceedings to be sent back to the Trial Court concerned.