

(1986) 08 KL CK 0040
In the High Court Of Kerala
Case No : M.F.A. No. 82 of 1987

Regional Director ESI Corporation

APPELLANT

Vs

P.R. Narahari Rao

RESPONDENT

Date of Decision : 14-08-1986

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(13A), 2(9), 2(9)(i), 2(9)(ii), 75

Citation : (1986) 23 KLJ 994

Hon'ble Judges : V. Sivaraman Nair, J;K. John Mathew, J

Bench : Division Bench

Advocate : C. Sankaran Nair, for the Appellant; S. Narayanan Poti and S. Sankarasubban, for the Respondent

Final Decision : Dismissed

Judgement

Sivaraman Nair, J.—The Regional Director of the Employees State Insurance Corporation, Trichur, is the appellant. The appeal is filed against the judgment of the Employees Instance Court, Calicut in E.I.C No. 99 of 1978. The dispute relates to the contribution payable in respect of the temporary/casual workmen of a covered establishment. The brief facts are the following:- The employer is a hotelier. He was the applicant in E.I.C. No. 99 of 1978 before the Insurance Court. That application was filed u/s 77 read with section 75 of the Employees State Insurance Act (hereinafter to be referred to as the Act) for a declaration that "the persons employed on casual items of work from April 1975 to March 1976 are not employees within the definition of employees under the E.S.I. Act" The consequential declaration sought was to the effect that no contributions were payable in respect of such employees.

2. The controversy arose as a consequence of an inspection conducted by the Insurance Inspector in April, 1976. In his inspection report dated 7-4-1976, which was marked as Ext. D1 before the Insurance Court, the Inspector pointed out that the general ledger-figures relating to wages, and the entries in the wages register differ substantially. Amounts were omitted in the wages register

almost regularly for the period from April, 1975 to March, 1976, which amounted to Rs. 22,163.30. In January, 1976, there were no such omissions. In February, 1976 such omissions amounted only to Rs. 275. In other months, the amounts differed from Rs. 1,073.65 in November 1975 to Rs. 4,432.45 in December, 1975. In the letter dated 17-5-1976, the employer was required to pay a contribution of Rs 1,551.43 in respect of such omitted wages. The employer maintained, that the casual workmen were engaged through an independent contractor for the purpose of preparing food articles when special orders for catering on contract basis were received by the employer. He denied any employer-employee relationship between these persons and the hotelier. He maintained that even the names of such workmen were not known to him, that those persons had worked only for 5 or 6 days in a month to meet the special contingencies, and there did not exist any employer-employee relationship between such workmen and the hotelier.

3. PW-1 was examined to support the applicant's case. He claimed himself to be an independent contractor engaged by the employer-establishment. He also deposed that he was undertaking similar contracts for preparation of food articles for some other hoteliers in Ernakulam as well. He also stated that the casual workmen were controlled by him and he was paying them the stipulated rates of wages. Ext. D1 inspection report and Ext. D2 covering letter were marked on the side of the respondent.

4. On these materials, the Insurance Court came to the conclusion, that the omitted wages were amounts paid to the independent contractor, who engaged casual workmen for short period of time when the employer-hotelier had catering contracts. It was also found that the workmen concerned were not employed by the hotelier, since the same contractor and the same workmen were engaged in works under other similar catering establishments on a contract basis. The Insurance Court, therefore, granted the declaration sought by the employer and also held that the employer was not liable to pay contribution on the amount of omitted wages. The Insurance Court relied on the decision of this court reported in 1980 Labour and Industrial Cases 557, to the effect that unless it was found that the workmen were employed within the concept of the Employees Insurance Act, they would not be employees entitled to the benefit of the Act. It is that judgment in favour of the employer that is under challenge in this appeal.

5. Counsel for the appellant submitted that the definition of employee" in section 2 (9) of the Act is all comprehensive and the employer was obliged to pay contribution in respect of the wages of any such person. He relied on the decision of the Karnataka High Court reported in 1979 Labour and Industrial Cases 1335 in support of this extreme position. According to counsel, that decision is an authority for the proposition that even if a person works only for a day in an year, he is an employee and therefore the establishment will be obliged to pay contribution in respect of all workmen.

6. We feel that a distinction has to be made between cases where the/question

which has to be considered is about the liability of an establishment for coverage under the Act and those cases where the establishment is covered by the Act and some employees are alleged to have been excluded from the purview of the Act. In the former, what is essential is that there shall be the required number of employees in the establishment on the relevant date. Even if one such workman is a casual employee and he works only for a short period of time, the establishment will be liable to coverage if that person answers the definition of "employee" u/s 2 (9) of the Act. Even in such cases, two tests have been applied by courts. The oft repeated distinction is that between an "employment" and "engagement". If a person is engaged casually for a process unconnected with the operations of the establishment, or some work which does not form the integral part of such operations, he may not be an employee since there would be no employer-employee relationship between them only in consequence of the casual engagement for purposes unconnected with the main operations of the establishment. On the other hand, if a person is employed, though casually and for a very short period of time, but in connection with the processes which are integral and connected with or incidental or preparatory to the operations of the establishment, then he may be an employee entitled to coverage under the Act. The Courts have made a still further distinction to the effect that in a case of employment, however short it be, the employer shall have the right of disciplinary control, right of supervision and oversight of the quality of and the manner in which the work is to be performed etc. Further ramifications have been evolved by the decisions to the effect that the employer shall have control over the employee in the sense that the latter shall be obliged to report for duty at specified working hours and seek and obtain permission for absence on any account, and that the employer shall have the power to grant or refuse leave etc.

7. A long line of decisions have established that even a seemingly independent contractor working away from the factory or establishment of the employer may still be an employee in certain circumstances; if he is performing the work of the establishment, is employed by the employer, the employer and the manner of discharge of the work is bound to be supervised by him. These ramifications may be more relevant in cases where the question is one of coverage of the establishment.

8. In the earliest of the decisions viz., *Gnanambikai Mills Ltd v. Employees' State Insurance Corporation*. (1970) 2 LLJ 223, Ramamurthi J., of the Madras High Court took the view that the relevant question in deciding whether a casual employee would fall within the definition of section 2(9) of the Act was, "whether the work done by him is done in connection with the work in the factory and whether or not it is casual or precarious". On a consideration of the decisions rendered that far, the learned Judge held that the casual workmen concerned were not employees u/s 2(9) of the Act. That decision was affirmed by a Division Bench in the decision reported in *E.S.I. Corpn. v. Gnanambikai Mills Ltd.*, (1974) 2 LLJ 530. Veeraswami C.J., speaking for the Bench, related the status of the employee to the benefits contemplated under the Act and the entitlement of

members thereto. In *E.S.I. Corpn. v. United Electrical Industries*, 1975 KLT 714, a Division Bench of this court held that the nomenclature "casual" in describing the workmen did not determine their character and what was material was whether a person concerned was "employed" by the "employer", or whether he was only engaged for casual labour. In the decision in *President, K.P. Co-operative Society v. E.S.I. Corpn*, 1975 KLT 670, another Division Bench of this court held, that even if an employee was described as an apprentice, he would still be an employee u/s 2 (9) of the Act if it was found that he was "employed" as the term was generally understood. The same matter arose again in the decision reported in *E.S.I. Corporation v. Ayurvedic I.C.P.* 1979 KLT 897. This court emphasised the need to find out whether the person concerned was employed within the concept of the term in the Employee State Insurance Act. It was further held that the essential distinction between "engagement of a person to do particular items of work" and "employment of a person in Service" shall not be lost sight of. It was held, that the question to be determined was whether there was a contract of service, express or implied, resulting in the relationship of master and servant, and that in the absence of this, there would be no scope for coverage. In the decision in *E.S.I. Corpn. v. Punnoose*, 1983 KLT Narendran J., speaking for yet another Division Bench, highlighted the distinction between "engagement" of a workman casually for a specific item of work, and "employment" of a workman on a contract of service for operations connected with the work of the establishment.

9. The principle followed in the various decided cases is that employment necessarily involves a contract of service, pursuant to which a person enters into service of an employer in connection with some integral part of the operations carried on by the establishment. Such employment may be for short periods, and may be paid for daily. Even in such circumstances, he may still be an employee u/s 2(9) of the Act. On the other hand, a person engaged casually in connection with processes which are not integral parts of or incidental or preliminary to or connected with the operations of the establishment, though such engagement may be for longer periods, other than casual employment on a contract of service, such casual workman may not be employee as defined in the Act. It is this test that we have to apply to the facts of this case.

10. We have scanned the evidence: what we find is, that in addition to the regular workmen who were covered by the act, the employer used to make use of the services of PW-1 as an independent contractor, who, in turn, used to get the additional work done by engaging casual workmen. PW-1 was engaged for similar operations by other hotelier-establishments as well. During some of the months, such work may be of greater volume while during other months there would be no such work at all. The appellants have no case that the workmen are "employees" by virtue of section 2(9) (ii) or (iii) of the Act. We have therefore to consider only the effect of section 2(9)(i) of the Act. The essential question which we have to deal with is whether there is a contract of employment between the casual workmen engaged by PW-1 and the employer-establishment. The

evidence indicates that the employer was not aware of the number of workman engaged by PW1. He did not know the names and other details of such persons. He was not aware of the amount payable to each of the workmen. He could not have insisted upon the attendance of these persons at any point of time. He had no control over the manner in which the work was performed by them. Nor was there any evidence relating to the existence of master and servant relationship between such casual workmen and the employer-establishment.

11. The corner-stone of the case of the appellant is the decision of a Full Bench of the Karnataka High Court reported in *E.S.I. Corpn., Bangalore v. Suvarna Saw Mills*. 1979 Lab T. C. 1335. It was held therein, that the definition of "employee" in section 2(9) of the Act does not make any difference between casual, temporary, or permanent employee and that it is wide enough to include even a casual employee employed for a day for wages. It was further held, that every person who is employed for wages on any work connected with the work of a factory or establishment to which the Act applies except those exempted by the definition, fall within the definition of the word employees". The Full Bench disagreed with the decision of the Madras High Court reported in *E.S.I Corpn v. Gnanambikai Mills Ltd.*, (1974) 2 LLJ 530, and held, that the mere fact that some of the benefits may not be available to casual workmen who do not work for the qualifying period is immaterial to decide the question whether a casual employee would fall within the definition of an employee under the Act. We do not think that the Full Bench of the Karnataka High Court has said anything more than what has been said in the decisions of this court that there shall be employment-however short be its duration-by the establishment for works connected with or incidental or preliminary to the work of the factory or establishment to which the Act applies. this court had emphasised the same aspects in stating that there shall be employment as distinguished from engagement and such employment shall be in connection with the work of the establishment.

12, Admittedly, the workman concerned in the Karnataka Case was "employed" in connection with or incidental or preliminary to the work of the establishment. This is clear from the question considered by the Full Bench of the Karnataka High Court -

Whether the casual labourers employed by the employer-company are "employees" within the meaning of section 2 (9) of the E.S.I. Act and whether their employment is an insurable employment within the meaning of Section 2 (13A) and covered under the Act for the claim of contribution in respect of the wages paid or payable to them.?

Counsel for the appellant relied on the decision of the Supreme Court reported in *Regional Director, Employees' State Insurance Corpn., Madras Vs. South India Flour Mills (P) Ltd.*, . where it was held, affirming the decision of the Karnataka High Court reported in 1977 (2) LLJ 404 and disagreeing with the judgement of the Madras High Court in *ESI Corpn v. Gnanambikai Mills Ltd*: (1974) 2 LLJ 530, that casual employees are employees within the meaning of the term

"employee" as defined in section 2 (9) of the Act. The appeal which was decided by the Supreme Court arose from a decision of the Madras High Court holding that "persons employed in the construction of a new unit of the factory were not employees within the meaning of Section 2 (9) of the Act", because "their employment is less than the benefit period or contribution period" and "construction workers being casual employees do not come within the purview of the Act". Dealing with those observations, on the admitted position that the construction workers were "employed" by the factory, it was held:

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.

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.

The broader approach of the Supreme Court in the decision was meant to and will definitely take in a larger number of casual employees who were hitherto beyond the purview of the Act. It, however, seem to us to be essential that such persons as are meant to be taken in must be persons employed even on a casual basis: but, not persons who were engaged for specific items of work without entry into service of the employer. We do not find any departure from this basic test in the matter of determining whether a person who is not employed in the sense of being in the service of the employer and under its disciplinary control, but only engaged casually, will not be an employee as defined in section 2(9) of the Act. The significant departure, it would seem, in the above decision is to hold that it is not correct to say that the work in which only such employees as are employed for the benefit period or contribution period would fall within the definition of ""employee" u/s 2 (9) of the Act and that irrespective of the duration of employment any person employed in connection with the manufacturing process that is carried on in the factory and irrespective of his entitlement for a few only of the benefits, such person will be an employee. The basic question of the distinction between "engagement" and "employment" did not fall for consideration in that decision. The decisions of this court holding that employment is essential to make a person an employee still holds the field. We find, that the basic element of "employment" is absent in this case.

For the foregoing reasons, we do not find our way to accept the submission made on behalf of the appellant that the decision of the Insurance Court declaring coverage of the unknown casual workmen, was invalid, and does, in any manner, require interference in appeal. The appeal, therefore, fails and the same is dismissed. There will, however, be no order as to costs.