

(1997) 01 KL CK 0026
In the High Court Of Kerala
Case No : M.F.A. No. 565 of 1987

Regional Director, E.S.I. Corporation

APPELLANT

Vs

Sarathi Lines (P) Ltd.

RESPONDENT

Date of Decision : 29-01-1997

Acts Referred:

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

Citation : (1997) 2 ILR (Ker) 529 : (1998) 1 LLJ 28

Hon'ble Judges : K.K. Usha, J;G. Sivarajan, J

Bench : Division Bench

Advocate : P. Sankarankutty Nair, for the Appellant; M. Ramachandranan, V.K. Ramakrishnan, E.K. Madhavan and P.V. Lohithakshan, for the Respondent

Final Decision : Dismissed

Judgement

Usha, J.—In this appeal by the Regional Director, E.S.I. Corporation the question of law raised is whether the respondent company is liable to remit contribution on account of remuneration paid to the Managing Director of the company. It is contended by the appellant that when salary is paid to the Managing Director he has a dual capacity both as employer and employee and therefore the company is liable to pay contribution on the salary paid to Managing Director. Reliance was placed by the learned counsel appearing on behalf of the appellant on the decision of the Supreme Court in *Ram Pershad Vs. The Commissioner of Income Tax, New Delhi*, and of the Madras High Court in *Non -Ferrous Rotting Mills (P) Ltd. v. The Regional Director, Employees' State Insurance Corporation, Madras 1977 Lab. I.C. 1706*, respectively.

2. The Employees' Insurance Court had taken the view that the remuneration paid to the Managing Director is not in the nature of wages paid to an employee and there is no justification in treating a Managing Director of a company as its employee. It therefore held that the E.S.I. Corporation is not entitled to contribution on the remuneration paid to the Managing Director treating her as an employee. The above finding is under attack in this appeal.

3. It was contended by the appellant that the company being an independent legal entity from its share holders, there can be a relationship of employer and employee between the company and the Managing Director when the Managing Director is receiving salary for his services. Apart from the two decisions referred above, the learned counsel for the appellant made reliance on a Bench decision of this Court in Insurance Inspector v. Victory Tile Works 1973 KLT 927 and that of the Karnataka High Court in Regional Director, E.S.I. Corporation v. Margarine & Refined Oils Co. (P) Ltd., Bangalore 1984 Lab I.C.844. On the other hand, the respondent submitted that even according to the Corporation, the Managing Director is assigned the position of owner of the establishment, which is clear from the inspection report, the Corporation has no case that the Managing Director has no proprietary interest in the establishment. If that be so, the learned counsel for the respondent would submit that the principle laid down in the decision of the Supreme Court in Regional Director, Employees" State Insurance Corporation, Trichur Vs. Ramanuja Match Industries, has to be applied in this case. Reliance was also made by him on the decision of this Court in Regional Director of E.S.I. Corporation v. Oosamanna Tile Works ILR 1975 Ker. 207, and that of the High Court of Punjab and Haryana in Bombay Metal Works Pvt. Ltd. Ludhiana v. Regional Director, Employees" State Insurance Corporation, Chandigarh and Anr. 1985 Lab I.C. 1318.

4. We find it not possible to agree with the wide proposition of law put forward by the Employees Insurance Court that treating a person who is a Managing Director of a company as an employee is not justified at all under any circumstances. The question that has to be examined is whether, in this particular case, the Managing Director who is admittedly receiving a remuneration of Rs. 500/- p.m. would come within the definition of "employee" under the Employees" State Insurance Act, 1948 (hereinafter referred for short "the Act"). Unlike in the case of the partner receiving remuneration it cannot be said that a Director or Managing Director of a Company owning the factory or establishment can never be an employee also. The term employee is defined u/s 2(9) of the Act as "any person employed for wages in or in connection with the work of a factory or establishment to which the Act applies." It is true in the case of a Director or Managing Director of a Company he is not an employee of the Company but an agent in as much as the Company cannot act in its own person but has only to act through their Directors. Still it is possible that such a Director or Managing Director can have a dual capacity of an agent as well as an employee. It will depend on his work and the terms of his employment as discernible from the articles of association or terms of agreement. This was the view taken by the Supreme Court in Ram Pershad Vs. The Commissioner of Income Tax, New Delhi, even though it was a case arising under the Income tax Act. One of the tests laid down to ascertain whether a person is a servant or an agent is to examine whether under the terms of his employment, the employer exercises a supervisory control in respect of the work entrusted to him. A servant acts under the direct control and supervision of his master, whereas the agent in

exercise of his work is not subjected to the direct control or supervision of the principal, though he is bound to exercise his authority in accordance with all lawful orders and instructions which may be given to him from time to time by his principal. After examining the articles of association of the Company the Supreme Court came to the conclusion that powers of the Managing Director had to be exercised within the terms and limitations prescribed thereunder and subject to the control and supervision of the Directors, which, would indicate that he was employed as a servant of the Company.

5. A similar question was considered by the Privy Council in *Catherine Lee v. Lee's Air Farming Ltd.* 1961 AC 12. In that case one Lee who was holding all the shares except one of a Private Limited Company was its governing Director too. Being a qualified pilot, he was manning the Company's air-craft. While piloting one of Company's airplane Lee was killed. The question arose as to whether Lee was a worker under the Company and whether his wife was entitled to compensation for his death under the New Zealand Workers Compensation Act, 1922. The Judicial Committee took the view that the Company and the deceased were separate legal entities, even though Lee was the governing. Director of the Company he was nonetheless a worker under the Company while flying its aircraft for wages. His position as governing Director would not stand in the way of his being the servant of the company in the capacity of Chief Pilot of the Company.

6. In *Boulting v. Cinematograph Association Etc.* 1963 I All ER 716, the Court of Appeal took the view that two Managing Directors of a film company could be regarded as employees of the Company, since they did work in the Company on the technical side of film production, as film directors, film producers, film editors and film script writers. The decision of this Court in 1973 KLT 927 (*supra*) may not have any direct application in the present case. The question which came up for consideration there was whether a person named as Manager under the Factories Act and thereby becoming a principal employer can be treated as an employee for the purpose of Employees' State Insurance Act, 1948. This Court held that taking into consideration the object of the Act a person who is in fact an employee but happens to come under the definition of the term "principal employer" only because he was named as Manager for the purpose of the Factories Act cannot be denied the benefit of the provisions under the Employees' State Insurance Act due to an employee". But the decision of the Madras High Court as well as the Karnataka High Court are in support of the case put forward by the appellant.

7. The decision relied on by the respondents are all cases where question arose as to whether a partner can be treated as an employee. While approving the decision of this Court in ILR 1975 Ker 207 (*supra*) the Supreme Court observed in *Regional Director, Employees' State Insurance Corporation, Trichur Vs. Ramanuja Match Industries*, as follows at p71:

"The partnership business belongs to the partners and each one of them is an

owner thereof. In common parlance the status of the partner qua the firm is thus different from employees working under the firm, it may be that a partner is being paid some remuneration for any special attention which he devotes but that would not involve any change of status and bring him within the definition of employee".

After referring to the definition of the terms "employee" and "wages" u/s 2(9) and 2(22) of the Act it is observed that in order that someone may be an employee within the meaning of the Act, he has to be employed for wages. The concept of wages would bring the contract of employment. Even though the term of employer is not defined in the Act, it has to be taken that in the absence of an employer who provides the employment, there would indeed be no employee. Since a partnership firm is not a legal entity, the employer has to be the partners themselves. After referring to decision of Courts in United States, United Kingdom and Australia, the Supreme Court observed as follows at p 72:-

"It is thus clear that in the United States, Great Britain and Australia, a partner is not treated as an employee of his firm merely because he receives a wage or remuneration for work done for the firm. This view is in complete accord with the jurisprudential approach. "

8. The reason that weighed with the Supreme Court for holding that a partner cannot be treated as an employee on his receiving remuneration cannot be made applicable in the case of a Director or Managing Director of a Company. Therefore, the decisions relied on by the respondent are of no help to support his stand that its Managing Director is not an employee and therefore not covered by the provisions of the Act. Merely because it is legally possible for a Director or Managing Director to function in the capacity of an employee also it does not mean that in all cases a Director or Managing Director who receives remuneration has necessarily to be treated as an employee. It has to be further established that either under the provisions of Articles of association or of separate agreement there was a contract of employment between the Company and the Managing Director or the Director. In the present case the appellant has not pleaded or placed any material either before the Employees Insurance Court or before this Court to the effect there was such a contract of employment between the Managing Director and the respondent company.

9. Reference to the Managing Director as owner in the inspection report is not of much relevance. By a mere reference to the Managing Director as owner in the inspection report of the appellant the Managing Director cannot be given the same proprietary rights as in the case of a partner in the partnership properties. But at the same time so long as the appellant has not proved that the Managing Director was functioning as an employee under a contract of employment with the company , it has to be taken that she is having only the normal status of a Managing Director. The remuneration received by her cannot be termed as "wages" and she will not be covered by the provisions of the Act. Thus, while not agreeing with the reasoning of the Employees Insurance Court we affirm the final

conclusion that the Managing Director of the respondent Company is not an employee of the Company who could be covered by the provisions of the Act.

In this result the appeal fails and it stands dismissed.