
(1996) 07 KL CK 0010
In the High Court Of Kerala
Case No : M.F.A. No. 727 of 1986

Regional Director, E.S.I. Corporation

APPELLANT

Vs

T.V. Poullose

RESPONDENT

Date of Decision : 12-07-1996

Acts Referred:

Employees State Insurance Act, 1948 — Section 1(5), 2(12)

Citation : (1996) 3 ILR (Ker) 602 : (1997) 1 LLJ 613

Hon'ble Judges : P.K. Balasubramanyan, J;P. Shanmugam, J

Bench : Division Bench

Advocate : T.V. Ajayakumar, for the Appellant; V.M. Bobby and K.C. Joseph, for the Respondent

Final Decision : Allowed

Judgement

Balasubramanyan, J.—In this appeal u/s 82 of the Employees' State Insurance Act, the Regional Director of the Employees' State Insurance Corporation has challenged the decision of the Employees' Insurance Court, Alleppey in I.C.No. 8 of 1985 holding that a saw mill employing more than 10 workers but less than 20 cannot be taken to be covered by the Act. The respondent is the proprietor of a saw mill which at the relevant time employed 14 persons. The authority under the Act initiated proceedings for assessing the contribution due from the respondent as the employer for the period from September 21, 1981 to January 29, 1983. After two inspections a demand was finalised and an adhoc assessment made on July 23, 1984. By that assessment a sum of Rs. 2821.95 was assessed to be the contribution payable by the respondent. The respondent refused to make the contribution on the basis of that ad-hoc assessment on the ground that he had never employed the minimum required so as to bring the establishment under the coverage of the Act. Since the amount was not paid, the authority under the Act initiated proceedings for recovery of the contribution assessed to be due. It is at that stage that the respondent approached the Insurance Court with I.C.No. 8 of 1985 questioning the claim of the authority

under the Act that the respondent was liable to contribute under the Act.

2. The respondent contended that going by the definition of "factory" in Section 2(12) of the Act, the establishment run by the respondent is not covered by the Act since the number of employees at the relevant period was not 20 or more as stipulated. This contention was met by the authority under the Act by contending that by virtue of a notification issued by the State Government in exercise of its power u/s 1(5) of the Act an establishment like that of the petitioner which employs more than 10 persons and which uses power has also been brought under the purview of the Act and the fact that the respondent's establishment is not a "factory" as defined in Section 2(12) of the Act does not enable the respondent to deny liability to make contribution under the Act. The Employees' State Insurance Court held that the establishment of the respondent would be covered by the Act only if it is possible to say that it would be a "factory" as defined in Section 2(12) of the Act and once it is conceded that it would not satisfy the definition of a "factory" occurring in the Act, it could not be brought under the cover of the Act. In a sense the court found that since there was no occasion when the respondent had employed 20 or more workers in his establishment, it could not be held that the establishment was covered under the Act. It was stated that if an establishment is registered under the Factories Act it could only be considered as a factory and not as an establishment at any time thereafter and the notification issued by the Government u/s 1(5) of the Act would not take in such a factory. It is this conclusion that is questioned before us by the Regional Director of the Employees' State Insurance Corporation.

3. By virtue of Section 1(4) of the Act the Act was made applicable in the first instance to all factories including factories belonging to the Government other than seasonal factories. A factory was defined as a premises where 20 or more persons are employed for wages on any day of the preceding 12 months and in any part of it a manufacturing process was being carried on with the aid of power. A seasonal factory meant a factory which was exclusively engaged in the manufacturing process specified in the definition itself. On the facts established in this case the establishment in question did not satisfy either the definition of "factory" in the Act or the definition of seasonal factory in the Act. u/s 1(5) of the Act the State Government was given the power to extend the provisions of the Act or any of them to any other establishment or class of establishments not directly covered under the Act on fulfillment of the conditions laid down in Section 1(5) of the Act. There is no dispute that the State Government issued a notification in terms of Section 1(5) of the Act extending the applicability of the Act to establishments other than those covered in the first instance by the Act. The relevant notification relied on by the Corporation is the one dt. May 27, 1976 by which any premises wherein 10 or more persons but less than 20 persons are employed for wages and in any part of which a manufacturing process could be carried on with the aid of power other than an establishment which was exclusively engaged in any of the manufacturing process specified in Clause 12 of Section 2 of the Act was brought under the purview of the Act. According to

counsel for the Corporation what are excluded are only a mine, a railway running shed or an establishment which would qualify as a seasonal factory under the definition that occurred at the relevant time. In other words, his contention was that all establishments using power and employing 10 or more persons and not being a seasonal factory were brought within the purview of the Act. This is sought to be met by contending that a factory already stood covered by virtue of Section 1(4) of the Act and the factory that was covered was the factory as defined in the Act and once the entity "factory" stood initially covered by the Act itself, any Notification issued u/s 1(5) of the Act specifying an establishment to be covered by the Act would not include within its purview a factory which does not satisfy the definition contained in Section 2(12) of the Act. The contention is that an; establishment could not be understood as a factory since the factory has already been dealt with by the definition in the Act. This argument found favour with the Employees' State Insurance Court. The question is whether the position canvassed for by the respondent is acceptable.

4. Section 1(4) of the Act provided for the initial application of the Act to factories other than seasonal factories. So a factory as defined by the Act, not being a seasonal factory was covered by the Act. What Section 1(5) did was to give power to the State Government or the appropriate Government to extend the provisions of the Act to establishments other than those which stand covered by virtue of the provisions of the Act in terms of Section 1(4) of the Act. The power thus granted u/s 1(5) of the Act is the power to expand the applicability of the Act. That is a power to rope in establishments that would not have been covered originally by the Act. The purpose of Section 1(5) of the Act is to extend that applicability of the Act to more institutions than that were originally envisaged by the Act. That is why restrictions are imposed on the State Government for the exercise of power u/s 1(5) of the Act. The prior concurrence of the Central Government and a prior six months' notice are insisted on by Section 1(5) of the Act before the State Government could extend the operation of the Act. It is in exercise of that power that the Notification u/s 1(5) of the Act has been issued by the State Government, bringing within its purview any premises wherein 10 or more persons are employed and in which a manufacturing process is being carried on with the aid of power. The establishment of the respondent admittedly has the aid of power. On the finding, the establishment employs more than ten persons. Therefore going by the notification No. 16141/E2/73/LBR dt. May 27, 1976 the establishment of the respondent would stand included in the coverage under the Act. The only question then to be considered is whether it is engaged in any of the manufacturing process specified in clause 12 of Section 2 of the Act as it then stood. What stands excluded by virtue of Section 1 (4) of the Act are the seasonal factories and seasonal factory is defined to be a factory engaged in the process of cotton ginning, cotton or jute pressing, decortication of groundnuts, manufacturing of coffee, indigo, lac, rubber, sugar or tea or any manufacturing process which is incidental to or connected with any of those process. The

establishment of the respondent is not engaged in any of those manufacturing processes. There is therefore no reason to exclude the operation of the main part of the Notification on the basis that it is a premises wherein 10 or more persons were employed for wages and wherein with the aid of power a manufacturing process was being carried on. In that view it has to be held that the Act would apply to the establishment of the respondent by virtue of the Notification.

5. Acceptance of the argument that any notification issued u/s 1(5) of the Act could not bring within its purview of factory if it does not employ 20 persons or more would in our view defeat the very object of the conferment of power u/s 1(5) of the Act to expand the area of operation of the Act and to rope in establishments which initially stood outside the purview of the Act. The intention to bring within the purview of the Act more establishments can be achieved by the issuance of the Notification u/s 1(5) of the Act and once a Notification is brought, what one has to see is whether going by the Notification the particular establishment would be covered or not. The argument that the issuance of the Notification to rope in a factory employing less than 20 people would go against the intention expressed by the original definition of "factory" in the Act would not by itself lead to the conclusion that the factory otherwise not covered initially by the Act could not be brought within the purview of the Act at all. The very purpose of Section 1(5) of the Act, as we see it is to expand the operation of the Act and bring within its purview establishments that initially stood outside the Act. We are therefore led to the conclusion that the Notification issued u/s 1(5) of the Act would not exclude a factory which would not come within the definition of a "factory" u/s 2(12) of the Act as it originally stood.

6. The question that is raised before us had come up for consideration before other High Courts. The High Court of Orissa in the decision 3 in Sundar Paper Box Co. v. State of Orissa 1977 LABI.C. 1213 held as follows:

"Under Section 1(4) of the act, its provisions apply proprio vigore to factories as defined in: Section 2(12) of that Act once in terms of a notification u/s 1(3) of the Act the Statute or any part thereof is brought into force with reference to the area in question. Sub-section (5) of Section 1 vests power in the appropriate; Government as defined in Section 2(1) of the Act -to extend the provisions of the Act or any of them to any other establishment or class of establishments, industrial or commercial, agricultural or otherwise..... There is no dispute that petitioners' press is an "establishment" . There is also no dispute that as per the definition of "factory" in Section 2(12) of the Act, petitioners' establishment would not be a factory. Mr.Mohanty for the petitioners has strenuously contended that the power u/s 1(5) of the Act cannot be so exercised as to bring into the fold of the Statute the establishments which are otherwise factories but are not strictly factories by the definition, of the Act. It is claimed that such an action in fact amounts to a change of the definition in the Statute which is in excess of power in Section 1(5) of the Act. We see no force in such a contention. Reading Sub-sections(4) and (5) together, it is clear that the Act applies on its own force

to factories answering the definition in Section 2(12) of the Act. "Establishment" is a wide term which is capable of embracing even a factory. The use of the words any other "proceeding" establishment" in Section 1(5) of the Act supports the view that a factory is also an "establishment" and an establishment which is not a factory, in view of the definition, can be brought within the fold of the power to extend application of the Statute.

We find no force in the contention of Mr. Mohanty that the impugned notification brings in a change in the statutory definition of "factory". The proper way to look at the matter is that the petitioner's printing press never became a factory as a result of the impugned notification in terms of Section 2(12) of the Act. If that were so, the Act would have applied to it in terms of Section 1(4) of the Act. Petitioner's printing press came within the ambit of any other establishment and was, therefore, available to be dealt with u/s 1(5) of the Act".

Considering the question whether there could be an overlapping of establishments even in the Notification and whether it could be held to be covered by either of the clauses in the Notification of a similar nature, the High Court of Rajasthan held in *E.S.I. Corporation v. Jodhow Coffee House* 1988 (57) FLR 379 that a restaurant could be covered by the Act either on the basis that it comes under the relevant clause of the Notification or for the reason of it being a factory employing less than 20 but more than 10 if it were engaged in a manufacturing process. It was therefore held that even if the restaurant was not a factory as defined in the Act as it stood, it could be treated as a factory covered by the Act by reference to a Notification issued u/s 1(5) of the Act. The High Court of Andhra Pradesh in the decision in *Andhra Pradesh Handloom Weavers Co-operative Society Ltd. Vs. Employees' State Insurance Corporation*, Hyderabad, has held:

"The provisions of Section 1(4) read with Section 2(12) were contemplated by the Legislature as referable to certain factories wherein the employees were 20 or more and that was because the Legislature intended that such factories should straightaway come within the purview of the Act. The provision in Section 1(5) of the Act enabling the Government to issue a notification in respect of any other establishment or class of establishments industrial, commercial, agricultural or otherwise was introduced in the Act with the specific purpose of enabling the Government to extend the provisions even to factories wherein the employees were less than 20. It; was in that context that the notification in question was issued applying the Act to factories wherein the employees were 10 or more and less than 20. In my view the impugned notification is clearly within the powers of the Government u/s 1(5) of the Act".

The High Court of Punjab & Haryana in the decision in *M/s, Micro Alloys and Castings v. UOI* 1991 (4)SLR 768 has also taken the view that a Notification u/s 1(5) of the Act can be issued to a factory which has got less than 20 but more than 10 persons by describing it to be an establishment and that the definition of the word "factory" in such a situation will not be deemed to have changed. It

was thus held that a factory employing more than 10 persons but less than 20 was also covered by the Act.

In the light of the above discussion the finding of the Employees' State Insurance Court that a factory could be brought under the purview of the Act only if it satisfied definition of "factory" occurring in Section 2(12) of the Act cannot be sustained. On the basis of the Notification issued u/s 1(5) of the Act it has to be held that the establishment of the respondent employing more than 10 persons would also be covered by the Act. The consequence of the above finding is that the decision of the E.S.I. Court in No. 8 of 1985 has to be reversed and that case filed by the respondent herein has to be dismissed.

In the result, we allow this appeal, set aside the decision of the Employees' State Insurance Court, Alleppey in I.C.No. 8 of 1985 and dismiss I.C.No. 8 of 1985. In the circumstances we direct the parties to suffer their respective costs.