
(1997) 03 KL CK 0018
In the High Court Of Kerala
Case No : M.F.A. No. 870 of 1988

Regl. Director, ESI Corpn.

APPELLANT

Vs

Kerala Wheat Flour Roller Mill

RESPONDENT

Date of Decision : 14-03-1997

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(22), 2(9)

Citation : (1997) 2 ILR (Ker) 771 : (1997) 2 LLJ 839

Hon'ble Judges : S. Marimuthu, J; P.A. Mohammed, J

Bench : Division Bench

Advocate : T.P.M. Ibrahim Khan, for the Appellant;

Final Decision : Allowed

Judgement

Mohammed, J.—This is an appeal filed u/s 82 of the Employees' State Insurance Act, 1948 (for short "the Act"). The appellant is the Regional : Director, E.S.I. Corporation, Trichur who challenges an order passed by the Employees' Insurance Court, Calicut (Industrial Tribunal, Calicut) u/s 75 of the Act. The respondent is the "establishment" to which the provisions of the Act applies.

2. The E.S.I. Inspector conducted an inspection of the above establishment on March 14, 1984 and made a report that the respondent had paid a sum of Rs 28,682.33 as wages for the construction of the office building through a contractor. According to the Inspector, the said amount paid to the employees through the contractor is "wages" coming within the meaning of Section 2(22) of the Act and hence the respondent is bound to pay the contribution in respect of it. Accordingly, the Inspector made a demand calling upon the respondent to pay a sum of Rs. 2,007.75 as contribution for the period April 1, 1982 to March 31, 1983. Like wise a demand was made to pay Rs. 834.18 as contribution for the amount spent as wages for the maintenance and repair of the building. As against the said demands the respondent filed an application u/s 75 of the Act for determining the question whether the respondent was liable to pay the contribution as directed by the Inspector. The Court below after the enquiry set

aside the demands for contribution. Being aggrieved by the said judgment the opposite party has filed this appeal.

3. The Court below considered the question whether the applicant establishment is liable to pay contribution on the amount paid to the contractor for purposes of constructing a new building and also on the amount of wages paid to casual labourers for repairs and maintenance. After placing reliance on the decision in *Regional Director, E.S.I. Corporation v. Naraharl Rao* (1986 KLT 1397), the Court below held that the names of the employees and duration of their work were not noted by the Inspector. It further held that in the absence of such details it cannot be stated that those employees were regular or temporary employees. In that view of the matter the Court below came to the conclusion that the demands made by the E.S.I. Inspector for contribution were illegal and set aside the same.

4. The case of the appellant as urged in their written statement is as follows :

"Opposite party Corporation has stated in their written objection that they have noticed that the establishment had spent Rs. 28,682.33 which are found disbursed to contractor Sri Vasu and adds that the amount is wages as per Section 2(22) of the E.S.I. Act . They further contend that the employees employed through such contractor were persons falling u/s 2(9) of the E.S.I. Act and hence the applicants are liable to pay Rs. 2007.75 as contribution."

Therefore, the main question is whether the workers employed through the contractor for the construction of the office building are employees within the meaning of Section 2(9) of the Act. Learned counsel for the appellant while augmenting his submission places heavy reliance on the decision of the Supreme Court in *Regional Director, Employees' State Insurance Corpn., Madras Vs. South India Flour Mills (P) Ltd.*, This decision was noticed by the Division Bench of this Court in *Narahari Rao's case* (supra). This Division Bench, however, after referring to the above case observed thus:

"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, seems 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 only a few 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."

The above observation was made by the Division Bench in view of the factual situation in that case which revealed from the following observation contained therein.

"The evidence indicates that the employer was not aware of the number of workmen 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."

Therefore, the decision of the above Division Bench will not deter us from examining the facts of this case in the background of the decision of the Supreme Court in South Indian Flour Mills case (supra).

5. The Employees' State Insurance Act, 1948 is an act intended to provide for certain benefits to employees in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto. It is a piece of social security enactment. In this context it is apt to reproduce the Articles 22 and 25 of the Universal Declaration of Human Rights.

"Every one, as a member of Society, has the right to social security and is entitled to realisation, through national efforts and international co-operation and in accordance with organisation and resources of each State of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Every one has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social service and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood or circumstances beyond his control."

6. No doubt, our Constitution inter alia, promotes and upholds the above basic Human Rights for the all round development of the society by introducing legislations. The predominant question before this Court in this context is as to how the provisions contained in the enactments intended as social security measure to be interpreted. The "literal approach" as has been called for traditional method of interpretation has now modified by "purposive approach"

Lord Denning said :

"The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the "purposive approach". (Nothman v. Barnet London Borough Council 1978 W.L.R. 220."

The Supreme Court in R.M.D. Chamarbaugwalla Vs. The Union of India (UOI), observed that the fundamental rule of interpretation to which all others are subordinate is that the statute is to be expounded according to the intent of them that made it.

7. "Social justice is an objective which is embodied and enshrined in our Constitution". Chagla C.J. said in Prakash Cotton Mills (Private) Ltd. Vs. The State of Bombay, Gajendragadker, J. in J.K. Cotton Spinning and Weaving Mills Company Ltd. v. Labour Appellate Tribunal of India and Ors. (1963 II LLJ 436) totally dispelled the confusion about the justification by importing the concept of social justice in interpreting the statutes. The Supreme Court in Gurupad Khandappa Magdum Vs. Hirabai Khandappa Magdum and Others, declined to accept an interpretation which in their Lordships' opinion would be "taking a retrograde step, putting back as it were the clock of social reform". This outlook however will not override the distinct objectives of enactments but supplement a frame for interpretation.

8. In the aforesaid social objective, we will examine the provisions contained in the Act which are relevant for the present purpose. The word "employee" has been defined in Section 2(9) of the Act as follows:

"Employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work done by the employee in the factory or establishment or elsewhere; or

(ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service."

The above definition was amended by Act 44 of 1966 which is not relevant for the present case. The above definition refers to three categories of persons as mentioned in Clauses (i), (ii) and (iii). In the present case, we are concerned with the category of persons mentioned in Clause (ii). What are the conditions to

be fulfilled under this clause in order the person may become an employee? He may be a person employed for wages in or in connection with the work of a factory or establishment. He must be employed by or through an immediate employer on the premises of the factory or establishment. The "immediate employer" is defined , in Section 2(13) as follows:

"immediate employer", in relation to employees employed by or through him, means a person who has undertaken the execution, on the premises of a factory or an establishment to which this Act applies or under the supervision of the principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment, and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer."

From the above definition, it is clear a contractor who has undertaken the execution of the work which is ordinarily part of the work of the factory or establishment of the principal employer, would come within the terms of "immediate employer. But it is pointed out that in view of the amendment of the above provision, vide Act 29 of 1989, the "contractor" is also included within the definition of the term "immediate employer" with effect from October 20, 1989. That does not mean the unamended provision will not take in a contractor. What is apparent is that by virtue of the amendment the position is now explicit and there is no room for uncertainty.

9. Sub-section (4) of Section 39 of the Act is as follows :

"The contributions payable in respect of each week shall ordinarily fall due on the last day of the week, and where an employee is employed for part of the week, or is employed under two or more employers during the same week, the contributions shall fall due on such days as may be specified in the regulation."

The Supreme Court while interpreting the above provision observed in *Regional Director, E.S.I. Corporation v. South India Flour Mills (P) Ltd.* (supra) that Sub-section (4) clearly indicates employment of a casual employee when it provides "and where an employee is employed for part of the week". When an employee is employed for part of a week, he cannot but be a casual employee. Therefore the casual employees would come within the purview of the Act,

10. What is involved in the present case is that the casual workers were employed by the contractor for the construction of the office building. In view of what is already discussed herein above, the only point which remains to be considered is whether the construction of the office building for the establishment would come within the meaning of Section 2(9) of the Act. The construction of the office building or the maintenance or repair of existing building is a work "incidental to the purpose" of the establishment. The office building is inseparably belonging to, connected with or inherent in establishment.

The Apex Court in *South India Flour Mills*" case, (supra) held "The work of construction of additional buildings required for the expansion of a factory must be held to be ancillary, incidental or having some relevance to or link with the object of the factory. 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. Such work is incidental or preliminary to or connected with the work of the factory or establishment."

In view of the discussion herein above, the demands made by the Inspector for contribution of Rs. 2,843.93 to the appellant are perfectly legal and valid. The impugned judgment is set aside. The appeal is thus allowed. No order as to costs.