

(1994) 08 BOM CK 0092
In the Bombay High Court
Case No : F.A. No. 822 of 1980

Ritz Hotel (Vegetarian), Pune

APPELLANT

Vs

E.S.I.C., Pune

RESPONDENT

Date of Decision : 16-08-1994

Acts Referred:

Employees State Insurance Act, 1948 — Section 1(5)
Factories Act, 1948 — Section 2(k), 2(k)(i)

Citation : (1995) 70 FLR 613 : (1998) 3 LLJ 309 : (1995) 1 MhLj 63

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Judgement

D.R. DHANUKA, J.—M/s. Ritz Hotel of Pune has preferred this appeal against order dated 17th August 1980 passed by the Employees' State Insurance Court, Pune in Application (ESI/LCP) No. 3 of 1980. By the impugned order, the trial Court dismissed the above referred application and held that the establishment of the appellant was covered by and under the provisions of Employees' State Insurance Act, 1948.

2. Sometime in the year 1961, Ritz Hotel (Vegetarian) was registered under the Bombay Shops and Establishments Act, 1948. At the material time the said hotel employed about 14 to 17 employees. The appellant stores and preserves milk curds in a refrigerator kept in its hotel. The said refrigerator is operated by power with 3 horse power capacity. The milk which is stored in the freezer is used for preparing tea for the customers. The curd which is kept in the freezer is used for preparing buttermilk to be served to the customers or for preparation of kadi (a liquid preparation). No power is used in the kitchen or for any other activity of the hotel. The said refrigerator appears to be like a domestic refrigerator.

3. On 19th November, 1976, the Government of Maharashtra issued a Notification No. ESI/1875/800/PH 15, in exercise of the powers conferred on it under sub-section (5) of section 1 of the Employees' State Insurance Act, 1948 extended the operation of the said Act to the various classes of establishments

mentioned in clause (1) of the Schedule appended to the said notification situate in the areas specified in column 2 of that schedule. Clause 1 and Clause 3 of the said schedule read as under :-

4. Even though the establishment of the appellant is liable to be considered as a hotel, the said establishment is not covered by category 3 inasmuch as 20 or more persons are not employed for wages in the said hotel at the material time.

5. The trial Court has held that the establishment of the appellant was covered by and under the provisions of the said Act inasmuch as the appellant employed more than 20 employees on wages at the relevant time and the appellant preserved or stored milk or curd in "cold storage". The trial Court has held that storing of milk or curd in the refrigerator amounts to storing of articles in cold storage. The trial Court has held that the definition of the expression "manufacturing process" prescribed by section 2(k) of the Factories Act, 1948 was clearly attracted. The trial Court has held that sub-clause (6) of the said definition incorporated in the Act by Amendment Act 94 of 1976 including process for preserving of any article in cold storage was wide enough to include the case of storage of articles by restaurant or a hotel even in a domestic refrigerator.

6. This appeal involves a substantial question of law as to interpretation and application of the above referred notification dated 19th November 1976 and the provisions of law contained in section 2(k) of the Factories Act, 1948 and particularly section 2(k)(i) and section 2(k)(vi) of the said Act.

7. In my opinion, the trial Court committed a substantial error of law while holding that the establishment of the appellant was covered under the Employees' State Insurance Act, 1948.

8. The first question which is required to be decided by the Court in this appeal is as to the interpretation of sub-clause (vi) of section 2(k) of Factories Act, 1948. It is not disputed that the said definition is incorporated in the Employees' State Insurance Act, 1948 for the purposes of the said Act also.

9. The learned counsel for the appellant has rightly invited the attention of the Court to the judgment of High Court of Madras in the case of New Taj Mahal Cafe Ltd., Mangalore v. Inspector of Factories, Mangalore, AIR 1956 Mad 600. In that case the writ petitioner company owned eight restaurants in the city of Mangalore and the question before the Court was as to whether the restaurant using refrigerator could be considered as a factory. It may be clarified here and not that at that time section 2(k) of the Factories Act, 1948 was not amended as done by the Legislature subsequently by incorporating sub-clause (vi) therein by Act 94 of 1976. Since Mr. Jayakar, the learned counsel for the respondent has mainly relied on section 2(k)(vi) of the Act, and not on section 2(k)(i) of the Act, this case appears to be relevant and useful for deciding this appeal even though it interprets unamended provisions of the Act. It was held by Rajgopalan, J. in this case that every place where refrigerator is used will not become a

factory even if the requisite number of persons were engaged in work on the premises where a refrigerator is in use. Merely because refrigerator is used with the aid of power, it does not follow that a manufacturing process is carried on in the establishment with the aid of power and the hotel or restaurant amounts to a "factory". In this case it was held by the Court that the mere storage of articles in refrigerator will not be part of the manufacturing process as defined by section 2(k) of the Act as it then stood. In this case Rajgopalan, J. inter alia observed as under :

"Normally a refrigerator is used for the purpose of storage. Even in a restaurant articles are kept in the refrigerator till they are required for sale. Mere storage as such will not be part of the manufacturing process as defined by section 2(k), Factories Act of 1948; it will not even amount to treating or adapting any article with a view to its sale or disposal. If, however, a refrigerator is used for treating or adapting any article with a view to its sale, then the test required by section 2(k) would be satisfied."

This decision is not directly on the point but is helpful to some extent to the learned counsel for the appellant for development of his submission to the effect that the establishment of the appellant is not covered under the Act.

10. Section 2(k)(vi) of the Act applies where a business is carried on of preserving or storing article in cold storage. It is common knowledge that there are several business concerns or companies owning cold storage equipments which are approached by others for preservation or storage of their articles in the cold storage apparatus of the owner. Perhaps it was little doubtful prior to amendment of Factories Act, 1948 as to whether the business of mere preservation or storing of articles in cold storage could be considered as a factory or whether the process of such storage could be considered as manufacturing process or not. To my mind, the definition of "manufacturing process" was extended by Amending Act 94 of 1976 from this point of view. The expression "cold storage" used in section 2(k)(vi) of the Factories Act cannot be interpreted literally and mechanically de hors the object of the Act. If preservation or storage of an article in a domestic refrigerator is to be treated as preservation or storage of an article in cold storage, it would be doing violence to the language. The definition of "manufacturing process" is liable to be interpreted in business sense of the term having regard to the meaning of the words in common parlance and the usage of the trade. If the test is to be applied, it shall become clear that the trial Court was not right in treating a small refrigerator in the restaurant or the hotel as a place of cold storage.

11. There is one another angle which must be considered for interpretation of the above referred notification. Restaurants and hotels are separately provided for in column 3 of the said notification. If the restaurants and hotels do not employ for wages 20 or more persons, the restaurants or hotel is not covered by column 3 of the said notification. The question to be asked is as to whether the restaurant or hotel can be treated as covered by column 1 if it carries on its business with

the aid of power where is employs more than 10 and less than 20 employees. If the restaurant or hotel employs more than 10 and less than 20 employees it can perhaps be covered by category 1 if it carries on its manufacturing activity with the aid of power. It has been held in several cases that even preparation of food in the kitchen of a large club can be treated as a "manufacturing activity" and if requisite number of employees are employed by the establishment, it can be treated as covered by and under the provisions of the Act. It is not the case of the respondent Corporation here that the kitchen in this case was operated with the aid of power.

12. The learned counsel for the respondent has argued that storage of milk in the refrigerator for purpose of preparation of tea for the customers and the storage of curd in the refrigerator for preparation of buttermilk and kadi for the customers would amount to manufacturing process within the meaning of section 2(k)(i) of the Act. I am not convinced. The learned counsel for the appellant has given an illustration in support of his submission in rebuttal of the above referred plea. The learned counsel for the appellant submits that the medical practitioners keep drugs and medicines in refrigerators and the said medicines are at times used for preparation of mixtures. The learned counsel for the appellant submits that if the submission of the learned counsel for the respondent were to be accepted, it would lead to many complications and the legislative intention would not be fulfilled by stretching the interpretation that far. It think that the learned counsel for the appellant is right.

13. In the result, the appeal succeeds. The findings of the trial Court on all the issues are set aside. The order under appeal is set aside. Application (ESI/LCP) No. 3 of 1980 is allowed.

14. Having regard to the facts and circumstances of the case, there shall be no order as to costs.

15. Appeal allowed.