

(2018) 01 BOM CK 0081
In the Bombay High Court
Case No : 292 of 2004

Shri Ganesh Bhandar

APPELLANT

Vs

Employees State Insurance Corporation

RESPONDENT

Date of Decision : 22-01-2018

Acts Referred:

[Employees State Insurance Act, 1948](#), [Section 75](#), [Section 45\(a\)](#), [Section 2\(12\)\(a\)](#) - Matters to be decided by Employees Insurance Court - Inspectors, their functions and duties - Definitions
[Factories Act, 1948](#), [Section 2\(k\)](#) - Interpretation

Citation : (2018) 01 BOM CK 0081

Hon'ble Judges : Manish Pitale

Bench : Single Bench

Advocate : H.R. Gadhia, B.P. Maldhure

Final Decision : Dismissed

Judgement

1. The appellant, being a proprietary concern, has filed this appeal against the order dated 21.02.2004 passed by the Employees Insurance Court, Nagpur in Application (ESI) No. 5 of 1993, whereby an application filed by the appellant under Section 75 of the Employees State Insurance Act, 1948 (hereinafter referred to as the "ESI Act"), has been dismissed.

2. The facts of the present case are that on 28.07.1992, an inspection was conducted by Insurance Inspector of the respondent/ Employees State Insurance Corporation in the premises of the appellant, wherein it was found by the Inspector that 17 employees were working in

the establishment of the appellant and LPG cooking gas was being used for preparing edibles. It was also found that there was use of wet grinding machine to grind and prepare edibles with the help of electric current. A refrigerator was also found on the premises wherein eatables, milk and soft drinks were stored. The said Inspector prepared a preliminary investigation report (Exh.31) recording that the said premises of the appellant were being used as restaurant, and an observation sheet (Exh.16) was prepared recording as to what was observed at the premises. On the same day, the Inspector prepared a list of 17 employees found working on the premises wherein the caption was written in the handwriting of the Inspector and the details of the names of the employees with the work being performed by them, the dates of their employment and the wages being paid to them were recorded in the handwriting of Lalit Dave, son of the proprietor of the appellant, which was countersigned by him. This list was marked as Exh.32, which also contained the signatures and thumb impressions of 17 employees. The Inspector also collected a muster of the appellant/establishment for the month July, 1992, which gave names of only seven employees. This muster was marked as Exh.27.

3. On the basis of the said preliminary investigation report, observation sheet and the list of 17 employees countersigned by the son of the proprietor who was present at the time of inspection, a communication dated 01.09.1992 was issued to the appellant from the respondent/authority, stating that the establishment of the appellant was covered under the provisions of ESI Act as it came within the purview of the definition of "factory" under Section 2(12)(a) of the ESI Act. This was the definition as existing prior to the amendment to the ESI Act made in the year 2010. Thereafter, on 04.02.1993, another communication was addressed to the appellant assessing the liability under ESI Act on the basis of assumed wages. On 02.02.1993, the appellant submitted a reply denying its liability under the ESI Act primarily on the ground that the appellant

(Ganesh Bhandar) was situated in Block No.11 and that another establishment Ganesh Dugdha Bhandar was situated in Block No.10 and that the employees of said Ganesh Dugdha Bhandar had been wrongly shown by the Inspector as employees of the appellant (Ganesh Bhandar). It was claimed that the appellant had only seven employees as per the muster already presented before the Inspector.

4. On 10.03.1993, the Deputy Regional Director of the respondent/Corporation passed its order under Section 45(A) of the ESI Act, holding that the appellant establishment was covered under the provisions of ESI Act and that it was liable to pay contribution as per the statute along with interest. In this order, the said authority recorded that the contention of the appellant could not be accepted because the copy of muster roll of the other entity i.e. Ganesh Dugdha Bhandar was also placed on record, which showed only seven employees. It was observed by the said authority that even if seven out of 17 employees found on the premises of the appellant were held to be employees of Ganesh Dugdha Bhandar, it would still show that the remaining ten employees were of the appellant establishment, which was enough to cover the appellant under the provisions of ESI Act.

5. Aggrieved by the same, the appellant filed application under Section 75 of the ESI Act. Evidence was recorded in the said proceedings wherein the Inspector who conducted the inspection on 28.07.1992 appeared as a witness on behalf of the respondent/Corporation while Bhavanishankar Dave, son of the proprietor of the appellant, appeared as witness on behalf of the appellant. It is relevant that Lalit Dave, the other son of the proprietor, who was actually present at the time of inspection and who had signed the list of 17 employees (Exh.32), did not appear as a witness in support of the contention of the appellant. The witness appearing on behalf of the respondent/Corporation supported the inspection report and the observation sheet prepared by him and stated in

the evidence that there were 17 employees working on the premises where food items were being prepared with the help of Liquified Petroleum Gas (LPG) cooking gas, grinding machine running on electricity and kerosene ovens. The witness appearing on behalf of the appellant stated that Lalit Dave, his younger brother present at the time of inspection, was not the proprietor of the appellant/establishment and that his signature on the list of employees was of no consequence. It was also stated that there were only seven employees working with the appellant/establishment at the time of inspection.

6. On the basis of evidence and material on record, the Employees Insurance Court, Nagpur, found that the appellant had failed to make out any case and accordingly dismissed the application. It was held by the said Court that since Bhavanishankar Dave, who had appeared as witness on behalf of the appellant, was neither its proprietor nor the person present when the inspection was conducted, his evidence could not further the case of the appellant. The said Court held that the material brought on record by the respondent/Corporation proved that the appellant/establishment was covered under the definition of "factory" under Section 2(12)(a) of the ESI Act and that, therefore, there was no error committed by the Deputy Regional Director of the respondent/Corporation in passing the order dated 10.03.1993 under Section 45(A) of the ESI Act.

7. Aggrieved by the said order, the appellant has filed this appeal raising questions of law and grounds of challenge, to claim that the impugned order is erroneous and that it deserves to be set aside. On 19.01.2005, this Court admitted this appeal on the following substantial questions of law :

"(i) Whether the appellant is covered by Clause 3 of the Schedule in the Government Notification dated 19.11.1976 ?

(ii) Whether the appellant is covered by Section 2(12) of the Employees' State

Insurance Act, 1948 ?"

8. Shri Gadhia, learned Counsel appearing on behalf of the appellant submitted that the said questions were required to be answered in favour of the appellant. He contended that the list of 17 employees at Exh.32 prepared on 28.07.1992, when the inspection was conducted, could not be relied upon because it was not countersigned by the proprietor of the appellant. The person, who countersigned it on behalf of the proprietor, was his son Lalit Dave who had nothing to do with the said establishment. The appellant had already placed before the Inspector of respondent/Corporation, the muster roll of July, 1992, which showed only seven employees working with the appellant/establishment. Therefore, according to the learned Counsel for the appellant, since minimum number of employees required under Section 2(12)(a) of the ESI Act is ten, the appellant/establishment ought not to have been covered under the provisions of the ESI Act. Apart from this, it was submitted that there was no cogent evidence to show that power was being used directly or in proximate manner in any manufacturing process in the establishment of the appellant and that, therefore, in the absence of proof of use of power, the minimum number of employees required for covering an establishment under the provisions of ESI Act was 20. It was further submitted that the Employees Insurance Court was not justified in discarding the evidence of Bhavanishankar Dave only on the ground that he was not the person present at the time of inspection, when he had been duly authorised by the proprietor to adduce evidence before the Court. It was further submitted that the said Court had wrongly clubbed two different establishments i.e. appellant (Ganesh Bhandar) and Ganesh Dugdha Bhandar while ascertaining the number of employees. It was further submitted that as per Notification dated 19.11.1976, for covering hotels and restaurants under the provisions of ESI Act, minimum 20 employees were required and that, therefore, the Court below had

committed an error in holding that the appellant/establishment was covered under the provisions of the said Act. The learned Counsel appearing on behalf of the appellant placed reliance on the judgment of the Hon''ble Supreme Court in the case of Hotel New Nalanda .v. Regional Director, ESI Corporation (reported in 2009(14) SCC, 558).

9. On the other hand, Smt. Maldhure, learned Counsel appearing on behalf of the respondent/Corporation submitted that there was no error committed by the Employees Insurance Court while dismissing the application of the appellant by the impugned order. It was submitted that there was sufficient documentary and oral evidence placed on record on behalf of the respondent/Corporation to demonstrate that the appellant/establishment was indeed covered under the provisions of the ESI Act, particularly because it was clearly covered within the definition of "factory" under Section 2(12)(a) of the ESI Act. It was submitted that this Court and the Hon''ble Supreme Court had held that preparation of food items was clearly covered under the expression "manufacturing process" and further that use of LPG gas amounts to use of "power" as stated in Section 2(12)(a) of the ESI Act. It was further submitted that since the details of the names, the work done, the dates of employment and the wages of 17 employees were recorded in Exh.32, countersigned by Lalit Dave, son of the proprietor who was present at the time of inspection, there was sufficient material to show that the appellant/establishment deserved to be covered under the provisions of ESI Act. Learned Counsel for the respondent/Corporation placed reliance on the judgment of this Court in the case of Poona Industrial Hotel Ltd. .v. I.C. Sarin (reported in 1980 LabIC 100) and the judgment of the Hon''ble Supreme Court in the case of Bombay Anand Bhavan Restaurant .v. Deputy Director, Employees' State Insurance Corporation and another (reported in 2010(2) Mh.L.J., 96 = 2009(9) SCC, 61).

10. Having considered the contentions raised by the learned

Counsel appearing on behalf of the respective parties, I will first consider the second question on which this appeal was admitted i.e. "Whether the appellant is covered by Section 2(12) of the Employees' State Insurance Act, 1948 ?".

In order to answer the said question, it is necessary to refer to the definition of "factory" as it then stood under the ESI Act. The same reads as follows :

"(12) "factory" means any premises including the precincts thereof-

(a) whereon ten or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on, or

(b) whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power or is ordinarily so carried on, but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952) or a railway running shed."

11. A perusal of the aforesaid definition would show that if an establishment employs ten or more persons for wages on any day of the preceding 12 months and in any part of which a manufacturing process is being carried on with the aid of power, it shall be covered under the definition of "factory". Therefore, crucial facts to be ascertained before concluding that an establishment is covered under Section 2(12)(a) of the ESI Act are, firstly, that there are ten or more persons employed in the establishment on any day of the preceding 12 months, secondly there is a manufacturing process being carried on in the establishment and thirdly, that such manufacturing process is carried on with the aid of power.

12. In the instant case, a perusal of the preliminary investigation report (Exh.31) along with observation sheet (Exh.16) and list of employees (Exh.32) prepared by the Inspector of the respondent/Corporation on the date of inspection show that there were 17 employees found working in the appellant/establishment and that there was work of preparing edibles

undertaken with the help of LPG cooking gas and electric current. The list of 17 employees (Exh.32) shows that the names of the employees with all the relevant details were written in the handwriting of Lalit Dave, son of the proprietor of the appellant/establishment. It is the contention raised on behalf of the appellant that in this list at Exh.32, names of employees of adjoining establishment i.e. Ganesh Dugdha Bhandar were also included and that as per the muster of employees for the month of July, 1992 (Exh.27), there were only seven employees in the appellant/establishment. It is contended that the Inspector, at the time of conducting the inspection on 28.07.1992, failed to differentiate between employees of the appellant/establishment and the adjoining Ganesh Dugdha Bhandar, leading to 17 persons being shown as the employees of the appellant.

13. A perusal of the order dated 10.03.1993 passed by the Deputy Regional Director under Section 45(A) of the ESI Act shows that a copy of the muster roll of the said adjoining establishment Ganesh Dugdha Bhandar was also on record, which showed that there were seven employees of the said establishment. It is also recorded in the said order that even if seven out of 17 employees recorded in Exh.32 were presumed to be the employees of Ganesh Dugdha Bhandar, still the remaining ten employees found on the premises of the appellant were employees of the appellant/ establishment.

14. Learned Counsel for the appellant has strenuously argued that it was for the respondent/Corporation to give explanation regarding the names of employees beyond seven employees shown in the muster roll of the appellant/establishment. It was contended that the burden was entirely on the respondent/Corporation to show that there were more than ten employees at the time of inspection. It is undoubtedly true that the respondent/Corporation was required to place on record the material to show that the appellant/establishment was covered under the definition of "factory" under Section 2(12)(a) of the ESI Act. In the instant case, the

documents at Exh.16 (observation sheet), Exh.32 (list of 17 employees) and the preliminary investigation report dated 28.07.1992 (Exh.31) were placed on record by the respondent/Corporation to show that there were 17 employees found working in the appellant/establishment at the time of inspection. The list of employees at Exh.32 was countersigned by Lalit Dave, son of the proprietor. I find that the respondent/Corporation had placed on record enough material to show that the appellant/establishment was indeed covered under the provision of the ESI Act and the onus was on the appellant to show that the material placed on record cannot be relied upon. Merely by producing muster roll of its employees of July, 1992 showing only seven employees cannot be said to be enough. It was for the appellant to have produced said Lalit Dave, son of the proprietor, who was present at the time of inspection, in evidence to depose in respect of the list of 17 employees at Exh.32. The said person was not produced in evidence and there was nothing placed on record to show that his signature and the details given by him in his own handwriting at Exh.32 were obtained by misrepresentation or coercion.

15. The contention raised on behalf of the appellant that the signature of said Lalit Dave at Exh.32 was of no consequence, because he was not the proprietor of the appellant/establishment, cannot be accepted because his presence at the site during the inspection has not been denied. In fact, the witness who appeared in support of the contentions of the appellant before the Employees Insurance Court, was also not the proprietor, being the other son of the proprietor and he was not even present at the time when the inspection was conducted. Therefore, his evidence could not have taken the case of the appellant any further. Since the list of 17 employees at Exh.32 gives all the details of the said employees including their names and it bears their signatures, the Employees Insurance Court was justified in relying upon the same to conclude that the appellant/establishment was found to have employed 17 employees on

the date of inspection.

16. As regards the question as to whether there was manufacturing process undertaken in the appellant/establishment at the time of inspection, the learned Counsel for the appellant has contended that sufficient material was not produced on record to show that such process had been undertaken. It was claimed that the statements in the observation sheet (Exh.16) and the preliminary investigation report (Exh.31) cannot be said to be enough to show that there was a manufacturing process undertaken and further that the Inspector who appeared as a witness for the respondent/Corporation could also not state anything significant in this regard in his evidence. A perusal of the observation sheet (Exh.16) shows that the Inspector has recorded that at the time of inspection, edibles were being prepared using LPG cooking gas and that a wet grinding machine running on electricity was being used to prepare the edibles. It was also recorded that there were kerosene ovens (air blown through electrical motor) for making edibles and that there was a refrigerator running on electricity for storing milk, soft drinks and eatables. The question whether preparation of food items amounts to manufacturing process or not, is no more res-integra. This Court in the case of Poona Industrial Hotel Ltd. .v. I.C. Sarin (cited supra) has considered this question and in the context of the question as to whether preparation of food is included in the expression "manufacturing process", has held as follows :

"(8) The phrase "manufacturing process" itself has not been defined in the E.S.T. Act but it has been mentioned that the expression "manufacturing process shall have the meaning assigned to it in Factories Act, 1948. Sec.2 (k) of the Factories Act defines the phrase "manufacturing process" as follows :

"manufacturing process" means any process for making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or....."

That the preparation of the food in the kitchen of the hotel is done with the aid of

power is admitted. Now the question is whether manufacturing process is employed in the preparation of the food. In our opinion, the preparation of the food necessarily implies making of the food which is an article or substance as mentioned in the definition of the phrase "manufacturing process". Several other articles which go into the preparation of the food are altered or cleaned or otherwise treated or adapted before the ultimate item of food emerges in the kitchen. We do not see how this process for making food or for washing, cleaning or otherwise treating or adapting raw materials with a view to prepare food cannot be treated as manufacturing process as defined in Section 2(k) of the Factories Act. It must also be noted that such manufacturing process is being employed for making of the food article either for use or for disposal. In our opinion, therefore, the processes which have been described in the petition itself viz. use of the various electrical appliances involve manufacturing process as defined in Clause (k) of Section 2 of the Factories Act."

17. The aforesaid judgment of this Court has been approved by the Hon"ble Supreme Court while dealing with the said question and it has been held in the case of Bombay Anand Bhavan Restaurant .v. Deputy Director, Employees" State Insurance Corporation and another (cited supra), as follows :

22. Therefore, first it needs to be proved as to whether there is manufacturing process carried on in the establishing of the appellants. Manufacturing process is defined under section 2(k) of the Factories Act as :-

"Manufacturing process means any process for - (i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or

(ii) pumping oil, water, sewage or any other substance; or

(iii) generating, transforming or transmitting power; or

(iv) composing types for printing, printing by letter press, lithography, photogravure or other simkilar process or book binding; or

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels;

23. Both the appellants prepare sweets, savories and other beverages in their establishments. It is a settled position

of law that cooking and preparing food items qualifies as manufacturing process. In the case of ESI vs. Spencer and Co. (1978) L.I.C. 1759, the Madras High Court held, while dealing with the case of a hotel run by Spencer and Company, that preparation of coffee, peeling of potatoes, making bread-toast, etc., in a

hotel, involve "manufacturing process". Similarly, the Bombay High Court in Poona Industrial Hotel Limited vs. I.C.Sarin, (1980) Lab. I.C. 106 held that the kitchen attached to Hotel Blue Diamond run by the petitioners therein, should be considered as a "factory" for the purpose of ESI Act. Hence, it is beyond doubt that there is manufacturing process involved in the establishment of the appellants."

18. Thus, it is settled law that preparation of food items in an establishment amounts to "manufacturing process". In the instant case, the appellant/establishment is found by the Inspector at the time of inspection to be preparing edibles with the use of LPG cooking gas, kerosene ovens and wet grinding machine run on electricity. The witness (Bhavanishankar Dave) deposing on behalf of the appellant/establishment has clearly stated in his evidence that the appellant is a hotel/shop where Samosa and Kachori are prepared. Thus, it is clearly established by the evidence and material on record that the process of preparing food items is undertaken in the establishment of the appellant, which amounts to manufacturing process.

19. The next question that requires consideration is whether there is use of power in carrying on the manufacturing process in the appellant/establishment to completely answer the definition of "factory" within Section 2(12)(a) of the ESI Act. In this regard, the learned Counsel for the appellant has relied upon judgment of the Hon"ble Supreme Court in the case of Hotel New Nalanda .v. Regional Director, ESI Corporation (cited supra). In this judgment, on the facts of the said case, the Hon"ble Supreme Court has held that a sweeping statement about the existence of grinder and refrigerator in the inspection report cannot be said to be enough to establish that there was activity of cooking undertaken. It was also held that the use of power in the manufacturing process should be direct and proximate and that an indirect application of power would not be sufficient. It was further held that mere presence of refrigerator and grinder even though connected to the main power line may not necessarily

lead to the inference that the establishment is a factory as defined under the provisions of the ESI Act. On this basis, it was the contention of the learned Counsel for the appellant that in the instant case also, a direct and proximate connection regarding use of power was not established. It was also contended that since the activity of preparation of food was undertaken mainly by use of LPG cooking gas, it may not be said to be use of power for manufacturing process.

20. As stated above, the observation sheet at Exh.16 in the instant case records that edibles were being prepared with the use of LPG cooking gas and that wet grinding machine running on electricity was also being used to prepare edibles, apart from kerosene ovens (air blown through electric motor) being used for the same purpose. The witness appearing on behalf of the appellant has also clearly stated in the evidence that food items like Samosa and Kachori were being prepared in the appellant/establishment by use of LPG cooking gas. It has been held by the Hon''ble Supreme Court in the case of Bombay Anand Bhavan Restaurant .v. Deputy Director, Employees' State Insurance corporation and another (cited supra) that use of LPG satisfies the expression "power" used in the definition of "manufacturing process" under Section 2(k) of the Factories Act. In the said judgment, it has been held as follows :

"31. LPG is stored in a cylinder fitted with a tube. Upon careful perusal of the definitions, which we have noticed earlier, it is clear that an LPG cylinder would qualify as an appliance which provides power. This power is transmitted by a tube which upon careful reading of the definition qualifies as transmission machinery as it is an appliance or device by which the motion of a primary mover is transmitted. In fact an analogy between the transmission of electricity and transmission of LPG can be drawn. The movement or transfer of electrical energy takes place over an interconnected group of lines and associated equipment between points of supply and points

at which it is transformed for delivery to consumers or is delivered to other electric systems. Transmission is considered to end when the energy is transformed for distribution to the consumer. In many countries transmission of LPG also takes place in a similar manner from a large fixed tank. In case of LPG stored in a cylinder the mechanism of transmission is essentially the same as the

gas travels from the cylinder whether it is stored to the gas cooking stove. While transmission of electricity involves a switch, transmission of LPG involves a valve mechanism or a regulator to ensure smooth flow. Hence, LPG is a source of energy which is mechanically transmitted by way of the tube attached to the machinery.

32. In our view, the use of LPG satisfies the definition of power as it is mechanically transmitted and is not something generated by human or animal agency."

21. Thus, it has been held that use of LPG cooking gas amounts to use of power and, therefore, an establishment using LPG cooking gas for manufacturing process would be covered under the expression "manufacturing process being carried on with the aid of power" as used in Section 2(12)(a) of the ESI Act. Thus, there is no substance in the contention raised on behalf of the appellant that use of LPG cooking gas does not amount to use of power in the manufacturing process. Apart from this, use of electricity has been specifically stated in the said observation sheet (Exh.16) and, therefore, this issue is also established against the appellant.

22. Thus, as all the three aspects and requirements under Section 2(12)(a) of the ESI Act for covering the appellant/establishment in the definition of "factory" are satisfied in the instant case, I answer the aforesaid question No.(ii) framed by this Court while admitting the appeal, against the appellant and in favour of the respondent/Corporation.

23. As regards question No.(i), framed while admitting the instant appeal, it is the contention of the learned Counsel for the appellant that Notification dated 19.11.1976 issued under Section 1(5) of the ESI Act in Clause (3) of its schedule, states that hotels, restaurants and shops would be covered under the definition of "factory" only if twenty persons are employed. The said contention raised on behalf of the appellant is without any substance because the definition of "factory" under Section 2(12)(a) of the ESI Act was amended in the year 1989 and it read as quoted hereinabove. Once the statute itself specifically defined the aforesaid term

and thereby the application of the provisions of the ESI Act on such establishments like restaurant/hotel of the appellant, the Notification dated 19.11.1976 would certainly not override the statutory definition. Apart from this, a similar contention placing reliance on the Notification dated 19.11.1976 was rejected by this Court in the case of Poona Industrial Hotel Ltd. .v. I.C. Sarin (cited supra) in the following manner :

"By the notifications referred to above, the State Government has extended the provisions of the Act to the establishments including hotels and restaurants wherein 20 or more persons are employed. This is necessary different from the word "factory" contained in Section 1 (4) of the E.S.I. Act and if the hotel which answers the description of a factory is already covered by the provisions of the Act, the notification issued by the State Government will necessarily not apply to the said hotel. Indeed the language used in the notification shows that the provisions may apply to establishments where power is not used in the manufacturing process. It is also conceivable that by extending all the provisions of the Act to the wider classes of hotels and restaurants, the intention might be to cover employees of a hotel who may not have been covered despite the fact that the hotel is held to be a factory under the provisions of the E.S.I.Act."

24. Therefore, there is no substance in the contentions raised on behalf of the appellant in this regard. Consequently, the aforesaid question No.(i), framed by this Court, while admitting the instant appeal, is answered against the appellant and in favour of the respondent/ Corporation.

25. In the light of the above, it is evident that the appellant has failed to demonstrate any error committed by the Employees Insurance Court while passing the impugned order dismissing the application of the appellant.

Accordingly, this appeal is dismissed with no order as to costs.