

(2010) 10 DEL CK 0011

In the Delhi High Court

Case No : FAO 21 of 2003

S.N. Sunderson and Co.

APPELLANT

Vs

Employees State Insurance Corporation

RESPONDENT

Date of Decision : 26-10-2010

Acts Referred:

Employees State Insurance Act, 1948 — Section 1(5), 2(12), 2(9), 38, 39

Citation : (2010) 10 DEL CK 0011

Hon'ble Judges : Mool Chand Garg, J

Bench : Single Bench

Advocate : Rakesh Aggarwal and Pulkit Aggarwal, for the Appellant; M.P. Raju, for the Respondent

Final Decision : Dismissed

Judgement

Mool Chand Garg, J.—This appeal has been filed by the appellant u/s 82 of the ESI Act, 1948 (hereinafter referred to as "the Act") against judgment and order dated 26.10.2002 whereby the ESI Court dismissed the petition filed by the appellant u/s 75 of the ESI Act, 1948.

2. Basically, the grievance made by the appellant before this Court in this appeal is twofold i.e. i) Head Office of the appellant is in Delhi which is covered under the Act, however, the branches located outside Delhi cannot be covered under the Act and ii) That some of the branches of the appellant are even located in mining areas & are involved in mining activities and therefore they could not have been covered under the provisions of the Act.

3. Briefly stating the facts leading to the filing of this appeal are that a letter dated 16.02.1989 was served upon the appellant by the respondent informing them that the establishment of the appellant was covered under the provisions of the Act. They were also allotted Code No. 11-14413-102. After about 3 years, the respondent sent another letter dated 19.10.1992 with regard to an inspection carried out in the establishment of the appellant on 30.09.1992. At

that time, the appellants were advised by the respondent that even the units of the appellant located outside Union Territory of Delhi should also start compliance with the provisions of the Act. A reply was sent by the appellant to the aforesaid letter whereby they specifically stated that the branches which could be covered in view of Section 1(5) of the Act could be the branches in the same State and that the branches which are located outside were not covered under the Act.

4. Despite that, notice u/s 45A of the Act was sent to the appellants. This notice was also replied to by the appellants. Finally, vide letter dated 24.08.1993 the respondent reiterated their stand that the employees working in the various officers of the appellant outside were also covered as envisaged u/s 2(9) of the Act which reads as under:

2. Definitions:

1. to 8. xxxx (9) "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 is 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;

[and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment] [or any person engaged as apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), [and includes such person engaged as apprentice whose training period is extended to any length of time] but does not include]-

....

5. In these circumstances, the appellant filed petition u/s 75 of the ESI Act. The respondent contested the aforesaid petition by filing a written statement. There also the respondent relied upon the provisions contained u/s 2(9) of the Act defining the term "Employee".

6. The ESI Court framed the following issues and allowed the parties to examine their witnesses.

1. Whether the impugned demand is liable to be set aside?

2. Relief.

7. The appellant examined PW 1, Satish Aggarwal while the respondent examined 3 witnesses, namely, RW-1, Sh. T.K. Ghosa, Dy. Director, RW-2 Sh. Chuni Lal and RW-3, Sh. S.L. Ahuja.

8. While deciding issue No. 1 the trial Court has relied upon the judgment delivered by the this Court in the case of Hindustan Lever Ltd. v. Employees' State Insurance Corporation and Ors. 1973 Lab. I.C. 706 (V 6 C 152) and observed that though the office and factory of the appellant are situated in different places still when the employees in the head office and branches are connected with the management of the factory, they are to be covered under the Act. The trial Court has also relied upon a judgment delivered by the Supreme Court in Hyderabad Asbestos Cement Products Ltd. Vs. Employees Insurance Court and Another, wherein it was held that the employees working in zonal and branch office of the factory are also covered under the Act. This is also the view taken by Hon''ble Supreme Court in Hindu Jea Band, Jaipur Vs. Regional Director, Employees' State Insurance Corporation, Jaipur,

9. Observing that no contrary authority was brought to the notice of the Court, it was held that the employees working in other branches of the appellant were also covered under the Act and, therefore, the demand raised by the respondent was justified.

10. Taking note of the specific submissions of the appellant that the branches situated in the area where Mining Act is applicable are not liable to be covered under the Act which is an exception created u/s 2(12) of the Act, it was observed that in the entire petition or even in the correspondence exchanged by the appellant with the respondent, the appellant had not taken even a plea that their branches outside Delhi were situated in area where the Mining Act are applicable or that the branches were engaged in mining activities and, therefore, it was held that the plea does not inspire confidence since such plea was taken for the first time in their application only. Moreover no documentary evidence was filed to support the aforesaid plea before the ESI Court. In fact, no notification which may go to show that the area where it is alleged that the branches are situated is covered under the Mining Act has been placed on record. Similarly, no evidence was forthcoming regarding the plea that there was functional integration of branches.

11. I have heard the submissions made on behalf of the appellant which are similar to what was pleaded before the ESI Court. In fact, in addition to the plea that some branches of the appellant were located in the mining areas and that they were also taking mining activities, which has been added for the first time,

the appellant has also stated that the branches are independent and there is no functional integration even though no such plea was taken earlier.

12. Scanning the evidence led on behalf of the appellant it is found that no evidence to support the plea of the appellant that some of the branches situated in mining areas or that they are undertaking mining activities. In fact, the cross-examination of the witness of the appellant goes to show that he was not even fully aware of the facts of the case inasmuch as in his cross-examination, he states:

I cannot tell the total number of the employees in all our branches including Delhi branches. The names of the persons mentioned in para 1 of survey report dated 09.10.1989 are all our partners. It is correct that a survey was conducted by the Inspector of the petitioner-firm on 09.01.1989. The list of the employees given by the inspector of the respondent bears the seal of the petitioner office and also bears the signatures of Sh. S.D. Lamba, Sr. Executive of the petitioner at points A to D. The list of the employees of all the branches of the petitioner-firm given by the Inspector is Ex.PW-1/R-1 (4 pages). It is correct that a letter dated 14.10.1989 was written by the petitioner-firm and it bears the signatures of one of the partner at point E which I can identify and the said letter is Ex.PW-1/R-2.

It is correct that another letter dated 26.09.1990 was sent by the petitioner-firm to the respondent and the same bears the signatures of one of the partner at point F which I can identify and the said letter is Ex.PW-1/R-3. The address given on the letter dated 29.08.1991 is the correct address of the petitioner-firm but I cannot say whether the same was received by the petitioner-firm or not.

The above stated letters bear the seal of the petitioner-firm and the same appears to be signed by our employee at point G namely Mr. S.D. Lamba. I have no knowledge whether any inspection was carried out by the Inspector of the respondent. Another letter dated 08.10.1992 was written and sent by the petitioner to the respondent, and the said letter bears the signatures of our Sr. Executive S.D. Lamba. The signatures are at point H and the same is Ex.PW-1/R-4. I cannot tell whether the letter dated 19.10.1992 was received by the petitioner-firm but the address on the letter is correct.

It is wrong to suggest that the branches and offices of the petitioner-firm are working under the supervision of our headquarters and the same are not independent units. We are carrying on the business of mine activities in Madhya Pradesh. NO work is being carried out at our Delhi office. It is wrong to suggest that the staff of our Delhi office is dealing with the official work of mine. The petitioner-firm is also carrying on the business of trading. The different kind of trading activities are carried on in UP branches and in other branches the work relating to mines is carried on. Our branches are maintaining their independent registers and independent balance sheet etc. I cannot say whether the report regarding the work carried on in different branches of the petitioner-firm is made

out Delhi office. The partners mentioned in the survey report are the partners of all the branches. All the branches of the petitioner-firm carry on their business under the partners mentioned in the survey report. The partners in the petitioner-firm have not been given a specific work.

It is wrong to suggest that our branches are not independent branches. I cannot say whether the petitioner has submitted all the record of their branch offices to the respondent. I cannot say whether any opportunity to produce the record was given but we failed to produce the record.

13. No evidence to substantiate the plea taken by the appellant before the ESI Court was filed before the said Court nor any such document has been shown to this Court. In fact, even no partner of the firm has been examined on behalf of the appellant. No evidence about the activities of the branches situated outside Delhi allegedly situated in mining areas or allegedly involved in mining activities have been placed on record. It is not the case of the appellant that the branches are having different constitution or different partnership deeds have been executed so as to make them completely different from each other. In fact, not even a notification to show that the areas where it is alleged that mining activities take place has been placed on record.

14. In these circumstances, in the absence of any evidence led on behalf of the appellant that some of the branches situated outside Delhi are in mining areas or are involved in mining activities without taking such plea in the written statement and taking such plea for the first time in the application that also without leading any evidence would not help the appellant to suffer from the rigors of the Act.

15. Coming to the judgments referred to by the trial Court, I find that in the case of Hindustan Lever Ltd. (Supra), this Court has specifically held that once the company is covered by the Act having a factory at Ghaziabad and an office at Delhi, the persons employed in Delhi office are also employee of the factory of Ghaziabad and therefore they are covered by the amended definition of Section 2(9) of the Act. In the case of Hyderabad Asbestos Cement Products Ltd. (Supra), the Supreme Court has also dealt with the matter and has made the following observations:

On a careful consideration of Section 2(9) Section 2(12), Section 38 and Section 39, we are unable to accept the restricted interpretation sought to be put upon the words Employees in factories. Even before the amendment the word "employee" included persons connected with the work of the factory. The Supreme Court has laid down that person employed in connection with the work of the factory would fall within the definition as it stood before the amendment and it may not be open to the counsel to contend that it is only employees that are employed in the factory that would fall within the definition. The definition before the amendment as well as after the amendment would include not only persons employed in the factory but also in connection with the work of the factory. The Section 39 of the Act makes the position clear. It provides that the

contribution payable under the Act is in respect of an employee. It is not confined only to employees in factories. We see no justification for reading the words employees in factories in Section 38 as meaning persons employed in factories only. We are unable to accept the contention that the employees in factories defined u/s 2(12) of the Act.

Word "employee" would include not only persons employed in the factory but also persons connected with the work of the factory. The employee may be working within the factory or outside the factory and may be employed for administrative purposes or for purchase of raw materials or for sale of the finished goods all such employees are included within the definition of "employee".

16. Another judgment which has also been relied upon by the respondent is a judgment delivered in the case of *Transport Corporation of India Ltd. v. Employees' State Insurance Corporation and Anr.* AIR 2000 Supreme Court 238. It would be appropriate to take note of paragraph 20 of the aforesaid judgment which reads as under:

20. Now it is time for us to deal with the judgments to which our attention was invited by learned Counsel for the respective parties. Before we consider the decisions of this Court, it is appropriate to refer to a decision of the Division bench of the Andhra Pradesh High Court in the case of *Employees' State Insurance Corporation, Hyderabad Vs. Southern Eastern Roadways*, The question before the Division Bench of the High Court in that case was as to whether the notification applying the Act to a branch of a transport company situated at Visakhapatnam in Andhra Pradesh whose head office was at Calcutta could make available to the employees of the branch benefits of the Act even though head office was not covered by the Act. It becomes at once clear that this was a converse case wherein the head office was not governed by the Act as the West Bengal Government had not issued any notification for governing the parent establishment at Calcutta but it was the branch which was governed by the Act because it was situated in Andhra Pradesh State which had issued the notification in question. It was held by the Division Bench, speaking through Rama Rao J., that even if the head office was not governed by the Act, so far as the branch was concerned, because the Act was applicable to the employees working therein the benefit of the Act could not be denied to the employees of the branch within the limits of Andhra Pradesh State. Dealing with the statutory provisions of the Act and the beneficial provisions thereof, the following pertinent observations were made in paragraph 8 of the Report. The same read as follows:

The *Employees' State Insurance Act* is aimed at conferring benefits on employees in case of sickness, maternity and employment injury. Section 38 of the Act mandates that all the employee in the factories or establishments shall be insured. The initial and vital endeavour should be to identify the beneficiaries or the employees for insurance. It is well settled that the employees in head office as well as the branches are comprehended within the ambit of the

coverage of the Act. The branch office is only an appendage to the head office and the branches are located in the place or State where the head office is situated or other places outside the States also to measure up to the expansion or diversification of the business or undertaking. Each branch is an off-shoot of the head office and cannot be considered to have an independent entity as all the transactions ultimately funnel into head office and the entirety of transactions of the head office and branches as well are reflected by the head office as one unit. The infrastructure for the maintenance and running all the branches flows from the same capital source and the streams of business by all the units will be ultimately pooled. It is not in dispute that the branches carry on the identical business and transactions. Each branch is a component of the main office and all the branches are miniatures of the main office and as such cannot be considered as separate and independent entities.

17. In view of the principle laid down in the aforesaid case by the Apex Court and for the reasons stated in earlier paragraph of this judgment; in the absence of no evidence which may establish that some of the branches sought to be covered were situated in a mining area or were involved in mining activities, no relief can be granted to the appellant as there is no infirmity in the order passed by the ESI Court taking all the facts into consideration.

18. Accordingly, the appeal is dismissed with no orders as to costs.

19. LCR be sent back.

C.M. 56/2003(stay)

Disposed of as having become infructuous.