

(2000) 07 MAD CK 0026
In the Madras High Court
Case No : C.M.A. No. 1020 of 1994

Soft Beverages (P) Ltd.

APPELLANT

Vs

E.S.I. Corporation

RESPONDENT

Date of Decision : 25-07-2000

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(9), 44

Citation : (2001) 1 LLJ 309

Hon'ble Judges : K.P. Sivasubramaniam, J

Bench : Single Bench

Advocate : K.V. Ananthakrishnan, for the Appellant; Radha Srinivasan, for the Respondent

Final Decision : Dismissed

Judgement

K.P. Sivasubramaniam, J.—This appeal is directed against the award of the E.S.I. Court, Madurai, in E.S.I. O.P. No. 10 of 1990. The

management/opposite party is the appellant before this Court.

2. The appeal arises out of an application filed by the management u/s 75 of the Employees' State Insurance Act, 1948 as against the order of the

Regional Director, E.S.I. Corporation, dated March 14, 1990.

3. According to the appellant, the petitioner concern is registered under the Companies Act and was manufacturing and distributing soft drinks

under the trade name of Torino. The petitioner's concern was covered under the Factories Act and they have been remitting the Employees' State

Insurance contribution to their regular employees. But sometimes for the purpose of loading and unloading sugar, new bottles from the

manufacturers, the petitioner engaged some outside loadmen who are independent and self employed. A show-cause notice was issued by the E.

S. I. Corporation claiming contribution to the tune of Rs. 17,019 for the period from January 1985 to December, 1987 for the amount paid

towards the loading and unloading charges. A reply was submitted by the appellant. However, without considering the issues raised, the impugned

order had been passed. It was further submitted that the petitioner's concern was engaged only in engaging certain self-employed loadmen for the

purpose of loading and unloading the bottles and the said people were engaged by others also on contract for service. Therefore, according to the

appellant, the nature of the work was (sic) contract for service and not contract of service. According to the appellant, the provisions of the E.S.I.

Act would not apply to such employees. The persons on contract for service may last only a few minutes in a day or few hours or few days in a

month and such persons will not come under the provisions of the Act. There was no supervision or control over the loading or unloading. The

management was involved in checking the bottles. The persons engaged for loading and unloading are self-employed and they are not employees

within the meaning of the Act.

4. In the written statement filed by the E.S.I. Corporation, the contentions raised by the employer were denied. The loading and unloading work

was regular work of the petitioner's factory and the petitioner disburses wages periodically to the employees and it was false and incorrect to

allege that they were engaged only occasionally and that they were self-employed persons. On the other hand, the nature of the work was regular

in the petitioner's factory.

5. On a consideration of the said objection by the appellant as regards the demand for contribution, the E.S.I. Court held that the workers

concerned were discharging the work relating to the employer and such of those persons were employees of the appellant/company. Therefore,

the demand raised by the E. S. I. Corporation was sustained. Hence, the present appeal. Learned counsel for the appellant very strenuously

contends that the workmen in question come along with the lorries engaged by the suppliers of raw materials and that they have no other work

except to load or unload the materials brought through such vehicles. It is further stated that they have no control over the employment of such

persons. Therefore, the appellant cannot be made liable to pay contribution.

6. Learned counsel relies on a judgment of the Supreme Court in C.E.S.C. Limited and Others Vs. Subhash Chandra Bose and Others, . On the facts of that particular case, it was held that if the work by the employee was conducted under the direct supervision of the principal employer, he would be an employee under the Act. In that case, it was held that direct supervision and control by the principal employer was held to be one of the determinative factors to decide about the liability to pay contribution under the E.S.I. Act.

7. Reference is also made to the judgment of the Supreme Court in Employees" State Insurance Corporation, v. Premier Clay Products 1994 (3)

SCC (Supp) 567. In that case, it was held that where the work itself was of a sporadic nature and the employer had hired some casual coolies for

loading and unloading, such individuals cannot even be called casual workmen. In Parle Bottling Co. (P) Ltd. v. E.S.I. Corporation 1995 III LLJ

(Suppl) 394 a Division Bench of Bombay High Court held that hiring of casual coolies from road/street to assist the permanent loaders to load or

unload crates at various places cannot be treated as employees of the Company. Learned counsel also states that in Employees" State Insurance

Corpn. Vs. M/s. Harrison Malayalam Pvt. Ltd., a question whether the casual contractors such as plumbers, electricity repairers could be treated

as covered by the Act, the Supreme Court had left the question open to be considered later.

8. Reliance is also placed on another judgment of the Supreme Court in Rajakamal Transport and Another Vs. Employees" State Insurance

Corporation, Hyderabad, where it was held that in dealing with Hamalis engaged as carriers of goods for loading and unloading purposes and

wages were also paid by the institution, it was held that the test of payment of salary alone was not relevant consideration.

9. In South India Surgical Company Vs. The Regional Director, Employees" State Insurance Corporation, Madras-34, a Division Bench of this

Court held that where employees were employed through independent contractor were held to be not workmen of the appellant. In Employees"

State Insurance Corporation Vs. Surya Printmac Industries, Faridabad, , a learned single Judge of Punjab and Haryana High Court held that if

workers were engaged for a specific and limited job, they would not be employees for the purpose of the Act.

10. In the The Regional Director, E.S.I. Corporation 143, Sterling Road, Madras 34 Vs. S SR.S. Brothers, B. aKBAR BASHA KHADIRI, J.

held that employees engaged by independent contractor for loading and unloading operation, on facts it was found that they were not under the supervision and control of the principal employer and hence the employer was not liable to pay contribution.

11. Therefore, on the basis of the aforesaid rulings, learned counsel for the appellant contends that having regard to the nature of the casual and indefinite nature of the work, the employees cannot be treated as employees of the appellant company.

12. Learned counsel for the respondents" however, contends that the provisions of the Act as well as several rulings of the Supreme Court have

clearly laid down that even casual employees are to be treated as employees under the E.S.I. Act. The lack of identity cannot be a reason for not

paying the contribution. On the facts of the case, the workers were also carrying only materials which were essential for the manufacture of soft

drinks and hence the said workers were very much involved in the discharge of duties of the appellant factory. The appellant was also involved in

both the manufacture as well as the distribution.

13. Reference is made to the judgment of the Supreme Court in Regional Director, Employees" State Insurance Corpn., Madras Vs. South India

Flour Mills (P) Ltd., , wherein the Supreme Court held that even the casual employees involved in construction work of the additional building for

expansion of the factory would be employees u/s 2(9) of the E.S.I. Act.

14. In Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation, , the Supreme Court held that persons employed in the

canteens and cycle stand of Cinema theatre have to be construed as employees of Cinema owner.

15. In E.S.I.C. v. Harrisons Malayalam Ltd. (supra), it was held that where the management pleaded that it was not possible to identify the

workmen employed by the construction company during the relevant time, it was held that failure on the part of the company in discharging its

obligation could not entitle the company to say that workers were unidentifiable and no data was available with them about the exact number of

employees.

16. In *Kirloskar Brothers Ltd. Vs. Employees' State Insurance Corpn.*, the Supreme Court held that the true test to find out the applicability of

the Act was to see whether the principal employer had control over the employees.

17. In *Shivam International Exports, by Partner Vijay Bulchandani v. Assistant Regional Director, E.S.I. Corporation, Madras W.P.Nos. 6589 of*

1998 etc. dated February 20, 1998 R. JAYASIMHA BABU, J. held that stitching charges paid to a person whom the employer claimed to be an

independent contractor by the manufacturers and exporters of garments, the learned Judge held that such workers have to be treated as employees

under the Act.

18. I have considered the mutual submissions of both the learned counsel and in the light of the various judgments referred to on both sides.

19. It is settled proposition of law that Section 2(9) of the E.S.I. Act is wide enough to include casual employees also. Section 2(9)(i) specifically

includes employees who are directly employed by the principal employer whether such work is done by the employee in the factory or

establishment or elsewhere.

20. In the present case, though in the argument learned counsel for the appellant has stated that the concerned employees come along with the

lorries for delivery of the raw materials and that they go away after the loading and unloading work is over, it is not consistent with the very

pleading by the appellant. In paragraph No. 5 of the petition before the E.S.I. Court, it has been specifically stated that sometimes for the purpose

of loading and unloading sugar, new bottles from the manufacturers, the petitioner engages some outside loadmen. Again in paragraph No. 7, it is

stated that the appellant concern occasionally engaged self-employed loadmen for the purpose of loading and unloading new bottles. Therefore, on

facts, it is clear that the concerned employees were employed only by the appellant company itself and not either by independent contractor or

employed by the owners of the lorry or suppliers. Therefore, on the said fact alone, the judgments cited by learned counsel for the appellant are

rendered inapplicable.

21. The fact that it will not, be possible for the employer to identify the concerned employees, cannot also be a proper reason for not paying the

contribution. In this context, the judgment of the Supreme Court in *E. S. I. C. v. Harrison's Malayalam Ltd.* (supra) is relevant. It is also relevant to

note that Section 40 of the E.S.I. Act makes the principal employer liable to pay the contributions at the first instance. Section 44 requires the

immediate employer to maintain a register of employees employed by him or to any establishment as provided under the Act. Therefore, whether

the employees are employed directly by the principal employer or through an immediate employer, a duty is cast upon them to maintain a register

of employees and cannot be heard to say that such employees are not identifiable.

22. In the present case, it cannot also be disputed that engaging a particular individual as a loadman or not is completely within the discretion of the

appellant. If the work of the concerned employee is not satisfactory, the appellant would be certainly entitled to refuse to provide employment to

the particular employee. Therefore, it cannot be said that the appellant's company do not exercise any supervisory control over the employees.

23. Therefore, viewed from any angle I am unable to find any justification to interfere with the order of the E.S.I. Corporation.

24. In the result, there are no merits in the appeal and the same is dismissed. No costs.