

(2005) 07 AP CK 0109

In the Andhra Pradesh High Court

Case No : C.M.A. No's. 1506 and 2115 of 1998

Tata Projects Limited

APPELLANT

Vs

Employees State Insurance Corporation and Another

RESPONDENT

Date of Decision : 06-07-2005

Acts Referred:

Andhra Pradesh Shops and Establishments Act, 1988 — Section 1(5), 2(12), 44, 45A, 45B

Employees State Insurance Act, 1948 — Section 17(4), 32(2), 39, 40, 41

Citation : (2005) 5 ALD 791 : (2005) 5 ALT 502

Hon'ble Judges : V. Eswaraiah, J

Bench : Single Bench

Advocate : M. Radha Krishna Murthy, for the Appellant; V. Venkateswara Rao, for the Respondent

Final Decision : Dismissed

Judgement

V. Eswaraiah, J.—These two Civil Miscellaneous Appeals arise out of the order, dated 04-05-1998, made in E.I.C.No. 27 of 1996 on the file of the Employees Insurance Court and Chairman; Industrial Tribunal-1, Hyderabad.

2. C.M.A. 1506 of 1998 is filed by M/s. Tata Projects Limited, Begumpet, Hyderabad, the petitioner in E.I.C.No. 27 of 1996. C.M.A.No. 2115 of 1998 is filed by the Employees State Insurance Corporation, Hyderabad, the respondent in E.I.C.No. 27 of 1996.

3. Insofar as granting relief against the petitioner therein, making it liable to pay the contribution from 04-01-1996 instead of 01-01-1987, C.M.A.1506 of 1998 has been filed, contending that the appellant company is neither a "shop nor a "factory" either within the meaning of "shop" as per the notification of Government of A.P., or within the meaning of "factory" as per Section 2(12) of the Employees State Insurance Act (hereinafter referred to as "the Act"). Therefore, the provisions of the Act are not applicable to the appellant company, that as there are certain exemptions exempting the appellant company from

coverage under the Act and that the claim made by the E.S.I Corporation is barred by limitation.

4. The parties in both the appeals are hereinafter referred to as they were arrayed in E.I.C.No. 27 of 1996.

5. It is the case of the petitioner that the petitioner's establishment is neither a "shop" nor a "factory" as per the notification issued by the Government of A.P. It is only a commercial establishment registered under the A.P. Shops and Establishments Act and therefore the petitioner establishment can not be covered u/s 1(5) of the Act, it is stated that the respondent served a notice, dated 09-09-1983, on the petitioner-appellant stating that it is a factory/ establishment to which the Act applies. A reply was sent to the said notice stating that there is no manufacturing activity and therefore the petitioner is neither a "shop" nor a "factory". It is further stated that the respondent Corporation did not pursue the matter for a period of two years, i.e., from 1983 to 1985 and also from 16-09-1985 to 02-04-1987. The respondent corporation after a gap of seven years conducted an inspection on 05-07-1994 reiterating the stand of coverage of the petitioner company under the Act and a notice was issued by the respondent on 05-07-1995, asking the petitioner company to submit various records. Thereafter, no action was taken for a period of six months and a notice, dated 27-02-1996, was issued stating that the petitioner company is covered under the Act and it comes within the purview of Section 1(5) of the Act.

6. The undisputed facts are that the petitioner company filed E.I.C.No. 27 of 1996 on the file of the Employees insurance Court and Chairman, Industrial Tribunal-1, Hyderabad u/s 75 of the Act to declare that the petitioner is not liable to pay the contributions as claimed by the respondent Corporation with a consequential relief to set aside the impugned orders bearing No. AP-1 Nos. VII 52-12607-101, AP-1 No. VII 52-12607-101, both dt. 04-11-1996, for an amount of Rs. 3,45,197/- and Rs. 1,97,024/- respectively, in total for an amount of Rs. 5,42,221/- issued by the respondent Corporation.

7. It is the case of the petitioner before the E.I.C. Court that the petitioner company was established in Hyderabad in the Year, 1982 and the number of employees exceeded twenty, only in the year 1984. While the matter stood thus, the respondent served a notice, dated 09-09-1983, on the petitioner company stating that it is neither a "factory" nor an "establishment", to which the Act applies. On receipt of the said letter, the petitioner company sought legal opinion from various institutions. The respondents once again sent a letter dated, 01-02-1984, informing the petitioner company that the Act is applicable to the petitioner company and asked the petitioner company to submit Form No. 1 duly filled for the purpose of coverage of the company under the Act. The petitioner company replied to the respondents, informing that their company is not covered under the Act since it is only a professional firm of consulting service giving advice to its clients from time to time on various engineering projects which are to be executed by them and that the petitioner company is not dealing with any

commodity or any other form of goods in the process of offering services. It is stated that it is neither purchasing goods nor carrying out any manufacturing activity, therefore, the petitioner company is neither a "shop" nor a "factory" within the meaning of the "shop" and "factory" as defined under the notification of the Government of A.P. The respondent again sent a letter, dated 15-10-1985, reiterating its stand on coverage of the petitioner's establishment under the Act and accordingly sent a notice, dated 04-11-1985, asking the petitioner to submit Form No. 1 for the purpose of coverage of the petitioner company under the Act. As the petitioner establishment failed to submit Form No. 1 the respondent issued another letter, dated 02-04-1987, requesting the petitioner company to submit Form No. 1. As the petitioner company failed to submit Form No. 1, the respondent ultimately inspected the petitioner establishment on 5-7-1994 reiterating its stand of coverage of the petitioner company under the Act and accordingly, issued notice dated 05-07-1995, asking the petitioner to submit various records as stated in the said notice. Then the petitioner company submitted all the records and registers as requested by the respondent Corporation. Basing on the records, the respondent Corporation served a demand notice, dated 04-11-1996, demanding the payment of contribution for a sum of Rs. 1,97,024/- for the period from 01-10-1983 to 30-06-1995 in respect of the office at Mumbai and a sum of Rs. 3,45,197/- for the said period in respect of the office at Hyderabad. Questioning the said demand notices, a case has been filed stating that the petitioner establishment does not come under the coverage of "establishment" u/s 1(5) of the Act, as it is not a "shop" or an "establishment". It is further stated that under Clause (b) of Section 77 of the Act, it is not open for the respondent Corporation to make a demand after five years and therefore, the demand made by the respondent Corporation for the period from 01-10-1983 is barred by limitation and the respondent Corporation is entitled to make demand only for a period of five years prior to the demand notice dated 04-11-1996 i.e. from 04-11-1991 only they can make a demand and the demand made from 01-08-1983 to 04-11-1991 is barred by time and unsustainable.

8. It is the case of the respondent Corporation before the E.I.C. Court that the petitioner establishment which is situated at Suryodaya, Begumpet, Hyderabad, having branches at several places, including Mumbai, was covered u/s 1(5) of the Act with effect from 01-10-1983. As per the provisions of Sections 39 and 40 of the Act, the petitioner is liable to pay contributions in respect of all the employees, either engaged by it directly or through an immediate employer within the time limit prescribed under the Regulation 31 of the Act. All the persons, who are drawing wages of Rs. 6500/- and working in the establishment, are amenable under the Act and the petitioner establishment is liable to pay the contributions. It is stated that the respondent Corporation visited the petitioner establishment on 15-04-1985 for survey and having verified the registers/ records, submitted a report recommending coverage u/s 1(5) of the Act and accordingly, the petitioner company was directed to comply with the provisions of the said Act. But the petitioner failed to submit Form No. 1. Therefore, the said

demand notices issued by the respondent Corporation are legal and valid and there is no bar for recovering all the demands made in respect of the respective contributions recoverable under the Act.

9. The Employees State Insurance Act was enacted to provide certain benefits to the employees in case of sickness, maternity and injury and to make provision for certain other matters in relation thereto. Accordingly, the State Government issued notification extending provisions under the Act to the case of establishment, industrial and commercial concerns etc., covering the said establishments under the purview of the act.

Under Section 2(12) factory means

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

(a) where 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 (Act No. 35 of 1952) or a railway running shed;)

Therefore, it is clear that the petitioner establishment is a "factory" within the meaning of Section 2(12) of the Act. If the petitioner "establishment" is a factory, it is the duty of every factory or establishment, to which the Act applies, to get its establishment registered under the Act as per the regulations specified therein. Every factory or establishment shall provide insurance to all its employees in the manner provided under the Act and make contributions as contemplated under Sections 38, 39 and 40 of the Act.

10. u/s 44 of the Act every employer is liable to furnish returns and maintain registers. If the establishments or factories furnish records and make contributions, it is open for the E.S.I Corporation to determine the contribution as contemplated u/s 45A of the Act and recover the said contributions u/s 45B of the Act. The said contributions can also be recovered by issuing a recovery certificate to the Recovery officer u/s 45(c), (d) and (e) of the Act. Thus, it is clear that the contribution to be paid by the factory/establishment to which the Act applies is a statutory obligation. Chapter 4 of the Act deals with the contributions. Chapter 5 of the Act deals with the benefits to the insured employees. Chapter 6 of the Act deals with educational disputes and claims. The Employees State Insurance Corporation has been constituted u/s 17(4) of the Act to decide the matters in respect of their disputes as contemplated u/s 75 of the Act. Section 76 of the Act deals with the manner of institution of the proceedings.

11. Section 77 of the Act deals with the commencement of the proceedings

before the Employees State Insurance Court. It is open for any employer, i.e., the establishment or the factory to make such application before the E.S.I.Court within a period of three years from the date on which the cause of action arose. In respect of the claim to be made by the Corporation before the E.S.I Court for recovering contributions from the principal employer, as the case may be, such claims by the Corporation have to be made within a period of five years. Therefore, the limitation stipulated to approach the E.S.I.Court by the Corporation is five years and the other applications i.e., by the employer, who is liable to make contribution in respect of his shop, establishment or factory is three years from the date of the cause of action.

12. Therefore, the contention raised by the learned Counsel appearing for the petitioner establishment that the demand made by the E.S.I Corporation after a lapse of five years is untenable as Section 77(1)(a) and (c) proviso relates to the limitation stipulated to approach the E.S.I. Court by the respondent Corporation but not the said period of five years to demand or recover E.S.I. contributions.

13. u/s 96 of the Act, the State Government is empowered to make certain rules. u/s 97 of the Act, the respondent Corporation is empowered to make certain regulations. Therefore the regulations made by the Corporation are having statutory course of law. Under Regulation 10(b) of the Act, the employer of the factory or establishment shall register his factory under the Shops and Establishments Act, for filing declaration of registration, in writing, in Form No. 1. Regulation 32 of the Act states that every employer shall maintain a register in Form-7 in respect of every employee engaged by the immediate employer and submit the same to the principal employer before the settlement of any amount payable under Sub-section (1) of Section 41 of the Act. u/s 32(2) of the Act, every employer shall preserve every register maintained under this regulation, after it is filled, for a period of five years from the date of last entry therein.

14. Based on the rival contentions, the E.S.I Court considered the following points:

- (1) Whether the petitioner is a shop or not?
- (2) Whether the part of the claim is barred by time?
- (3) From what date the petitioner has to pay the contribution in the event of this Court holding that it is liable to be covered?

15. On point No. 1, the Court, based on the judgments of various High Courts, and the Apex Court, held that the petitioner is a "shop" and the petitioner's establishments at Hyderabad and Mumbai are covered u/s E.S.I. Act, as they are shops. There is no dispute with regard to the principle as decided by the Apex Court, that the petitioner establishment comes within the meaning of the "shop" and therefore, the petitioner establishment is covered under the E.S.I. Act and liable to pay contributions.

16. Insofar as Point No. 2 is concerned, the E.S.I.Court held that part of the

claim contended by the respondent Corporation is not barred by limitation and accordingly, held against the petitioner establishment. But, insofar as point No. 3 is concerned, it is stated that a Division Bench of this Court in Hyderabad Race Club Vs. ESI Corporation, , held that the Hyderabad Race Club is a shop as per the expanded definition of the shop as decided by the Supreme Court for the first time in Hindu Jea Band, Jaipur Vs. Regional Director, Employees' State Insurance Corporation, Jaipur, and therefore, the provisions of the Act shall be applied from 1987, i.e. from the date of the judgment of the Apex Court only to the establishment which comes in the expanded definition of a "shop". So, power has to be given to the petitioner. Accordingly, the petition filed by the petitioner was allowed in part giving directions that the petitioner establishments at Hyderabad and Mumbai come within the definition of the "shop" and the petitioner has to pay contribution to the employees coming within the definition of the "employee", under the Act. Taking the wage limit into consideration from time to time, it is further directed that the petitioner has to pay the contribution from 01-01-1987. It is further held that the inspector of the Corporation, having jurisdiction over the petitioner establishment, shall visit the petitioner's office within one month and after giving advance intimation, the petitioner establishment shall place all the records before the said Inspector. The Inspector shall then decide the names of the employees who have to be covered by the Act and for what period. The period for which the same employees work at project site should be excluded. Both the parties can approach the Court for clarification, if any.

17. The grievance of the E.S.I. Corporation is only with regard to the prospective effect to pay the contribution from 01-01-1987 as directed in direction No. 2 by the E.S.I Court. There is no dispute that the State of A.P. issued notification in exercise of its powers under Sub-section (5) of Section 1 of the Act, expanding the areas in which the establishments are situated in the State of A.P. and the class of establishments, such as hotels, restaurants, shops, cinema theatres including newspaper shops etc., vide G.O.Ms.No. 788, dated 25-09-1974.

18. There is no dispute that the petitioner establishment comes within the meaning of "shop" as held by the Apex Court in Hindu Jea Band's case (2nd supra). In the said decision, it was the case of M/s. Hindu Jea Band that the place of a firm carrying on the business of playing music on occasions, such as, marriages and other social functions is not liable to pay contributions under the provisions of the Act and therefore, filed a petition u/s 75 of the Act before the E.S.I.Court. But, the said contention was rejected by the E.S.I. Court directing the petitioner company therein to pay the ;amounts which had been computed as arrears by the E.S.I.Corporation. Appeal was filed before the High Court of Rajasthan which was dismissed. As against which, a SLP was filed before the Apex Court. The Apex Court held that a notification was issued on 20-9-1975 covering certain establishments u/s 1(5) of the Act, therefore, the petitioner firm therein comes within the purview of the "shop" from 26-10-1975 from the appointed date i.e., 20-9-1975. The contention, that there was no sale of any

goods in the place of his business, but was not only engaged in playing music on occasions such as marriages etc., and therefore, the said petitioner firm cannot be called as a shop, was disagreed by the Apex Court and held that the petitioner comes within the meaning of "shop" as per the notification issued u/s 1(5) of the Act. Accordingly, the Apex Court dismissed the petition. Merely, because the Apex Court dismissed the SLP on 20-01-1987, it cannot be said that the petitioner establishment herein has a legal liability to pay contribution from the date of judgment of the Apex Court, as there is statutory liability on the part of the petitioner establishment to pay the contributions from the notified date or from the date of establishment of its shop at Hyderabad and Mumbai. Therefore, the directions issued by the E.S.I.Court in E.I.C.No. 27 of 1996 on 04-05-1998 is set aside and the appeal filed by the E.S.I.Corporation in C.M.A.2115 of 1999 is liable to be allowed.

19. Insofar as the contention of the petitioner establishment that the claim of the respondent Corporation is barred by time as contemplated u/s 77(1)(a) and (b) of the Act and the petitioner establishment is liable to pay the contribution for a period of five years prior to the demand notice and in support of his contention, the learned Counsel relied on a judgment of this Court in *E.I.D. Parry (India) Ltd. Vs. Employees" State Insurance Corporation and Another*, wherein a learned Judge of this Court while considering the proviso to explanation of Sub-section (1-A) of Section 77 of the Act held that the Corporation can make a claim in respect of arrears due only for the period of five years prior to the date of the demand and those arrears can only be recovered as amounts of the land revenue u/s 45B of the Act. Quite contrary to the said judgment, the learned Counsel appearing for the respondent Corporation relied on a judgment of a learned single Judge of this Court in A.A.O.No. 215 of 1992 dated 11-09-2002, which is subsequent to the said judgment. In the latter judgment after considering elaborately and in view of the Division Bench of Madras High Court in *Regional Director, ESI Corporation v. Henry Woleey & Co., 1999 (2) LW 762 (D.B.) (Madras)*, held that the limitation applies only in case the Corporation approaches the ESI Court by filing an application in which event the claim cannot be made beyond five years, but if the arrears are arrived at, by taking recourse to Section 45A of the Act, what is required is that a notice has to be issued calling upon the employer to furnish the details and thereafter the liability of the employer is determined which can be challenged u/s 75 of the Act. A similar finding of the E.S.I. Court that the demand made prior to five years of the notice was held to be unsustainable and the notice issued u/s 45A of the Act pursuant to which the recovery proceedings were initiated in which event the limitation prescribed u/s 77 of the Act does not arise. Thus, the similar finding of the E.S.I Court that the claim is barred by limitation is wholly unsustainable in law.

20. Therefore, in view of the judgment, I am not inclined to accept the earlier judgment of the learned single Judge of this Court in A.A.O.No. 215 of 1992, dated 11-09-2002. Even other wise, Chapter 6 of the Act deals with adjudication of disputes and claims. As already held, Section 77 of the Act deals with

commencement of the proceedings and limitation to make claim before the E.S.I. Court by the employer as well as the Corporation, therefore, there is no limitation to make the claim and for recovery of the proceedings but the limitation applies for the purpose of approaching the E.S.I. Court by the Corporation within a period for five years alone.

21. Accordingly, C.M.A.No. 2115 of 1998 filed by the Corporation is allowed and the appeal filed by the petitioner establishment in C.M.A.No. 1506 of 1998 is dismissed. No order as to costs.