

(2007) 08 BOM CK 0103
In the Bombay High Court
Case No : First Appeal No. 394 of 1988

The Assistant Regional Director, Employees State Insurance Corporation APPELLANT

Vs

Kolhapur Motor Malak Sangh Limited RESPONDENT

Date of Decision : 02-08-2007

Acts Referred:

Employees State Insurance Act, 1948 — Section 1(5), 2(12), 2(9), 38, 75

Citation : (2007) 6 ALLMR 673 : (2007) 5 BomCR 493 : (2007) 109 BOMLR 1651 : (2007) 115 FLR 563 : (2008) 1 LLJ 735 : (2007) 6 MhLj 333

Hon'ble Judges : V.M. Kanade, J

Bench : Single Bench

Advocate : H.V. Mehta, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

V.M. Kanade, J.—Heard the learned Counsel appearing on behalf of the appellant. None appears on behalf of the respondent company though it was served. Mr. Mehta, the learned Counsel appearing on behalf of the appellant submits that though the respondent has been served, the respondent has never appeared on earlier occasions when the matter was heard. This First Appeal is of 1988 and though the respondent has been served, respondent has not chosen to appear in this Court. Hence, there is no option for this Court but to decide the First Appeal after hearing the submissions made by the learned Counsel appearing on behalf of the appellant.

2. The short question which arises in this First Appeal is regarding the applicability of the Employees State Insurance Act, 1948 (hereinafter referred to as "the Act") to the petrol pumps owned by the respondent company.

3. Brief facts which are relevant for the purpose of deciding this appeal are as under:

4. Respondent was running two petrol pumps; one at Pune Bangalore Highway

and the other at Kolhapur viz. Shivaji Udyamnagar Petrol Pump. It is the case of the appellant that the two branches were liable to be clubbed together in view of the provisions of Section 2(12) of the Act. The Employees State Insurance Inspector visited the respondent company and the respondent company was called upon to make payment of contribution towards the ESI Scheme with effect from 01/09/1963 to 01/06/1977. This demand was received by the respondent company on 17/03/1982. It is the case of the respondent company that it was not liable to pay any contribution prior to 01/01/1977 and that there was no functional integrity between the two units and, therefore, they could not have been clubbed together. The appellant filed its written statement justifying its action.

5. Accordingly, the case was heard on the application u/s 77 read with Section 75 of the Act before the competent authority under the Act, who, having heard both sides, came to the conclusion that the provisions of the said Act were applicable to the Pune Bangalore Petrol Pump only and that they were not applicable to Shivaji Udyamnagar Petrol Pump at Kolhapur. It further held that the appellant Corporation was entitled to claim contribution from 01/01/1977 in respect of its Unit situated at Pune Bangalore road. Being aggrieved by the aforesaid order, the appellant has preferred this appeal u/s 82 of the said Act.

6. The learned Counsel appearing on behalf of the appellant submitted that the Trial Court had erred in holding that the said two Units were separate. He submitted that the Trial court had not taken into consideration the admission which was given by the Managing Director of the respondent company wherein he had admitted that the salaries of employees working at both the Units were paid by the respondent company and that the accounts of both the Petrol Pumps were consolidated while preparing the balance sheets of the company. He further admitted that though the profit and loss accounts were drawn separately, later on, they were consolidated. The learned Counsel for the appellant further submitted that the Trial Court also did not consider the evidence which indicated that both the Petrol Pumps have purchased their spare parts from the Head Office and the raw material and petrol was also purchased by the company and, thereafter, it was sold at respective shops. He submitted that in view of the provisions of Section 2(12) of the Act, even Branches of the company fell within the definition of "shop" as defined u/s 1(5) and 38 of the said Act. He submitted that the evidence on record indicated that there was a functional integrity between the two Units.

In support of the said submission, the learned Counsel for the appellant relied upon the Division Bench Judgment of Kerala High Court in E.S.I.C. Vs. New India Maritime Agencies, . He also relied on the judgment of the Apex Court in the case of M/s. Southern Agencies, Rajamundry Vs. Andhra Pradesh Employees State Insurance Corporation, . He submitted that the Trial Court erred in relying on the judgment in the case of Narottamdas Bhau v. Regional Director, Employees' State Insurance Corporation, Bombay⁵ reported in (1979) Mh LJ

641. He submitted that, in the said case, it was held that two Units working in different places could not be treated as one factory unless the nexus was established between the two. He submitted that, in the facts of the present case, it was established by the appellant that there was a functional integrity between the two Units. He submitted that the Trial Court had wrongly relied on this judgment.

7. In the present case, the appellant Corporation, in my view, has established that there is a functional integrity between the two Petrol Pumps in view of the clear admission given by the Managing Director of the respondent company and in view of the documentary evidence which clearly established the fact that the two Units were, in fact, being controlled by the Head Office of respondent company. In my view, ratio of the judgment of the Apex Court in the case of M/s. Southern Agencies (supra) would squarely apply to the facts of the present case. The Apex Court while considering the scope of the expression "shop" has held that the word "shop" had acquired an expanded meaning. In the present case also, the respondent admittedly supervises and controls the sales in all its branch offices and takes share of their income. Both the Petrol Pumps, therefore, in my view, constitute a single entity. The ratio of the judgment of the Apex Court is, therefore, squarely applicable to the facts of the present case. Similarly, Division Bench of the Kerala High Court in its judgment in the case of New India Maritime Agencies (supra) has considered the expression "shop" and has considered whether all branches can be put together and treated as one Unit and has laid down that on the basis of the evidence if it could be established that two Units were functioning under the supervision and control of the Head Office then they could be treated as one Unit. It would be fruitful to see the observations made by the Division Bench of the Kerala High Court in its judgment in the case of New India Maritime Agencies (supra) in para 5 which reads as under:

5. The coverage for all employees whether they be employees in factories or employees in establishments is by reason of Section 38 of the Act, provided the factories or establishments are those to which the Act applies. The definition of "employee" in Section 2(9) of the Act takes in persons employed for wages not only in an establishment or factory but also in connection with the work of an establishment or factory. By Amendment Act 44 of 1966 incorporating an inclusive clause in the definition of the term "employee" even those employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or engaged in activities such as purchase or sale were sought to be included. At one time it had been contended in courts that despite the broadening of the definition of the term "employee" by the Amendment Act the coverage under the Act would not extend to employees other than those who were working in the premises of a factory or establishment. Such an approach was sought to be supported by reference to Section 38 which provides for insurance under the Act. That limits such insurance to employees in factories or establishments. It was, therefore, said that notwithstanding the wide scope of the definition of the term "employee" in

Section 2(9) as well as "factory" in Section 2(12), Section 38 must be read as limited to persons working "in" factories or establishments. In other words it would apply only to persons working in factories or establishments which in turn would mean that only employees working in the premises or precincts of factories or establishments would be covered by the Act. A Division Bench of this Court had occasion to notice this contention in the decision in *Regional Rubber E.S.I. Corporation, Trichur v. Ruby Rubber Works Ltd.* ILR (1974) Ker. 536. This Court expressed the view that the term "in" in Section 38 was not intended to indicate the nexus between the employees and the factory by mere location. It was not the physical presence in the factory premises or working in the factory premises that was postulated, but a rational connection between the factory and the employment.

The ratio of the said judgment, in my view, therefore, clearly applies to the facts of the present case. The Trial Court, therefore, in my view, clearly erred in coming to the conclusion that since the number of employees working at Shivaji Udyamnagar Unit was less than 20, it was not covered under the Act. The Trial Court, in my view, further erred in holding that there was no functional integrity between the two Units.

8. The impugned order is, therefore, liable to be set aside. The appeal is allowed. The appellant Corporation is entitled to claim contribution from 01/01/1977 in respect of the Unit at Kolhapur viz. Shivaji Udyamnagar Petrol Pump. First Appeal is accordingly disposed of.