

(2000) 09 MAD CK 0032
In the Madras High Court
Case No : C.M.A. No. 1061 of 1995

The Deputy Regional Director, E.S.I. Corporation	APPELLANT
Vs	
M/s. K.A.S. Sons and another	RESPONDENT

Date of Decision : 29-09-2000

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(9)
Factories Act, 1948 — Section 2(12)

Citation : (2000) 4 CTC 537 : (2001) 1 LLJ 934

Hon'ble Judges : D. Murugesan, J

Bench : Single Bench

Advocate : Mr. G. Desappan, for the Appellant; Mr. D. Krishnakumar, for the Respondent

Judgement

1. This civil miscellaneous appeal is directed against the order of the Principal District Judge, Periyar District at Erode (The Employees' State Insurance Court, Erode) made in E.S.I.O.P.No.2 of 1991 dated 13.12.1994. The respondent in the said petition is the appellant herein. The respondents in the present appeal challenged the order of the appellant herein dated 29.7.1991 determining the contribution amount to be paid by the respondents on the ground that the respondents were not given reasonable opportunity and the claim on contribution was without any basis. The E.S.I. Court by order dated 13.12.1994 allowed the petition filed by the respondents.

2. The case of the respondents in the petition filed before E.S.I. Court is that, they are manufacturing wet grinders. The establishment is not a factory defined u/s 2(12) of the Employees' State Insurance Act, 1948 since the establishment has only 5 employees. It was the further case of the respondents that on 21.12.1989, the Insurance Inspector who inspected the premises found 5 persons working whose names were entered in the attendance register. The Insurance Inspector also found one Thangavelu and Ashokkumar reported to be the workers of M/s. Jothi Electro Plating Works and Ramakrishnan and Selvaraj

reported to be the workers of M/s. Sastha Electro Plating Works were found engaged in cutting body plates, bolts, nuts etc., and one Velusamy, a carpenter was also found working in the premises with the assistance of two helper boys by name Ramaswamy and Siva. In view of the above, the Insurance Inspector came to the conclusion that the respondents establishment had 5+7=12 employees and therefore, they are governed by the provisions of the E.S.I. Act. However, the respondents contended that the establishment employed only 5 persons as could be evidenced from the attendance registers maintained on a day-to-day basis. Thangavelu and Ashokkumar are the employees of M/s. Jothi Electro Plating Works. Similarly, Ramakrishnan and Selvaraj are the employees of M/s. Sastha Electro Plating Works. These four employees used to receive their salaries only from their respective employers. When the respondents used to purchase certain materials from the Jothi Electro Plating Works and Sastha Electro Plating Works, they used to send their own employees for the purpose of fabricating, cutting plates and painting them. Similarly, Velusamy is an independent contractor in carpentry. He had the assistance of two helper boys. These employees were not under the supervision and control of the respondents and there was no understanding between these employees and the respondents for payment of any wages. Therefore, the respondents contended that they are not liable to pay any contribution in respect of the employees as the establishment is not a factory and will not come within the provisions of Employee's State Insurance Act, 1948. The respondents also contended that the order of the Deputy Regional Director dated 29.7.1991 was passed without giving any opportunity to the respondents.

3. The appellant herein contended before the E.S.I. Court that in the process of the work, the respondents used to get finished components from other traders and that electro plating work is done by different traders are not true. When the Insurance Inspector inspected the respondents factory, found 12 persons employed and they were actually working in the factory. Therefore, it was informed to the respondents that the establishment will fall within the definition of Section 2(12) of the Factories Act as there were 12 persons employed.

4. As already referred to the E.S.I. Court, on appreciation of the stand taken by the respondents, allowed the petition. The learned counsel for the appellant in the civil miscellaneous appeal contended that these seven employees were actually found employed in the premises of the respondents when the Insurance Inspector visited on 21.12.1989 and these seven employees are treated to be the employees of the immediate employer and therefore, the respondents establishment is also covered under the E.S.I. Act as per Section 2(9)(ii) of the Act. Therefore, the learned counsel contended that the order of the E.S.I. Court holding that the respondents establishment will not come under the E.S.I. Act and setting aside the order of the appellant herein dated 29.7.1991 is not sustainable. In support of the above submission, the learned counsel brought to the notice of this Court, the judgment reported in Regional Director, Employees' State Insurance Corpn., Madras Vs. South India Flour Mills (P) Ltd., and in M/s.

Udipi Hotel Sudha v. Employees" State Insurance Corporation, 1997 (2) LLJ 219.

5. The learned counsel for the respondents would on the other hand contend, that the seven employees in question are not either directly employed by the respondents and there was no supervision or control over their work, they are the employees of their respective employers and there is no question of applicability of the provisions of E.S.I. Act in respect of their establishment as they have employed only 5 persons as could be seen in the attendance register and therefore, the establishment is not a factory as defined u/s 2(12) of the Factories Act. Therefore, the learned counsel for the respondents submitted that the E.S.I. Court has rightly decided the issue and there is nothing for the appellant to agitate the issue in this appeal.

6. Before considering the rival submissions, it would be relevant to refer to Section 2(9) of the E.S.I. Act which reads as follows:-

"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."

7. The submission of the teamed counsel for the appellant is that, the employees in question should be considered as employees as defined u/s 2(9)(ii) of the Act inasmuch as these employees were employed by the respondents through their immediate employer on the premises of the factory. In this connection, the judgments relied upon by the learned counsel could be considered. In the judgment reported in Regional Director, Employees" State Insurance Corpn., Madras Vs. South India Flour Mills (P) Ltd., , the Supreme Court was considering the question as to whether, construction workers putting up new factory buildings and additional factory buildings being casual employees do come within the purview of the Act. The facts were that South India Flour Mills Private Limited engaged in milling wheat into wheat products in its flour mill and the construction of another building in the compound of existing factory for expansion of factory and engaged workmen for such construction on daily wage basis. In another civil appeal, Sri Sakthi Textiles Private Limited expanded its mill

by pulling up of new buildings and, for that purpose, the company employed a large number of workers. In another special leave petition, the company owning a textile mill, employed workers for the construction of additional factory buildings. On the above set of facts, the question that was before the Supreme Court was, as to whether, the workers employed for the construction of additional buildings for the expansion of factories in question are employees within the meaning of Section 2(9) of the E.S.I. Act. The Supreme Court firstly held that these workmen were casual employees. The Supreme Court next found, that the work of construction of additional buildings required for the expansion of a factory must be held to be ancillary, incidental or having some relevance or link with the object of the factory. While deciding, the Supreme Court further held that the expression "work of the factory" should also be understood in the sense of any work necessary for the expansion of the factory or establishment or for augmenting or increasing the work of the factory or establishment. While holding so, the Supreme Court held that such work is incidental or preliminary to or connected with the work of the factory or establishment.

8. The other judgment relied upon by the learned counsel for the appellant reported in *M/s. Udipi Hotel Sudha v. Employees' State Insurance Corporation*, 1997 (2) LLJ 219, a single Judge of this Court while considering a case, where the establishment engaged more than 20 persons, the stand of the establishment was that, the persons employed by them are casuals in the strict sense of its terms and these employees were working through a catering contractor and therefore, they are not governed under the definitions of Section 2(9) of the E.S.I. Act. While considering the said question, the learned Judge after referring to the judgment of the Supreme Court reported in 1986 (2) LLJ 304 as well as another judgment of the Supreme Court reported in 1984 (2) LLJ 475 held that the remuneration paid under the terms of contract of employment had intervals not exceeding two months, is to be considered as wages and the casual employees are also governed by the provisions of the Act.

9. However, in the present case, it is not the case of the appellant that the seven workers in question have been employed by the respondents as casual labourers. All that has been contended by the appellant is that, at the time when the Insurance Inspector inspected the premises of the respondents, he found these seven employees were actually working in the factory. To this, the respondents submitted explanation saying, these seven workers are not employed either by them or they were permitted to carry on their functions within the premises only, on behalf of their employer and there is no supervision, control on the part of the respondents over these employees. The wages are also paid directly by the respective employers to the employees and there was no understanding between the respondents and the employees in question with regard to any payment of wages. Therefore, the employees cannot be considered as casual labourers. Therefore, the judgments referred to by the learned counsel for the appellant will not be applicable to the facts of the present case as the above judgments were with reference to the facts of a case covered in respect of employees u/s 2(9)(i)

of the E.S.I. Act. However, the claim of the appellant in this case is that the employees in question shall be treated as employees as defined u/s 2(9)(ii) of the Act. Therefore, the relevant conditions for applicability of these provisions with reference to these employees has to be determined only with reference to Section 2(9)(ii) of the Act. As already stated by me, in the absence of any control, supervision and also any undertaking for payment of wages on the part of the respondents over these employees and also in view of the fact that these employees are paid wages from their employers and they were permitted to do certain works for fitting and installing of parts purchased by them from the above Jothi Electro Plating Works and Sastha Electro Plating Works. Merely, because of the fact that the employees were permitted to work in the premises of the respondents, these employees cannot be brought u/s 2(9)(ii) of the Act. In this connection, it would be relevant to refer to a judgment of the Supreme Court reported in *Employees State Insurance Corporation v. Premier Clay Products*. The Supreme Court was considering the applicability of the Act in respect of coolies employed by the establishment for loading and unloading of its goods. While considering the said question, the Supreme Court has held as follows:-

"The respondent had hired some casual coolies for loading and unloading of its goods. The work itself was of a sporadic nature. The coolies were available for work to others and in fact on the very day worked for several others who engaged them. In the circumstances, the said coolies cannot even be called casual workmen. Hence, no contribution is payable by the respondent to the Corporation on their behalf."

10. The Supreme Court in the judgment reported in 1978 LAP I.C 1245 while considering the question as to whether who has no statutory obligation to run a canteen or provide a cycle stand but, for the better amenities of his customers and improvement of his business, enters into an arrangement with another to maintain a canteen and a cycle stand and that other employs, on his own, workers in connection with the canteen and the cycle stand, can be held liable for contribution as the principal employer of the workmen although they are engaged independently by the owner of the canteen or the cycle stand held that "merely being employed in connection with the work of an establishment in itself, does not entitle a person to be an "employee". He must not only be employed in connection with the work of the establishment but also be shown to be employed in one or other of the three categories mentioned in Section 2(9). In order to attract the provisions of Section 2(9)(ii) of the Act, it has to be proved that the person has been employed 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. The necessary ingredient is that a person must be 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 the facts of this case, I do not agree with the contention of the learned counsel for the appellant that there was a relationship of any kind between the principal employer and the

employees. Equally, I do not find any control or supervision by the employer/respondents over the employees in question. There is not agreement for payment of wages between the employer and these employees also. In the circumstances, the case of the respondents that the employees in question are workers of the other employers from whom they purchased certain parts for wet grinders, and in the said transaction those employers used to send their men for fitting, cutting etc., and for those purposes, the respondents permitted these employees to work in their premises, has to be accepted. Once in facts, the employees are not the employees of the respondents, the appellant's contention that they were engaged by the respondents through their immediate employer also cannot be accepted. In that view of the matter, the employees in question cannot be brought u/s 2(9)(ii) of the Act. If that be the position in law, I do not find any substantial question of law that arises for consideration in this civil miscellaneous appeal. Accordingly, this civil miscellaneous appeal is dismissed. No costs.