

(2002) 08 KL CK 0029
In the High Court Of Kerala
Case No : MFA No. 575 of 1996 (D)

The Regional Director, E.S.I. Corporation	APPELLANT
Vs	
Fact Engineering Works Palluruthy, Camilles Fabricators and Dipak Constructions	RESPONDENT

Date of Decision : 05-08-2002

Acts Referred:

Employees State Insurance Act, 1948 — Section 1(4), 1(5), 2(12), 2(13), 2(17)

Citation : (2003) 97 FLR 308

Hon'ble Judges : P.R. Raman, J

Bench : Single Bench

Advocate : P. Sankarankutty Nair, for the Appellant; Antony Dominic and Sri. A.M. Shaffique for R1 and K.L. Varghese, for R2 and R3, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Raman, J. 1. This appeal by the Regional Director of the Employees State Insurance Corporation is directed against the judgment in I.C. 106 of 1991 on the file of the E.I. Court, Alappuzha dated 30.11.1995.

2. The appellant herein sought to recover certain amounts of contribution in respect of employees engaged for the work of erection of a new plant, namely, caprolactam plant, in the Petrochemical Division of the Fertilisers And Chemicals Travancore Limited (FACT) Udyogamandal, sometimes in the year 1983.

3. The F.A.C.T. Udyogamandal is a company under the Companies Act. The Company is engaged in varied activities and they have got many divisions which are independent of its own from the other having no functional integrality. Each of such Division is admittedly covered separately, allotting a separate code number by the Employees State Insurance Corporation. Fact Engineering Works is one such division. There is yet another division by name Fact Engineering and Design Organisation shortly known as "FEDO". Besides these two Divisions, a new division by name Petrochemical Division was started sometime in the year

1983 for the manufacture of Ammonium Sulphate and Caprolactam. The erection and establishment of the new Plant was entrusted with FEDO another division of the FACT. The FEDO, in turn awarded the work of construction of this new project to the first respondent namely, the FACT Engineering Works. FACT Engineering Works in turn awarded some part of the work to respondents 2 and 3 herein who engaged their employees. In respect of the employees so engaged by respondents 2 and 3 the question arose as to who is liable to make contribution at the first instance? The appellant herein sought to recover the contribution in respect of the employees engaged by respondents 2 and 3 from the first respondent contending that the first respondent is the principal employer and respondents 2 and 3 are the immediate employers. FEDO, which was entrusted with the work of erection of the plant had sought for a clarification from the E.S.I. Corporation as to whether the workers engaged in the erection work are liable to be covered under the E.S.I. Act. By Ext.P2 letter dated 5.10.1983, the Assistant Regional Director, informed the FACT Engineering and Design Organisation (FEDO) that the employees engaged by the contractors for the erection work of the Caprolactam Plant would not come under the provisions of the E.S.I. Act and the coverage was required only when the Plant commences production. Hence the first respondents contended that since the work was awarded to them by the FEDO and FEDO having been told by the E.S.I. Corporation that the workers engaged in the erection work will not come within the purview of the E.S.I. Act, no contribution is payable by them in respect of the employees engaged for erection work. So contending, they sought for a declaration that the contribution now sought to be recovered from them are illegal and that they are not liable to pay any contribution.

4. The E.I. Court, on the basis of Ext.P2 letter dated 5.10.1983, came to the conclusion that the Corporation is estopped from recovering any contribution in respect of the workmen engaged for the erection work of the Caprolactam Plant from the first respondent as they themselves have taken the stand that no contribution is leviable until commencement of the Plant after trial run. In this view of the matter, the court below found that the assessments consequent on the demand are unsustainable and Exts.P7 and P8 notices issued in Form C.18 and C.19 respectively were set aside.

5. Learned counsel for the Appellant/Corporation contended before me that a letter issued by the Corporation expressing an opinion in the matter will not estop the Corporation from recovering any amount due and payable as per the provisions of the Statute and hence the view taken by the E.I. Court is not sustainable in law. The learned counsel appearing for Respondent No. 1 as well as Respondent Nos. 2 and 3, contended that even before starting the work, a clarification was sought for as to whether the employees would be covered and FEDO who was entrusted with the work of erecting the plant having been told by the Corporation as per Ext.P2 letter that no contribution is leviable in respect of the contract workers until the trial run starts, the Corporation is estopped from contending otherwise, after the lapse of several years. It is true that FEDO

having acted on the basis of Ext.P2 letter and having not recovered any contribution from the employees engaged in the work and employers' contribution from the immediate employer, it will not be possible for them to recover such contribution at a belated stage when the demand itself is made sometimes in 1991. But as per Ext.P7 dated 5.8.1991 provisional assessment has been made demanding contribution for the period relating to 1988-90 and by Ext.P8 dated 10.9.1991 the said amount is sought to be recovered. Therefore, it cannot be said that the period in respect of which notice has been issued as per Ext.P7 is belated.

6. However, the question is as to whether the liability to pay contribution arising under the Statute could be denied and is there any estoppel on the part of the Corporation to recover the contribution in view of their earlier stand expressed in Ext.P2 letter?

7. Ext.P2 letter is not issued by virtue of any power under the Statute. There is no provision in the Act or Rules enabling an authority to give any such clarification. On the other hand, the power to grant exemption is specifically dealt with u/s 87 of the Employees State Insurance Act. Section 87 of the E.S.I. Act reads as follows:

"Exemption of a factory or establishment or class of factories or establishments-- The appropriate Government may, by notification in the Official Gazette and subject to such conditions as may be specified in the notification, exempt any factory or establishment or class of factories or establishments in any specified area from the operation of this Act for a period not exceeding one year any may from time to time by like notification renew any such exemption for periods not exceeding one year at a time."

8. Therefore, if contributions are leviable and the establishment is coverable, then the only provision under which exemption could be granted is u/s 87 of the Act. It is nobody's case that Ext.P2 letter have the force of granting any such exemption and even otherwise it can be seen that the power of granting exemption rests with the Government and that too, only for a limited period of one year at any particular time. As per Section 1(4) of the E.S.I. Act, the Act applies to all factories including factories belonging to Government other than seasonal factories. The word "factory" is defined u/s 2(12) of the Act which reads as follows:

"factory" means any premises including the precincts thereof--

(a) whereon 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 (35 of 1952) or a railway running shed;"

9. Section 1(5) of the Act enables the Government after following the procedure prescribed thereunder to issue a notification in the Official Gazette extending the provisions of the Act or any of them to any other establishment or class or establishments, industrial, commercial, agricultural or otherwise.

10. Therefore, if it is a factory falling within the definition of the term "factory" employing the required number of employees then, even at the first instances, it will be covered under the provisions of the Act. In respect of other establishments, the same can be brought under the purview of the Act by issuing a notification. Therefore, by the enforcement of the provisions contained in the Act, if an establishment is liable to be covered as falling within the definition clause contained in Section 2(12) of the Act or by a notification issued u/s 1(5), then any letter issued as in this case Ext.P2, cannot legally preclude the Corporation from recovering contribution in respect of such factory or establishment, as the case may be. In the absence of any power to issue any such letter regarding coverage of the establishment, such a letter can at best be considered only as an opinion rendered by the Corporation, but it cannot operate against the Statute. It is well settled principle that there cannot be any estoppel against the Statute. In such circumstances, the view taken by the E.I. Court that by virtue of Ext.P2 letter the appellant is estopped from recovering the contribution does not appear to be legally sustainable.

11. However, the matter does not end there. Admittedly, the appellant wanted to rope in the first respondent as the principal employer and contended that respondents 2 and 3 are the immediate employers. The word "principal employer" is defined in Section 2(17) of the Act as follows:

"principal employer" means--

(i) in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under [the Factories Act, 1948 (63 of 1948)], the person so named;

(ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed the head of the Department;

(iii) in any other establishment, any person responsible for the supervision and control of the establishment;"

12. From the above definition, it can be seen that in order to satisfy the definition of the term "principal employer" in respect of a factory, he should either be the owner or occupier of the factory or he could be the managing agent of such owner or occupier or legal representative of the deceased owner or

occupier and even the manager under the Factories Act can be termed as "principal employer" and in the case of an establishment under the Government, the authorities specified by the Government in this behalf and in the case of other establishment, the person responsible for the supervision and control of the establishment. Therefore, it can be seen that a principal employer need not necessarily be the occupier but even an officer or the manager of the factory or the person responsible for the control of the establishment can satisfy the term "principal employer". Section 2(13) of the Act defines "immediate employer" as follows:

"immediate employer", in relation to employees employed by or through him, means a person who has undertaken the execution, on the premises of a factory or an establishment to which this Act applies or under the supervision of the principal employer or his agent of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment, and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer [and includes a contractor]"

13. From the above definition, it can be seen that the "immediate employer" is always in relation to the employees employed by or through him who has undertaken the execution or work on the premises of a factory or an establishment to which the Act applies. Section 40(1) of the E.S.I. Act imposes on the "principal employer" the duty to pay contribution in respect of every employee whether directly employed by him or by or through an "immediate employer" both employer's contribution and employee's contribution. As per Section 40(2) the principal employer is enable to recover contribution in respect of employees directly employed by him from out of the wages payable by him. Section 41(1-A) imposes a duty on the part of the immediate employer to maintain registers of employees employed by or through him and to submit the same to the principal employer before settlement of any amount payable under Sub-section (1). The immediate employer is also entitled to deduct the contribution payable in respect of the employees employed by him if such deduction has been made and paid by the principal employer.

14. From the above provisions, it can be seen that the ultimate liability to pay contribution always rests with the immediate employer namely, the master in respect of the contribution payable by him towards the employees engaged by or through him. So however, the Corporation is enabled to recover the contribution at the first instance from the principal employer. Thus, as respect the contribution payable by an immediate employer in respect of his employees working in the premises of a factory or establishment of another who falls within the definition of the term "principal employer" a safeguard is provided that the principal employer who ultimately expends the amount is required to meet the

liability in the first instance and he is entitled to recover the amount of contribution so paid by him from the immediate employer, either by deduction from any amount payable to him by the principal employer under any contract or as a debt payable by the immediate employer. Therefore, the concept of a principal employer introduced in the Act is merely to safeguard the interest of the employees in the matter of payment of contribution. That does not make the principal employer a master of the employees engaged by the immediate employer. In other words, the ultimate liability rests with the master as far as the servants employed by him is concerned. Therefore, one has to see whether the first respondent satisfies the definition of the term "principal employer" in this case.

15. Admittedly, the work is carried on in the premises of the new Division namely Petrochemical Division of the FACT which by this name is already a covered establishment allotting a separate code. Therefore, the work that is entrusted with the FEDO and in turn which has been entrusted by the FEDO to the first respondent is the work in respect of the new Division and the work is also done in the premises of the new Division. Therefore, the first respondent herein is neither the owner nor the occupier of the factory in respect of the new Division. Nor is he the manager or a person responsible for the supervision and control of the establishment namely, the Petrochemical Division. In that view of the matter, I find that the first respondent herein will not satisfy the definition of the term "principal employer". Since recovery sought to be made against the first respondent is only in the capacity as the "principal employer", the recovery sought against the first respondent is only to be held as unwarranted by the provisions of the Act.

16. In this view of the matter the conclusion reached by the court below that Exts.P7 and P8 are liable to be set aside stands confirmed, though for different reasons, as stated above. Since the Corporation has proceeded to recover the amount from the first respondent only in his capacity as "principal employer" no other question arises for consideration. In such circumstances, the appeal fails and is dismissed.