

(2002) 05 DEL CK 0019
In the Delhi High Court
Case No : CWP 2736 of 2002

Tirath Ram Ahuja (Pvt.) Limited and Another	APPELLANT
Vs	
Delhi Administration and Others	RESPONDENT

Date of Decision : 31-05-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)
Employees State Insurance (Amendment) Act, 1966 — Section 32
Employees State Insurance (General) Regulations, 1950 — Regulation 10B
Employees State Insurance Act, 1948 — Section 1(5), 2(12), 3, 44, 44(2)

Citation : (2002) 95 FLR 1080 : (2003) 1 LLJ 64

Hon'ble Judges : S.B. Sinha, C.J.; A.K. Sikri, J

Bench : Division Bench

Advocate : S.N. Bhandari and Rakesh Kumar, for the Appellant; V.K. Shali, for Respondent No. 1, Geeta Luthra and Deepak Bharti for Respondents No. 2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, C.J.—The virus of Sub-section (5) of Section 1 of the Employees State Insurance Act, 1948 (hereinafter called and referred to for the sake of brevity as "the said Act") is in question in this writ petition.

2. The writ petitioner herein has also questioned an order dated 26th/28th December 2001 issued by the Regional Director of the Employees State Insurance Corporation whereby and whereunder its establishment was held to be covered under the provisions of the said Act as also a notice dated 30th January 2002 in terms whereof the petitioner has been directed to deposit a sum of Rs. 11,61,875.00.

FACTS 3. The petitioner is a company incorporated under the Companies Act. It carries on business as a construction contractor.

4. According to the petitioner, as neither at its registered office nor at construction sites any manufacturing activity is carried out, it does not come

within the expression "factory" as occurring in Section 2(12) of the Act. It allegedly has employed less than 20 persons in its office. It has been contended that the office of the company is not a "shop" inasmuch as there does not exist any go-down nor any stock is stored therein far less any sale or purchase is carried on from the said premises nor any services there from are rendered to any customer.

5. Admittedly, at the relevant point of time, the petitioner had construction sites at the following places:

- 1) Nehru Place,
- 2) Rajendra Place, and
- 3) Lodhi Road.

6. The petitioner would contend that by reason of Sub-section (5) of Section 1, Section 45A of the Act and Regulation 10B of the Employees State Insurance (General) Regulations, 1950 (hereinafter called as "the Regulations"), unguided, unbridled and naked power has been delegated upon the executive, pursuant to or in furtherance whereof, the Government had been vested with powers of specifying such establishment, as it may pick out, to be brought within the purview thereof.

7. On 25.5.1987 efforts of ESI Corporation to cover one of the sites i.e. Centaur Hotel of the petitioner company, as "factory" were proved to be abortive due to intervention of ESI Court in petitioner's favor. On 27.11.1989 after issuance of impugned notification dated 30.9.1988, the ESI Corporation again tried to cover establishment of the petitioner company as "factory". However, after exchange of correspondence between the petitioner and the Corporation, the Corporation vide its letter dated 27.11.1989 admitted that the establishment of the petitioner company was not a factory and in fact ESI Corporation was not going to cover it as factory either u/s 2(12) or 1(5) of the ESI Act. On 5.1.1998 the Insurance Inspector issued notice for inspection on 13.1.1998. The said Inspector was allegedly fully co-operated by the petitioner company in exercise of her functions and discharging of duties and no impediment or obstruction was created. The records of the petitioner company were shown to her. Correspondences were exchanged between the petitioner and the ESI Inspector and a Survey Report dated 6.2.1998 was also prepared by the ESI Inspector. On 6.3.1998 despite the fact that the petitioner company did not come within the purview of coverage of the Act and the Scheme, ESI Corporation allotted a Code Number to it. There against ,on 17.3.1998 petitioner company made representation whereby it objected to the said stand of the ESI Corporation. Thereafter, on 13.4.1998 petitioner company also sent a legal notice to the Corporation. On 28.9.2001 allegedly, after sleeping for about two and half years, the ESI Corporation woke up and abruptly, without application of mind, requested the petitioner to submit the Returns of Contributions for Contribution period ended March 2001. This letter was suitably replied by the petitioner vide its letter dated 22/23.11.2001.

On 4/8.10.2001, Deputy Director of ESI Corporation for the first time replied to petitioner's letter dated 17.3.1998 and Legal Notice dated 13.4.1998 and also directed the petitioner to show cause u/s 44(2) of the ESI Act on 24.10.2001. The petitioner company supplied the requisite documents to the Deputy Director of the ESI Corporation and also showed cause. On 26/28.12.2001 Regional Director of ESI Corporation rejected all contentions of the petitioner and vide his impugned order dated 26/28.12.2001 replied that the establishment of the petitioner was covered under the ESI Act by virtue of Notification issued on 30.9.1988. On 22.1.2002 the petitioner company again clarified the purported illogical conclusions of the Regional Director of the Corporation. Regional Director asked the petitioner company to present its case before him on 24.1.2002 at 3 PM. However when the chief accountant of the petitioner reached the office of the Regional Director, it transpired that he was not available in the office and had gone for some meeting. Therefore, the Chief Accountant of the petitioner sought for another opportunity of personal hearing to present the case before the Regional Director but no opportunity whatever was granted. On 30.1.2002, Deputy Director of the ESI Corporation issued the impugned notice to show cause dated 30.1.2002 to the petitioner. In terms of the said notice, a sum of Rs. 11,61,875.00 was computed on ad-hoc basis as contributions for the period from 1.11.1997 to 31.12.2001. On 26.2.2002 cause was shown to the Deputy Director of the Corporation and reply dated 25.2.2002 was filed. On 22.3.2002 Deputy Director of the Corporation, without appreciating the facts stated by the petitioner company, passed the impugned order and confirmed the ad hoc assessment. By means of the impugned order Deputy Director of the Corporation directed the petitioner company to pay contributions amounting to Rs. 11,61,875.00 for the period from 1.11.1997 to 31.12.2001 along with interest @ 15% per annum within 15 days and has threatened to recover the same as arrears of Land Revenue.

SUBMISSIONS: 8. Mr. Bhandari, learned senior counsel appearing on behalf of the petitioner would argue that Sub-section (5)(of Section 1, Section 45A of the Act and Regulation 10B of the Regulations are ultra virus the Constitution of India inasmuch as by reason thereof, the appropriate Government, without any guidelines whatsoever, may extend the provisions of the said Act irrespective of the nature of business, financial capacity, length of period or such other relevant factors. The learned counsel would contend that from several notifications, it would appear that categories of the establishments had been mentioned therein to bring the same within the purview of the provisions of the said Act but by reason of the impugned notifications, all establishments have been brought within the purview thereof without classifying the nature of business, financial capacity, length of period of business and thus the same must be held to be ultra vires.

9. According to the learned counsel, "go-down" would not come within the purview of definition of "shop" nor the many offices of the petitioners would come within the purview thereof. The learned counsel would contend that for the

self-same reasons, Section 45A of the Act and Regulation 10B of the Regulations must also be declared ultra vires. Strong reliance in this connection has been placed on Hamdard Dawakhana and Another, Kalipada Deb and Another, Lakshman Shripati Itpure @ Lakshman Shripati Impore and A.B. Choudhri and Another Vs. The Union of India (UOI) and Others, .

10. According to the learned counsel, by reason of the impugned order dated 26th/28th December 2001, it had incorrectly been held that the employees working in the company's branch office or godown are covered within the meaning of provisions of the said Act and consequently the notice of demand dated 30th January 2002 must also be held to be illegal.

FINDINGS: 11. Sections 1(5), 45A of the Act and Regulation 10B of the Regulations read thus:

1. Short title, extend, commencement and application.-(5) The appropriate Government may, in consultation with the corporation and where the appropriate Government is a State Government, with the approval of the Central Government, after giving six months' notice of its intention of so doing by notification in the Official Gazette, extend the provisions of this Act or any of them, to any other establishment or class of establishment, industrial, commercial, agricultural or otherwise:

Provided that where the provisions of this Act have been brought into force in any part of a State, the said provisions shall stand extended to any such establishment or class of establishments within that part if the provisions have already been extended to similar establishment or class of establishment in another part of that State.

"45A. Determination of Contributions in certain cases.-(1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of Section 44 or any Inspector or other official of the Corporation referred to in Sub-section (2) of Section 45 is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties u/s 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment:

Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard.

(2) An order made by the Corporation under Sub-section (1) shall be sufficient proof of the claim of the Corporation u/s 75 or for recovery of the amount determined by such order as an arrear of land revenue u/s 45B or the recovery under Sections 45C to 45I.

10B. Registration of Factories or Establishment.-(a) The employer in respect of a

factory or an establishment to which the Act applies for the first time and to which an Employer's Code Number is not yet allotted and the employer in respect of a factory or an establishment to which the Act previously applied but has ceased to apply for the time being, shall furnish to the appropriate Regional Office not later than 15 days after the Act becomes applicable, as the case may be, to the factory or establishment, a declaration for registration in writing in Form 01 (hereinafter referred to as Employer's Registration Form).

(b) The employer shall be responsible for the correctness of all the particulars and information required for and furnished on the Employer's Registration Form.

(c) The appropriate Regional Office may direct the employer who fails to comply with the requirements of paragraph (a) of this regulation within the time stated therein, to furnish to that office Employer's Registration Form duly completed within such further time as may be specified and such employer shall thereupon comply with the instructions, issued by that office in this behalf.

(d) Upon receipt of the completed Employer's Registration Form, the appropriate Regional Office shall, if satisfied that the factory or the establishment is one to which the Act applies, allot to it an Employer's Code Number (unless the factory or the establishment has already been allotted an Employer's Code Number) and shall inform the employer of that number.

(e) The employer shall enter the Employer's Code Number on all documents prepared or completed by him in connection with the Act, the rules and regulations and in all correspondence with the appropriate office.

12. The said Act was enacted to provide for certain benefits to employees in case of sickness, maternity and employment injury and to make provisions for certain other matters in relation thereto. The said Act, at the first instance, was to apply to all factories other than seasonal factories. By reason of Sub-section (5) of Section 1, the Appropriate Government has been conferred with the power to extend the provisions of the said Act or any one of them to any other establishments or class of establishments, industrial, commercial, agricultural or otherwise in consultation with the Corporation and where the Appropriate Government is a State, with the approval of the Central Government and upon giving six months' notice of its intention of so doing by notification in the Official Gazette.

13. There cannot be any doubt or dispute that the legislature, by reason of such a provision, can delegate its power to an appropriate Government for extending the provisions of the Act. How far and to what extent the provisions of the Act are to be extended, is a matter of legislative policy. In exercise of its power under Sub-section (5) of Section 1 of the Act, the Appropriate Government exercises a legislative function and not an executive function. The court, in exercise of its power of judicial review could only interfere therewith if such a provision was held to be arbitrary and thus hit by Article 14 of the Constitution of India. Except in a case where the principles of *Wednesbury* unreasonableness is

attracted, the court would not interfere with any policy decision of a statutory authority, far less a legislative policy.

14. The contention of Mr. Bhandari to the effect that no guideline has been provided in terms of the said provision is stated to be rejected. The opinion which is required to be formed by the Appropriate Authority in such matters would be upon consideration of all relevant factors. Not only prior to exercise of the said power, the Appropriate Government is required to give six months' notice of its intention to do so, by a notification in the Official Gazette, it has to consult the Employees State Insurance Corporation in relation thereto. Furthermore, in the event the Appropriate Government is the State Government, it is also required to obtain the approval of the Central Government. Sufficient statutory safeguards have thus been provided. In the event, the establishment which would be affected by reason of such an order of extension intends to file an objection, it may do so within the afore-mentioned period of six months which inter alia would have to be taken into consideration by the appropriate authorities.

15. We, Therefore, find no reason as to why Sub-section (5) of Section 1 of the Act should be declared ultra vires.

16. In *Hamdard Dawakhana and Anr. v. Union of India and Ors.* (supra), whereupon Mr. Bhandari has placed strong reliance, the provisions were found to be absolutely vague and ambiguous. By reason of the provisions impugned therein, advertisements in respect of magic remedies were prohibited. Before the Apex Court, the question was raised as to whether Section 3 of the Act wherein it was stated "or any other disease or condition which may be specified in the rules made under the Act", which was impugned therein conferred a power of delegation or conditional legislation. The distinction between a conditional legislation and delegated legislation was pointed out stating:

"29. ...that in the former the delegate's power is that of determining when a legislative declared rule of conduct shall become effective; *Hampton & Co. v. United States*, (1927) US 394, and the latter involves delegation of rule making power which constitutionally may be exercised by the administrative agent. This means that the legislature having laid down the broad principles of its policy in the legislation can then leave the details to be supplied by the administrative authority. In other words by delegated legislation the delegate completes the legislation by supplying details within the limits prescribed by the statute and in the case of conditional legislation the power of legislation is exercised by the legislature conditionally leaving to the discretion of an external authority the time and manner of carrying its legislation into effect as also the determination of the area to which it is to extend..."

It was held:

34 "...In our view the words impugned are vague. Parliament has established no criteria, no standards and has not prescribed any principle on which a particular disease or condition is to be specified in the Schedule. It is not stated what facts

or circumstances are to be taken into consideration to include a particular condition or disease. The power of specifying disease and conditions as given in Section 3(d) must Therefore be held to be going beyond permissible boundaries of valid delegation. As a consequence the Schedule in the rules must be struck down. But that would not affect such conditions and diseases which properly fall within the four clauses of Section 3 excluding the portion of Clause (d) which has been declared to be unconstitutional..."

17. In the instant case, the provisions are absolutely clear and unambiguous.

18. Without referring to a large number of case laws, we may refer to the following passage from Dr. D.D. Basu's Shorter Constitution of India as regard the legal position in relation to conditional and subordinate legislation - permissibility of indicating conditional and subordinate legislation making-

"Conditional and Subordinate Legislation permissible. - But though the Legislature cannot delegate its essential legislative functions, it can entrust the administrative or application of a law to the Executive or some other body. Hamdard Dawakhana and Another, Kalipada Deb and Another, Lakshman Shripati Itpure @ Lakshman Shripati Impore and A.B. Choudhri and Another Vs. The Union of India (UOI) and Others, . Thus, after laying down the legislative policy -

(i) The Legislature may leave it to the judgment of a local administrative body as to the necessity of applying or introducing the Act in a local area; or the determination of a contingency or even, upon the happening of which the legislative provisions are made to operate. Epari Chinna Krishna Moorthy, Proprietor, Epari Chinna Moorthy and Sons, Berhampur, Orissa Vs. State of Orissa, ; M.K. Papiiah and Sons Vs. The Excise Commissioner and Another, ; In Re: The Delhi Laws Act, 1912, the Ajmer-Merwara (Extension of Laws) Act, 1947 and the Part C States (Laws) Act, 1950, ; Bhatnagars and Co. Ltd. Vs. The Union of India (UOI), : Sardar Inder Singh Vs. The State of Rajasthan, . This is known as "conditional legislation".

(ii) The Legislature may lay down the policy of the legislation and then leave to a subordinate body or agency, the power of making rules and regulations for filing in the details to carry out the purposes of the legislation. When legislative power is so exercised by an administrative or other subordinate body, under statutory authority, it is known as "subordinate legislation". On the part of the Legislature, it is delegated legislation, but it is a permissible delegation if it has laid down the policy. On the other hand, it will be unconstitutional as "excessive delegation" if the Legislature abdicates its essential legislative function or power in favor of some other body.

19. In Khoday Distilleries Ltd. and Ors. v. State of Karnataka and Ors. , (1996) 10 SC 304, the law was state din the following terms:

"13. It is next submitted before us that the amended Rules are arbitrary, unreasonable and cause undue hardship and, Therefore, violate Article 14 of the

Constitution. Although the protection of Article 19(1)(g) may not be available to the appellants, the rules must, undoubtedly, satisfy the test of Article 14, which is a guarantee against arbitrary action. However, one must bear in mind that what is being challenged here under Article 14 is not executive action but delegated legislation. The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power. In the case of *Indian Express Newspapers (Bombay)(P) Ltd. v. Union of India*, (SCR at p. 243) this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable; "unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary". Drawing a comparison between the law in England and in India, the Court further observed that in England the Judges would say, "Parliament never intended the authority to make such Rules; they are unreasonable and ultra vires". In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution."

20. The decision of the apex court in *Hamdard Dawakhana* (supra), Therefore, in our opinion is clearly inapplicable in the instant case.

21. The question as to whether a premises is a "shop" or not will depend upon the facts and circumstances of each case. But only because, according to the petitioner, the premises do not come within the purview of definition of "shop", the court would jump to the conclusion that the relevant provisions of the Act are unconstitutional.

22. In *M/s. Kirloskar Consultants Ltd. Vs. Employees' State Insurance Corpn.*, , a business of consultancy service to its consumer was held to come within the purview of definition of shop. The Apex Court held that the word "shop" has acquired as expanded meaning.

23. Yet again in *Christian Medical College v. Employees' State Insurance Corporation*, (2001) 1 SCC 256, the Apex Court held that in a case of this nature, the dominant nature test should be applied.

24. Yet again in *M/s. Southern Agencies, Rajamundry Vs. Andhra Pradesh Employees State Insurance Corporation*, , an administrative office of partnership firm concluding and supervising sales, taking in different branches was held to be covered under the definition of shop.

25. We, Therefore, fail to see any reason as to why Sub-section (5) of Section 1 of the Act can be held to be ultra vires.

26. As has been quoted hereinbefore, by reason of Section 45A of the Act, a power has been conferred upon the authorities to determine contributions of the employer in certain cases.

27. We fail to see as to how such a machinery provision can be said to be ultra virus the Constitution of India.

28. Regulation 10B is merely a procedural provision. We fail to comprehend as to how such a provision can be said to be unconstitutional .

29. So far as the legality of impugned order and the demand notice is concerned, in our opinion, having regard to the provisions contained in Sections 74 and 75 of the Act, the remedy of the petitioner would be to file an appropriate application before the Employees State Insurance Court. Sections 74(1) and 75 read thus:

Section 74. Constitution of Employees" Insurance Court.-(1) the State Government shall, by notification in the Official Gazette, constitute an Employees" Insurance Court for such local area as may be specified in the notification.

Section 75. Matters to be decided by Employees" Insurance Court.-(1) If any question or dispute arises as to-

(a) Whether any person is an employee within the meaning of this Act whether he is liable to pay the employee"s contribution, or

(b) the rate of wages or average daily wages of an employee for the purposes of this Act, or

(c) the rate of contribution payable by a principle employer in respect of any employee, or

(d) the person who is or was the principal employer in respect of any employee, or

(e) the right of any person to any benefit and as to the amount and duration thereof, or

(ee) any direction issued by the Corporation u/s 55A on a review of any payment of dependants" benefit, or

(f) omitted by Act 44 of 1966, Section 32 (w.e.f. 28-1-1968)

(g) any other matter which is in dispute between a principal employer and the Corporation, or between a principal employer and an immediate employer or between a person and the Corporation or between an employer and a principal or immediate employer, in respect of any contribution or benefit or other dues payable or recoverable under this Act. Or any other matter required to be or which may be decided by the Employees" Insurance Court under this Act.

Such question or dispute subject to the provisions of Sub-section (2A) shall be decided by the Employees' Insurance Court in accordance with the provisions of this Act.

(2) Subject to the provisions of Sub-section (2A), the following claims shall be decided by the Employees' Insurance Court, namely:-

- (a) claim for the recovery of contributions from the principal employer;
- (b) claim by a principal employer to recover contributions from any immediate employer;
- (c) omitted by Act 44 of 1966 Section 32 (w.e.f. 28.1.1968)
- (d) claim against a principal employer u/s 68;
- (e) claim u/s 70 for the recovery of the value or amount of the benefit received by a person when he is not lawfully entitled thereto; and
- (f) any claim for the recovery of any benefit admissible under this Act.

(2A) If in any proceedings before the Employees' Insurance Court a disablement question arises and the decision of a medical board or a medical appeal tribunal has not been obtained on the same and the decision of such question is necessary or the determination of the claim or question before the Employees' Insurance Court, that Court shall direct the Corporation to have the question decided by this Act and shall thereafter proceed with the determination of the claim or question before it in accordance with the decision of the medical board or the medical appeal tribunal, as the case may be, except where an appeal has been filed before the Employees' Insurance Court under Sub-section (2) of Section 54A in which case the Employees' Insurance Court may itself determine all the issue arising before it.

(2B) No matter which is in dispute between a principal employer and the Corporation in respect of any contribution or any other dues shall be raised by the principal employer in the Employees' Insurance Court unless he has deposited with the Court fifty per cent. of the amount due from him as claimed by the Corporation:

Provided that the Court may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this sub-section.

(3) No Civil Court shall have jurisdiction to decide or deal with any question or dispute as aforesaid or to adjudicate on any liability which by or under this Act is to be decided by a medical board, or by a medical appeal tribunal or by the Employees' Insurance Court."

30. The jurisdiction of the court, Therefore, is a wide one and interns thereof even the question of applicability of the notification can be questioned.

31. The apex court in Employees' State Insurance Corporation Vs. M/s. F. Fibre

Bangalore (P) Ltd., categorically held:

"The full Bench of the High Court has held that in a case where the order u/s 45-A becomes final, there is no need for the Corporation to seek adjudication before the Insurance Court. In all other cases, the Corporation is required to go to the Insurance Court, have it adjudicated and then make a demand. We are of the view that the Full Bench of the High Court is clearly in error to reach that conclusion. Though Section 75 of the Act does not envisage as to who has to approach the Insurance Court, by necessary implication when the employer denies the liability or applicability of the provisions of the Act or the quantum of the contribution to be deposited by the employer, it is for him to approach the Insurance Court and seek adjudication. It is not for the Corporation in each case whenever there is a dispute, to go to the Insurance Court and have the dispute adjudicated. Otherwise, the Act would become unworkable and defeat the object and purpose of the Act."

32. The said decision has been considered by a Division Bench of the Andhra Pradesh High Court, of which one of us was a member, in *Ashok Leyland Limited, Ductron, Castings Limited, R.R. District Vs. Deputy Tahsildar/Special Revenue Inspector (ESI) Recovery Cell, Collectorate, R.R. District, Hyderabad and another*, wherein upon referring to the afore-mentioned decision of the Apex Court in *Employees' State Insurance Corporation v. F. Fibre Bangalore (P) Ltd.* (supra), it was held:

"5. Having regard to the aforementioned authoritative pronouncement of the Apex Court, we are of the opinion that all questions, including the question of applicability of the ESI Act to the petitioners, can be raised before the Employees' Insurance Court. Therefore, the petitioners should avail the remedies available to them."

"6. The above aspect of the matter was also considered by a Division Bench of Patna High Court in *Shriram bearings Ltd. v. E.S.I. Corporation* (1977 Lab. I.C. 1482, and N.P. Singh, J. as he then was, speaking for the Bench categorically held that even the Courts and Tribunals constituted under the ESI Act, have inherent power to issue appropriate relief by way of injunction to the party before it and it can enforce the orders."

33. For the reasons afore-mentioned, we are of the opinion that the writ petition is not maintainable which is dismissed accordingly and the remedy for the petitioner would be to file an appropriate application before the Employees State Insurance Court, with costs. Advocate's fee is assessed at Rs. 5000/-.