
(2007) 08 AP CK 0060
In the Andhra Pradesh High Court
Case No : CMA No. 2729 of 2003

Venkata Naga Devi Picture Palace

APPELLANT

Vs

ESI Corporation and Another

RESPONDENT

Date of Decision : 17-08-2007

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(9), 75, 75(2B), 76, 77

Citation : (2007) 6 ALD 407 : (2008) 116 FLR 4 : (2008) 1 LLJ 403

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : P. Bhaskar, for the Appellant; P.R.K. Amerandra Kumar, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—The substantial question of law pointed out by the learned Counsel Sri P. Bhaskar, representing the appellant is as hereunder:

Whether the learned Principal Senior Civil Judge, Rajahmundry, had arrived at the correct conclusion in the light of the evidence available on record relating to the number of persons employed by the appellant so as to attract the provisions of the Employees State Insurance Act, 1948.

2. The learned Counsel while making elaborate submissions had taken this Court through the evidence of PWs.2 and 3 and further pointed out to the evidence of PW.1 and would maintain that in the light of this evidence, the workers or the persons who should not have been calculated also had been taken as workers of the appellant as such and this had resulted in the wrong calculation of the employees or the workers and hence the improper appreciation of evidence as such would constitute the substantial question of law as specified u/s 82(2) of the Employees State Insurance Act, 1948, hereinafter in short referred to as Act for the purpose of convenience. The learned Counsel also pointed out to the evidence of RW.1 and Exs.A1 to A7 and Exs.B1 to B6 and had taken this Court

through the findings recorded by the learned Principal Senior Civil Judge, Rajahmandry, in relation thereto.

3. Sri Amarendra Kumar, learned Standing Counsel representing the respondents-Corporation, hereinafter in short referred to as Corporation for the purpose of convenience, made the following submissions:

The learned Counsel had taken this Court through the docket proceedings of the learned Principal Senior Civil Judge, Rajahmandry, and also the respective pleadings of the parties and would maintain that no application praying for permission either to waive or reduce the amount to be deposited under Sub-section (2B) of Section 75 of the Act had been moved nor any order had been made in this regard. The learned Counsel also pointed out that the words "unless he has deposited with Court fifty per cent of the amount due from him as claimed by the Corporation" being mandatory, by virtue of the non-deposit made by the appellant and since Section 75(2B) of the Act had not been complied with, the O.P. itself being incompetent, and the civil miscellaneous appeal also deserves a summary dismissal without going into further merits and demerits of the matter. While further elaborating his submissions, the learned Counsel also pointed out to the evidence available on record and how the said evidence had been appreciated by the learned Principal Senior Civil Judge, Rajahmandry. The Counsel also would contend that the question of number of employees predominantly is a question of fact and on appreciation of evidence, proper findings had been recorded and hence even on merits the civil miscellaneous appeal being devoid of merit, the same to be dismissed. While further elaborating his submissions, the learned Counsel also pointed out that even otherwise the contention of the appellant that in the light of the evidence of PWs.2 and 3, such persons or workers not to be reckoned or computed for the purpose of calculating the number of employees to decide whether the establishment in question would fall within the ambit of the Act or not, cannot be sustained and strong reliance had been placed on the decisions reported in Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation, and C.E.S.C. Limited and Others Vs. Subhash Chandra Bose and Others, .

4. Heard the Counsel and perused the oral and documentary evidence available on record and also the findings recorded by the learned Principal Senior Civil Judge, Rajahmandry.

5. The appellant herein preferred the present civil miscellaneous appeal u/s 82 of the Act being aggrieved of an order made by the learned Principal Senior Civil Judge, Rajahmandry, dated 25.3.2003 in OP No. 263 of 2000. The appellant as petitioner filed the said O.P. on the file of the learned Principal Senior Civil Judge, Rajahmandry, under Sections 75, 76 and 77 of the Act for declaration that the notices dated 16.5.2000, 26.9.2000 and 8.11.2000 issued by the respondent-Corporation to the petitioner as illegal and for the consequential reliefs. The learned Judge, in the light of the respective pleadings of the parties, having appreciated the evidence available on record, PWs.1 to 3 and RW.1 and also

Exs.A1 to A7 and Exs.B1 to B6, came to the conclusion that the appellant-petitioner had employed 20 persons and thus became liable to pay contribution and hence the notices issued by the respondent-Corporation cannot be said to be illegal.

6. The parties hereinafter would be referred to as the petitioner and respondent as shown in OP No. 263 of 2000 aforesaid for the purpose of convenience.

7. The appellant herein as petitioner in the O.P. aforesaid pleaded as hereunder:

The petitioner is a theatre run by a partnership firm. Originally it was covered under E.S.I. Act. When the strength of the employees fell below the statutory minimum, it was de-covered under the Act. The employees' strength never raised to 20 or more subsequently. The E.S.I. Inspector by name K. Ramajogayya visited the petitioner's premises and verified registers and he found the number of employees not more than 19. But he mentioned in his inspection notes that there were 21 employees as on the date of inspection as the Managing Partner could not oblige the demands of the said Inspector. The then Managing Partner refused to acknowledge the visit since the visit note contained wrong entry. Thereafter the petitioner received a show-cause notice on 16.5.2000. There was a reply and further proceedings under the notice dated 16.5.2000, 26.9.2000 and 8.11.2000. The respondents demanded payment of contribution and threatened prosecution in default of paying the contribution. The canteen in the theatre is run by a contractor and his brother. There is one person in soda shop. Even if they are taken into account, the number of employees will not be more than 20. So, the coverage of the petitioner under ESI Act is not correct.

8. The respondents-Corporation in the written statement had taken a specific stand that the said appeal is not maintainable as the petitioner failed to deposit 50% of the amount demanded by the Corporation. It was also pleaded that inspection of records conducted by the Inspector of the Corporation on 22.9.1999 leading to coverage of the establishment is correct. It was also further pleaded that the Inspector of the respondent visited the petitioner-establishment on 22.9.1999 and submitted the report. It was pleaded that as per the said report, the petitioner's establishment is engaged in activity of exhibition of films and employed more than 20 employees for wages on 22.9.1999, and that fact was informed to the petitioner by letter of the respondent dated 29.11.1999. It was further pleaded that the respondent issued a final order dated 25.9.2000 determining the amount of Rs. 30,744/- payable by the petitioner as contribution for the period from 22.9.1999 to 31.3.2000 and also liable to pay interest at 15% p.a. It was also pleaded that the Inspector found 21 persons working including seven contract employees working in the cycle stand, canteen and soda shop. It was further pleaded that the petitioner failed to produce the contractor's record either on 22.9.1999 or on the dates of subsequent visits, and even in his representation dated 20.6.2000 the petitioner failed to furnish the details of the employees employed in the canteen, in the cycle stand and soda shop and

therefore the demands made by the respondents are correct and legal.

9. The learned Judge framed the following point for determination:

Whether the petitioner employed 20 persons and more and became liable to pay contribution, and if the notices issued by the respondents are illegal.

10. The learned Judge, as already referred to supra, appreciated the evidence of PWs.1 to 3, RW.1 and also the documentary evidence - Ex.A1, the show-cause notice in Form-C18, dated 16.5.2000; Ex.A2, office copy of reply, dated 20.6.2000; Ex.A3 the orders of the ESI Authorities, dated 26.9.2000; Ex.A4, notice dated 27.9.2000; Ex.A5 office copy of the letter dated 19.9.2000; Ex.A6 letter dated 28.10.2000 and Ex.A7 show-cause notice dated 8.11.2000, and also the Inspection Report dated 22.9.1999 (Ex.B1); Annexure (Ex.B2); office copy of notice dated 29.11.1999 (Ex.B3); returned covered unserved (Ex.B4); office copy of notice dated 16.5.2000 (Ex.B5) and copy of final order dated 25.9.2000 (Ex.B6), and recorded a positive finding that since the persons employed are more than 20 persons, the appellant-petitioner-establishment is liable to pay the contribution and hence the demand made in this regard cannot be said to be illegal.

11. It is not in serious controversy that the provisions of the Act covered the appellant-petitioner at one point of time, but it appears for sometime the appellant-establishment was not covered by the Act. The ESI Inspector visited the theatre in question in the month of September, 1999. RW.1 had prepared the visitor's note and PW1, the representative of the appellant-petitioner had refused to sign on the ground that it contained incorrect particulars. The inspection note is Ex.B1 and it is stated therein that there are 21 persons employed in the month of September, 1999 and they include 7 persons working under the contractor. The Inspector also verified the Attendance Register and Wage Register and signed in them as per column No. 11 of Ex.B1, and the next date of inspection was fixed on 11.11.1999, but it appears that the Inspector did not visit the appellant-petitioner-establishment again on 11.10.1999 as proposed. The specific stand taken by the appellant-petitioner is that the number of employees are less than 20 and hence the provisions of the Act do not cover the establishment in question. Apart from the evidence of PW.1, the evidence of PWs.2 and 3 also had been appreciated at length. PW.1 deposed about several particulars as averred in the petition. PW.2 is the person, who deposed that he is running a canteen on lease and he is paying daily rent to the theatre and this witness and his elder brother are jointly running the canteen. This witness was cross-examined at length. PW.3 is yet another person, who deposed that he had taken the shop on lease on a monthly rent of Rs. 500/- and he is not an employee under the petitioner-theatre. This witness also was cross-examined. On the strength of the evidence available on record, submissions at length were made that these persons cannot be treated as those falling under the number of employees for the purpose of deciding whether the appellant-establishment would fall within the ambit of the Act or not for the purpose of making

contribution.

12. The evidence of RW1 is clear and categorical and this witness had furnished several details. This witness deposed about Ex.B1, the Inspection Report, and also deposed that PW.1 was present at the theatre at the time of inspection and there were 21 employees in the petitioner-theatre at the time of his inspection and he had counted the workers in the cycle stand and soda shop in the petitioner's theatre and taken them as employees of the petitioner and he asked PW.1 for Wage Register and PW.1 had given him the Wage Register from April, 1998 to August, 1999 and as per the said Register, the maximum workers employed by the petitioner had been shown as 11 and the running Wage Register had not been shown to him and he was told that it was not prepared by the date of his inspection. This witness also deposed that he had covered the names of all the 21 persons in the petitioner's theatre except the night watchman and the Board Boy and also two cycle stand workers. This witness further deposed about Exs.B2 to B6 as well. This witness was cross-examined at length. This is the evidence available on record.

13. The learned Judge on appreciation of evidence recorded positive findings and arrived at a conclusion that the appellant-petitioner-establishment had more than 20 employees at the relevant time and hence the provisions of the Act cover the said establishment. It is needless to say that this is predominantly a question of fact and the learned Judge recorded positive findings relating to the number of employees. Even otherwise in the light of the clear evidence of RW.1, it cannot be said that the factual findings recorded by the learned Judge are in anyway erroneous.

14. The Counsel representing the respondents had placed reliance on Royal Talkies's case (supra), wherein the Apex Court at Paragraphs 13, 14, 17 and 18 observed as hereunder:

13. The reach and range of the definition is apparently wide and deliberately transcends pure contractual relationships. We are in the field of labour jurisprudence, welfare legislation and statutory construction, which must have due regard to Part IV of the Constitution. A teleological approach and social perspective must play upon the interpretative process.

14. Now here is a break-up of Section 2(9). The clause contains two substantive parts. Unless the person employed qualifies under both he is not an "employee". Firstly, he must be employed "in or in connection with" the work of an establishment. The expression "in connection with the work of an establishment" ropes in a wide variety of workmen who may not be employed in the establishment but may be engaged only in connection with the work of the establishment. Some nexus must exist between the establishment and the work of the employee but it may be a loose connection. "In connection with the work of an establishment" only postulates some connection between what the employee does and the work of the establishment. He may not do anything

directly for the establishment; he may not do anything statutorily obligatory in the establishment; he may not even do anything, which is primary or necessary for the survival or smooth running of the establishment or integral to the adventure. It is enough if the employee does some work which is ancillary, incidental or has relevance to or link with the object of the establishment. Surely, an amenity or facility for the customers who frequent the establishment has connection with the work of the establishment. The question is not whether without that amenity or facility the establishment cannot be carried on but whether such amenity or facility, even peripheral may be, has not a link with the establishment. Illustrations may not be exhaustive but may be informative. Taking the present case, an establishment like a cinema theatre is not bound to run a canteen or keep a cycle stand (in Andhra Pradesh) but no one will deny that a canteen service, a toilet service, a car park or cycle stand, a booth for sale of catchy film literature on actors, song hits and the like, surely have connection with the cinema theatre and even further the venture. On the other hand a book stall where scientific works or tools are sold or a stall where religious propaganda is done, may not have anything to do with the cinema establishment and may, therefore, be excluded on the score that the employees do not do any work in connection with the establishment, that is, the theatre. In the case of a five star hotel, for instance, a barber shop or an arcade massage parlour, foreign exchange counter or tourist assistance counter may be run by someone other than the owner of the establishment but the employees so engaged do work in connection with the establishment or the hotel even though there is no obligation for a hotel to maintain such an ancillary attraction. By contract, not a lawyer's chamber or architect's consultancy. Nor, indeed, is it a legal ingredient that such adjunct should be exclusively for the establishment, if it is mainly its ancillary.

17. Section 2(9)(i) covers only employees who are directly employed by the principal employer. Even here, there are expressions which take in a wider group of employees than traditionally so regarded, but it is imperative that any employee who is not directly employed by the principal employer cannot be eligible u/s 2(9)(i). In the present case, the employees concerned are admittedly not directly employed by the cinema proprietors.

18. Therefore, we move down to Section 2(9)(ii). Here again, the language used is extensive and diffusive imaginatively embracing all possible alternatives of employment by or through an independent employer. In such cases, the "principal employer" has no direct employment relationship since the "immediate employer" of the employee concerned is someone else. Even so, such an employee, if he works (a) on the premises of the establishment, or (b) under the supervision of the principal employer or his agent "on work which is ordinarily part of the work of the establishment or which is preliminary to the work carried on in or incidental to the purpose of the establishment", qualifies u/s 2(9)(ii). The plurality of persons engaged in various activities who are brought into the definitional net is wide and considerable; and all that is necessary is that the employee be on the premises or be under the supervision of the principal

employer or his agent. Assuming that the last part of Section 2(9)(ii) qualifies both these categories, all that is needed to satisfy that requirement is that the work done by the employee must be (a) such as is ordinarily (not necessarily non-statutorily) part of the work of the establishment, or (b) which is merely preliminary to the work carried on in the establishment, or (c) is just incidental to the purpose of the establishment. No one can seriously say that a canteen or cycle stand or cinema magazine booth is not even incidental to the purpose of the theatre. The cinema goesers ordinarily find such work an advantage, a facility an amenity and sometimes a necessity. All that the statute requires is that the work should not be irrelevant to the purpose of the establishment. It is sufficient if it is incidental to it. A thing is incidental to another if it merely appertains to something else as primary. Surely, such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either. Much depends on time and place, habits and appetites, ordinary expectations and social circumstances, in our view, clearly the two operations in the present case, namely, keeping a cycle stand and running a canteen are incidental or adjuncts to the primary purpose of the theatre.

Reliance also was placed on C.E.S.C. Limited's case (supra).

15. However, as can be seen from the docket entries in the O.P. and also in the light of the respective stands taken by the parties, the fact that the deposit of fifty per cent of the amount due from the establishment as claimed by the Corporation had not been deposited before presentation of the O.P. in question. It is also pertinent to note that no request was made either to waive or reduce the amount to be deposited under Sub-section (2B) of Section 75 of the Act. It may also be pertinent to have a look at the language employed in Sub-section (2B) of Section 75 of the Act along with the proviso and the said provision reads as hereunder:

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.

16. As can be seen from the language employed in Sub-section (2B) of Section 75 of the Act aforesaid, it is mandatory on the part of the appellant-establishment to make a deposit of fifty per cent of the amount due from the establishment as claimed by the Corporation and no doubt the proviso specifies that the Court may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this subsection. But from the record it is clear that no such attempt had been made by the appellant-establishment. Hence, inasmuch as OP itself was made without complying with Sub-section (2B) of Section 75 of the Act the same being not maintainable, the other merits and

demerits in the present civil miscellaneous appeal also need not be considered in elaboration. Even otherwise, this Court is of the considered opinion that the findings recorded by the learned Judge, even on merits, cannot be found fault with in anyway.

17. Hence, the civil miscellaneous appeal being devoid of merit, the same shall stand dismissed with costs.