(2005) 09 AP CK 0041

In the Andhra Pradesh High Court

Case No : C.M.A. No''s. 1165 and 1185 of 1999

Vijaya Diagnostic Centre and Another — APPELLANT

Vs

Employees State Insurance Corporation — RESPONDENT

Date of Decision : 26-09-2005

Acts Referred:
Central Excises and Salt Act, 1944 — Section 2
Constitution of India, 1950 — Article 226
Drugs and Cosmetics Act, 1940 — Section 18, 3
Employees State Insurance Act, 1948 — Section 1(4), 1(5), 2(12), 2(14AA), 75(1)
Factories Act, 1948 — Section 2

Citation : (2005) 6 ALT 813 : (2006) 2 LLJ 443

Hon'ble Judges : A. Gopal Reddy, J

Bench : Single Bench

Advocate : G. Vidyasagar and T.P. Acharya, for the Appellant; B.G. Ravindra Reddy, for the Respondent

Final Decision : Allowed

Judgement

A. Gopal Reddy, J.—Since a common issue viz., whether the Diagnostic Centres/ Pathological Centres carry on ''manufacturing process'' as defined u/s 2(k) of the Factories Act, 1948 and as such they fall within the meaning of ''factory'' u/s 2(12) of the Employees'' State Insurance Act, 1948 (for short ''the ESI Act''), in order to cover the employees employed therein under the Employees State Insurance Scheme, has arisen for consideration in both the appeals, they are heard together and are being disposed of through a common Judgment.

2. The factual backdrop of the cases relevant for the purpose of disposing these appeals is stated thus:

3. The appellants are purely diagnostic laboratories, established with a view to cater the diagnostic needs of the patients and are accordingly rendering the services like X-ray, examination of blood, urine, stools for medical diagnosis etc.

4. While so, on 30-7-1997 and 31-7-1997, the E.S.I. Inspector visited the

appellants-establishments and issued a demand notice intimating that they fall within the meaning of ''factory'' and hence they are covered u/s 2(12) of the ESI Act with effect from 1-7-1997, in view of the Memorandum dated 25-6-1997 issued by the Deputy Director of the Corporation, which is to the following effect:

"Human blood is ''Drug'' and the activities of its tapping, collecting, cross-matching and keeping in bottles amounts to manufacture of blood. In view of this legal position, it has been decided that the pathological labs (other than those located in the hospitals and meeting the requirements of the patients admitted in those hospitals) having above activities be covered as factory as defined u/s 2(12) of the ESI Act, 1948. These instructions may be enforced from 1-7-1997. Coverage of pathological laboratories if already effected in any case need not be reopened."

5. On receipt of such intimation, the appellant in C.M.A.No. 1165 of 1999 filed Writ Petition No. 20014 of 1997. The said writ petition was disposed of, through an order, dated 28-8-1997, directing the appellant to approach the Employees Insurance Court. The appellant, accordingly, filed E.I. Case No. 73 of 1997 u/s 75(1)(g) of the ESI Act seeking a declaration to the effect that it is not covered under the term ''factory'', as defined u/s 2(12) read with Section 2(14AA) of the said Act. Likewise, the appellant in C.M.A. No. 1185 of 1999 filed E.I. Case No. 1 of 1998 challenging the proceedings, dated 25-6-1997, of the Deputy Director, Employees State Insurance Corporation.

6. The case of the appellants is that no notification, as contemplated u/s 1(5) of the ESI Act, was issued by the Central Government and hence it cannot be said that they are covered under the provisions of the ESI Act. It is their further case that they are not engaged in any ''manufacturing process'' as defined u/s 2(14-AA) and therefore they will not fit in the meaning of ''factory'' u/s 2(12) of the Act.

7. The respondent-Corporation filed a written statement before the ESI Court, contending that the E.S.I. Inspector visited the appellants. Diagnostic Centres and found that they provided sophisticated facilities, such as, Scanning of human bodies, M.R.I. Scan, usage of various electrical devices etc., which activities would go to show that they are, in fact, engaged in the ''manufacturing process'', tapping and storing the blood, and, as such, they are covered by the provisions of Section 2(12) read with Section 1(5) of the ESI Act.

8. Based on the above pleadings, the Tribunal framed the following issues for consideration:

(1) Whether the petitioners-Diagnostic Centres are not ''factories'' under the definition of Section 2(12) of the ESI Act or shop as per notification, and

(2) Whether the petitioners-Diagnostic Centres are not engaged in any ''manufacturing process'' as defined u/s 2(14-AA) of the ESI Act or sale of service?

9. To substantiate their pleadings, both the parties have let in oral and documentary evidence on their behalf in both the cases.

10. The ESI Court, on appreciation of the evidence, both oral and documentary, and placing reliance on the Judgment of the Gujarat High Court in Subodh S. Shah and Others Vs. Director, Food and Drugs, Food and Drugs Control Office, Ahmedabad and Another, held that the activities of tapping, storing conducting tests by way of cross-matching on the basis of which diagnosis would be made and diseases would be prevented, would come within the meaning of ''manufacturing process'', as such the activities carried on by the appellants amount to ''manufacturing process'', as defined in Section 2(k) of the Factories Act. It further held that the appellants fall within the definition of ''factory'' as per Section 2(12) of the ESI Act, since they employed more than 20 members and engaged in ''manufacturing process'', and hence in view of Section 1(4), they come within the purview of the ESI Act. Accordingly, the ESI Court dismissed both the cases through the orders under appeals. Aggrieved thereby, the appellants preferred these two appeals.

11. Mr. G. Vidyasagar and Mr. T.P. Acharya, the learned Counsel appearing for the appellants in C.M.A. Nos. 1165 and 1185 of 1999 respectively, contend that the appellants-establishments are undertaking the services of X-ray, including M.R.I. Scan, blood examination etc., on the parties being referred to them and are giving their opinion thereof. They contend that in the absence of any tapping or storing of blood, the appellants-establishments cannot be said to be carrying on ''manufacturing process'' and as such they will not come within the definition of ''factory'', as defined in Section 2(12) of the ESI Act. According to them, inasmuch as no notification was issued u/s 1(5) of the ESI Act, to the effect that the provisions of the ESI Act or any of them are extended to the appellants, the principles laid down by the Gujarat High Court in Subodh S. Shah''s case (1 cited supra) cannot be made applicable to them.

12. Per contra, Sri P.G. Ravinder Reddy, the learned Counsel for the respondent-Corporation, submits that in view of the ratio laid down by the Gujarat High Court in Subodh S. Shah''s case (1 cited supra), administrative instructions, to that effect notifications, were issued specifying that the activities, such as, tapping, storing of blood and cross-matching on the basis of which diagnosis would be made, would come within the meaning of ''manufacturing process'', as defined in Section 2(k) of the Factories Act, and all the Diagnostic Centres carrying on the above said activities would be covered by the provisions of the ESI Act. He further submits that since the appellants are undertaking all such activities, they will, certainly, fall within the meaning of ''factory'' as per Section 2(12) and are covered by the provisions of the ESI Act.

13. It is well settled proposition of law that the administrative instructions do not have any statutory force as that of the enactments made by the Legislature nor can be enforceable and apart from that, unless the provisions of the Act itself are made applicable to the establishments, they cannot be brought within the

purview of the said Act. It is not in dispute that the decision of the Gujarat High Court in Subodh S. Shah''s case (1 cited supra) was based on the definition of word ''manufacture'' in Section 3(f) of the Drugs and Cosmetics Act, 1940. It defines the word ''manufacture'' as follows:

"manufacture" in relation to any drug (or cosmetic) includes any process or part of a process for making, altering, ornamenting, finishing, packing, labeling, breaking up or otherwise treating or adopting any drug (or cosmetic) with a view to its sale (or.) distribution but does not include the compounding or dispensing (of any drug, or the packing of any drug or cosmetic) in the ordinary course of retail business and "to manufacture" shall be construed accordingly".

14. It is also well settled proposition of law that while interpreting the particular provision of the Act, the definition of any other enactment with regard to ''manufacture'' cannot be borrowed unless the Acts are in pari materia.

15. The word ''factory'' has been defined in Section 2(12) of the ESI Act, which is excerpted hereunder:

''factory'' means any premises including the precincts thereof

(a) whereon 20 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 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) ora railway running shed."

16. In view of the above factual scenario, it is convenient to consider the submissions made on behalf of either party, in the context of the two cases viz. Subodh S. Shah''s case (1 cited supra), which is the basis for issuing administrative instructions and so also the Judgment of the Division Bench of Calcutta High Court in E.S.I. Corporation v. Duncan Gleneagles Hospital Ltd., 2005 Lab.I.C. 2118 (Cal.) (D.B.).

17. In Subodh S. Shah''s case (1 cited supra), the question that fell for consideration before the Gujarat High Court was

"Is Pathologists tapping blood from human beings manufacturing "drug" so as to incur liability to obtain licence u/s 18(c) of the Drugs and Cosmetics Act, 1940?"

In that case, the Director of Food and Drugs issued a notice to the petitioners stating that they have been carrying on the activities of tapping collecting and selling the blood for which license is required u/s 18(c) of the Act and since the said activity was being carried on by them without obtaining license, actions are required to be taken against them. The legality of the said notice was the subject

matter of challenge in the proceedings, under Article 226 of the Constitution of India, on the ground that they do not sell the drug and in the process of tapping the blood and making the same available to the relatives of the patient for being transfused, they are simply discharging their professional services, and the human blood cannot be treated as ''drug'' and pathologists cannot be treated as ''manufacturers of blood'' so as to incur obligation upon them, to obtain license under the provisions of the said Act. After considering the definition of ''manufacture'' as referred to above, it has been held that the inclusive definition of ''drug'' would include ''blood'' as it is, undoubtedly, a substance which can be used for or in the diagnosis, treatment, prevention of any disease or disorder in human being, therefore there is no manner of doubt that blood is ''drug'' within the meaning of Section 3(b) of the Drugs and Cosmetics Act. It has also been held that when the very functions or some of the functions of the blood bank are conducted or undertaken by the institution other than the Blood Bank or Pathological Laboratories and, admittedly, when such blood is transfused as treatment to a recipient of blood, the pathologists or transfused as treatment to a recipient of blood, the pathologists or pathological laboratories are required to perform number of tests for the safety of recipients, and it is, undoubtedly, a responsible job and must be done accurately and in view of the wider connotation given to the word ''manufacture'' the activities being carried on by the pathologists will fall within the definition of word ''manufacture'' and therefore they are required to obtain license as prescribed u/s 18(c) of the Drugs and Cosmetics Act.

18. The Division Bench of the Calcutta High Court, in E.S.I. Corporation''s case (2 cited supra), considering the definition of ''factory'' under Sections 2(12) and 2 (14-AA) of the ESI Act, held that

"the definition of word ''manufacturing process'' includes otherwise treating or adopting any article or substance with a view to its use, sale, transport, delivery or disposal. The outcome of the test is recorded through various machineries electronically operated or otherwise. In some cases, these are recorded on special kind of papers or any photo plates or X-ray plates or certain kind of devices recording ultra-sonographic tests. The process of these tests were not carried on either for making, altering repairing ornamenting, finishing or otherwise treating or adopting any article or substance, namely, the X-ray plates or the papers or the sonographic records with a view to its use, sale, transport, delivery or disposal. These articles or substance were used in aid of the process for the examination or the tests carried on. It is the report of the test, which is produced. It is the service of preparing the report or diagnosis is the services rendered. The process is not undertaken for the purpose of production of any article or substance in the form of developed X-ray films or Sonographic records or anything else. If we interpret in such a manner, in that event, even printing floppies or writing disks or typing of papers in course of any business or commerce or any office or administration would also amount to undertaking of manufacturing process since floppies, disks, Xerox and typing are undertaken for

the use or disposal. But if the pathological laboratory undertakes tapping of blood and process the same and use the same for the purpose of sale or transfusion or otherwise use thereof, the same may be a manufacturing process. But the pathological tests would not amount to manufacturing process even though the production of the developed X-ray films or Sonography reports may amount to manufacturing process otherwise in some other context. It has to be reconciled with the purpose and object for which it is being used or utilized. It is the ultimate produce that will determine the issue the process adopted for study and research in order to diagnose would not be a manufacturing process."

19. The Supreme Court in Empire Industries Limited and Others Vs. Union of India and Others, held that:

"Whether, at all events, even if the amendments to Central Excise Act are valid, the levy under the Additional Duties Act is unsupportable and without the authority of law as there is no corresponding enlargement of the definition of manufacture; under the Additional Duties Act."

The said view has been affirmed by the Constitution Bench in Ujagar Prints Vs. Union of India (UOI), . The Supreme Court, while considering the word ''manufacture'' u/s 2(f) of the Central Excises and Salt Act, 1944, held as under:

"On a consideration of the matter, we are persuaded to think that the view taken in the Empire Industries case that ''grey fabric'' after they undergo the various processes of bleaching, dyeing, sizing, printing, finishing etc. emerges as a commercially different commodity with its own price structure, custom and other commercial incidents and that there was in that sense a ''manufacture'' within the meaning of Section 2(f) of Central Excise and Salt Act".

20. The word ''manufacture'' has not been defined under the ESI Act. u/s 2(14-AA) of the said Act, it is stated that ''manufacturing process'' shall have the meaning assigned to it in the Factories Act, 1948. ''Manufacturing process'' has been defined u/s 2(k) of the Factories Act, which reads as under:

"manufacturing process" means any process for-

(i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up demolishing or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal; or

(iv) ...

(v) ...

(vi) preserving or storing any article in cold storage".

The definition of ''manufacturing process'' is exhaustive and covers wide range of activities.

21. The Supreme Court in Christian Medical College v. Employees'' State Insurance Corpn., (2001) 1 SCC 256 after considering

Sections 1(4), 2(12) and 2(14-AA), held that the equipment maintenance department of a medical college, which maintains and repairs their equipment for its efficient use in the hospital, is clearly covered by the term ''factory'' under the ESI Act and the provisions of the Act become applicable to the said department. No question arises of applying the test of dominant nature. The test of dominant nature would have become applicable only where the said department is carrying on any ''manufacturing process'' and it falls within the definition of the term ''factory'' as defined u/s 2(k)(i) of the Factories Act.

22. Now coming to the case on hand, the appellants-diagnostic centres are tapping the blood for the purpose of diagnosis, storing it and conducting the tests by way of cross-matching on the basis of which diagnosis could be made and the disease would be prevented, and giving their reports. It is not the case of the Corporation that the drawing of the blood sample for diagnosis purpose includes treating or adopting any article or substance in it with a view to its use, sale, transport, delivery or disposal. Therefore, in view of the Judgment of the Calcutta High Court in E.S.I. Corporation''s case (2 cited supra) in the absence of any further usage of blood as ''drug'' by the appellants, I am of the opinion that the process adopted and resorted to in the appellants-diagnostic centres would not amount to any ''manufacturing process'' as defined u/s 2(k) of the Factories Act so as to cover the appellants-establishments under the ESI Act.

23. It is an admitted fact that no notification was issued by the Central Government, as envisaged u/s 1(5) of the ESI Act, intimating the appellants that they will come within the purview of the Act. In that view of the matter, the orders passed by the ESI Court holding that the activities that are being undertaken by the appellants would come within the meaning of ''manufacturing process'', and since the requirements of the definition of ''factory'' u/s 2(12) of the ESI Act are established, the appellants are rightly brought under the purview of the ESI Act, cannot be sustainable and the same are liable to be set aside.

24. The orders passed by the ESI Court are accordingly set aside. Both the civil miscellaneous appeals are, therefore, allowed. There shall be no order as to costs.

