
(1998) 01 KL CK 0037
In the High Court Of Kerala
Case No : M.F.A. No. 394 of 1990

Vijayan Pillai

APPELLANT

Vs

E.S.I. Corporation

RESPONDENT

Date of Decision : 13-01-1998

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(12), 75, 77

Citation : (1998) 79 FLR 969 : (1998) 1 KLJ 485 : (1998) 1 LLJ 1190

Hon'ble Judges : P.A. Mohammed, J; B.N. Patnaik, J

Bench : Division Bench

Advocate : B. Suresh Kumar, for the Appellant; T.P.M. Ibrahimkhan, for the Respondent

Judgement

Mohammed, J.—This appeal is directed against the order of the Employees' Insurance Court, Kollam in Insurance Case No. 51 of 1988 dated February 9, 1990. The applicants before the Insurance Court are the appellants before us. Two important questions—one relates to limitation and the other, jurisdiction are involved in this appeal.

2. The appellants' father one Narayana Pillai was conducting a toddy shop during the period 1978-80, 1980-81 and 1981-82. He expired on July 21, 1982. The E.S.I. Corporation however issued Ext. Al dated November 1, 1988 directing the appellants to pay the alleged arrears of contribution in respect of all employees for the period from April 1, 1979 to March 31, 1982 under the provisions of the Employees' State Insurance Act (for short the Act). It was objected by the appellants and they filed the above case u/s 75 of the Act. After the enquiry the E.I. Court found that the Corporation had demanded the contribution without serving any notice or affording opportunity, to the appellants to explain their case. Accordingly Ext. Al notice was set aside. The Court below further directed the Corporation to pass fresh orders assessing contribution after affording sufficient opportunity to the appellants to explain their case. They being aggrieved by the said order of the Court below, have filed this appeal.

3. Let us first examine the question of limitation urged by the appellants" Section 77 of the Act, inter alia, provides the period of limitation for filing application before the Employees" Insurance Court. The said provision is extracted hereunder:

"77 Commencement of proceedings-

(1) The proceedings before an Employees" Insurance Court shall be commenced by application:

(1-A) Every such application shall be made within a period of three years from the date on which the cause of action arose.

Explanation-For the purpose of this Sub-section

(a) the cause of action in respect of a claim for benefit shall not be deemed to arise unless the insured person or in the case of dependents" benefit, the dependents of the insured person claims or claim that benefit in accordance with the regulations made in that behalf within a period of twelve months after the claim became due or within such further period as the Employees" Insurance Court may allow on grounds which appear to it to be reasonable;

(b) the cause of action in respect of a claim by the Corporation for recovering contributions (including interest and damages) from the principal employer shall be deemed to have arisen on the date on which such claim is made by the Corporation for the first time;

Provided that no claim shall be made by the Corporation after five years of the period to which the claim relates;

(c) the cause of action in respect of a claim by the principal employer for recovering contributions from an immediate employer shall not be deemed to arise till the date by which the evidence of contributions having been paid is due to be received by the Corporation under the regulations.

(2) Every such application shall be in such form and shall contain such particulars and shall be accompanied by such fee, if any, as may be prescribed by rules made by the State Government in consultation with the Corporation" .

Sub-section (1) mandates that the proceedings before the Employees" Insurance Court shall be commenced by the application and Sub-section (1-A) prescribes that every such application before the Court shall be made within a period of three years from the date on which the cause of action arose. Sub-section (1-A) was incorporated in the main Act by the Employees" State Insurance Amendment Act, 1966 (Act 44 of 1966) with effect from January 28, 1968. Explanation (b) was incorporated later by the Employees" State Insurance Amendment Act, 1989 (Act 29 of 1989) with effect from October 20, 1989.

4. The cause of action in respect of a claim is the basis for reckoning the period of limitation for filing an application before the E.I. Court u/s 77. Clauses (a),

(b) and (c) of the Explanation to Sub-section (1-A) of the said Section deal with three different kinds of claims and accrual of causes of actions therefor. Clause (a) deals with a claim for benefit by insured person or for dependents' benefit, by dependents of insured person, Clause (b) deals with a claim by Corporation for recovering contribution and Clause (c) deals with a claim by principal employer for recovering contributions from an immediate employer. In the present case, we are covered with Clause (b) which provides that the cause of action in respect of a claim by the Corporation recovering contributions (including interest and damages) from the principal employer shall be deemed to have arisen on the date on which such claim is made by the Corporation for the first time. Proviso to this clause mandates that no claim shall be made by the Corporation after five years of the period to which the claim relates. On behalf of the appellants it was argued that the Corporation had claimed contribution in respect of the period from April 1, 1979 to March 31, 1982 and hence the claim made in Ext. A1 dated November 1, 1988 by the Corporation is time barred. In other words, the contention is that the Corporation cannot make any claim for contribution after five years of the period to which the contribution relates. We cannot countenance this contention because the proviso refers to the claim arising out of a cause of action and not a claim arising out of the contribution due. By a legal fiction contained in Clause (b) the cause of action in respect of a claim by the Corporation from the principal employer arises on the date on which the Corporation makes the claim for the first time. The words "five years of the period of which the claim relates" contained in the said proviso shall not be interpreted to mean "five years of the period in relation to which the amount of contribution is due". If such an interpretation is given, the Clause (b) would become redundant. What is meant to be understood is to decide when the cause of action in respect of a claim by the Corporation had arisen. Once the date of arising of cause of action is known then the Corporation cannot make any claim after five years from the date on which it had arisen. In the present case, the cause of action arose for the first time with the issue of Ext. A1 notice dated November 11, 1988. That means in case the Corporation proposes to file application invoking Section 77(1-A) it cannot make a claim arising out of this cause of action after November 1, 1993. But the present application has been filed by the employer u/s 75 of the Act for determining the dispute as to whether the appellants are liable to pay the contribution demanded. In this context, the following observation of the Supreme Court in *Goodyear India Ltd. v. Regional Director, E.S.I. Corporation* (1997-II-LLJ-366), while dealing with an identical question is quite apposite.

"It would thus be seen that the cause of action for contribution would arise only after the decision by the Insurance Court in the proceedings as laid u/s 75 of the Act. Until then, the cause of action cannot be said to have arisen. In other words, there is no bar of limitation."

5. The arrears of contribution sought to be recovered in this case pointed out above relates to the period from April 1, 1979 to March 31, 1982. This is a period

prior to the coming into force of the Act 29 of 1989. In this context, it may be noted that the provisions contained in the Act 29 of 1989 have no retrospective operation. However, counsel pointed out that this being a pending proceeding the limitation prescribed in the proviso to Clause (b) of Sub-section (1-A) would apply. A similar contention had been advanced before the Supreme Court in Goodyear's case (supra). While holding that the Amendment Act has no retrospective operation, the Supreme Court held thus:

"It is seen that the Act was subsequently amended by Section 30 of the Amendment Act 28 of 1989 which came into effect with effect from October 20, 1989. To provides application can be made within three years from the date of arising of the cause of action. This amendment has no application to the proceedings in this case since the cause of action had arisen prior to the amendment."

6. The next point before us is the question of jurisdiction of the Corporation in claiming contribution under the Act. Section 38 of the Act provides that all the employees in factories or establishments to which the Act applies shall be insured in the manner provided under the Act. Section 39 provides that the contribution payable under the Act in respect of an employee shall comprise contribution payable employee shall comprise contribution payable by the employer (employer's contribution) and contribution payable by the employee (employee's contribution) and shall be paid to the Corporation. In order to determine the insurability of the factories or establishments, the definitions of "employee" and "factory" are very relevant. Section 2(9) defines the word "employee" as to mean any person employed for wages in or in connection with the work of a factory or establishment to which the Act applies. The word "factory" is defined in Section 2(12) thus:

"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 or 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.

The insurability of a factory or an establishment is depended on the fulfilment of the conditions prescribed in the above Clause (a) or (b) as the case may be. As far as the present case is concerned Clause (b) is relevant. A factory or an establishment would become insurable only when 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. Thus, if twenty or more persons are employed in a factory or establishment it becomes an insurable unit and hence all the employees shall be insured in view of the provisions contained in Section 38. But in case the number of persons employed is less than twenty there is no liability to pay the contribution in respect of the persons employed. Therefore the jurisdiction of the Corporation to demand contribution from a factory or an establishment depends on the determination of the total number of persons employed in a unit.

7. In this case, Ext. B17 report of the Inspector is the relevant document which reveals the , number of employees in the establishment. Ext. B. 17 had been prepared by the Manager of Local Office of the E.S.I Corporation, Sasthamcottah who is authorised under the provisions of the Act to inspect the factories and establishments and to submit a report. The said report, inter alia, reveals that there were eighteen employees employed by the licensee for wages. It is further stated that the present licensee of the shop added that the Welfare Fund Inspector, Quilon might have based on the statement submitted by the previous licensee that there were twenty one employees for wages in T.S No. 9. However, the details of only 18 employees were included in the statement submitted to the Welfare Fund Inspector, Quilon in respect of T.S. No. 9, The report further reveals that there is a dispute with regard to the employment of two persons: one K. Chellappan and other T. Velumban. Finally, the report concludes thus:

"The names of the above two employees are found in the Attendance Register and Wages Register produced by the present licensee whereas these two names were found to be included in the Attendance Register and Wage Register produced by the previous licensee and the Welfare Fund Inspector later. Hence the correct position will be ascertained by contacting these two employees as to whether they are employed in some other Toddy Shop in Kunnathoor Range or not. A further report in this regard will be submitted to the Regional Office shortly."

8. In spite of the above observation, no final report is seen to have been submitted by the local office of the E.S.I. Corporation. Of course, in addition to this report, the E.I Court has relied on various other materials and came to the conclusion that the establishment was covered under the Act for the period from April 1, 1979 to March 31, 1982. It is not known whether a final report has been submitted by the Inspector as observed in Ext, B-17. Anyway, the matter requires further examination by the Court inasmuch as the report of the Inspector is a crucial document to which reference can be made for determining the insurability of the establishment. Therefore, we are of the view that in case there is a final report as contemplated in Ext. B17, the appellants no doubt are entitled to get a copy of the same and file objections, if any. In the absence of such final report by the Inspector a fresh determination is required by the Court since the entire question depends on the number of persons employed by the employer in the establishment. We therefore, direct the Court below to decide

this question afresh in accordance with law and in view of the observations contained herein. While so deciding the appellants shall be given a reasonable and meaningful opportunity to raise all their contentions. The opportunity granted by the Court below to the appellants to canvass against the quantum of contribution is also preserved. That quantum of contribution shall be decided only after deciding the question of insurability of the establishment as discussed hereinabove.

9. Both parties are directed to appear before the Court below on February 23, 1998 for facilitating the early disposal of the case. We direct the Court below to dispose of the case as above expeditiously at any rate within a period of six months from the date of receipt of a copy of the judgment. The appeal is disposed of as above.