

(1995) 07 KAR CK 0006
In the Karnataka High Court

Workmen of Bharath Electronics Limited and Another	APPELLANT
Vs	
Employees State Insurance Corporation of India and Others	RESPONDENT

Date of Decision : 11-07-1995

Acts Referred:

Employees State Insurance Act, 1948 — Rule 50, 51, 54, 1 (4), 2 (9)

Citation : (1997) 2 ACC 423

Hon'ble Judges : S.A. Hakeem, Acting C.J.; J. Eswara Prasad, J

Bench : Division Bench

Judgement

J. Eswara Prasad, J.—These writ appeals and writ petitions are disposed of by this common judgment, as common questions arise for consideration.

2. The amendment to Rule 50 of the Employees' State Insurance (Central) Rules, 1950 ("the ESI Rules of 1950" for short) by the Employees' State Insurance (Central) First Amendment Rules, 1992, the amendment to Section 2(9) and the notification dated 27.3.1992 of the Employees' State Insurance Corporation of India are questioned. Some of the writ petitions were heard and disposed of by the learned Single Judge against which writ appeals are preferred, and the other writ petitions in which the same questions arose were also heard alongwith the writ appeals. Some of the appellants/writ petitioners are the Unions of Employees' of Establishments which are claimed to either belong to, or controlled by the ; Government, and the others are the employees or Employees' Unions of Private Establishments.

3. The validity of the amendment to the Employees State Insurance Central Rules and the Amendment to Section 2(9) is no longer open to challenge in view of the decision rendered by the Supreme Court in Employees' State Insurance Corporation v. Kerala State Handloom Development Corporation (CATU) Kannur and Ors. 1994 LLR 720. The Supreme Court while upholding the validity of the notification, set aside the direction of the Kerala High Court that the notification should be enforced with effect from November first, 1992, instead of April first, 1992.

4. The only question that remains for consideration is whether the factories and establishments belonging to, or under the control of the Government, whose employees" are otherwise in receipt of benefits substantially similar or superior to the benefits provided under the ESI Act, come within the purview of the ESI Act, in view of the proviso to Sub-section (4) of Section 1 of the Employees" State Insurance Act, 1948 ("the ESI Act" for short).

5. Mr. Narasimhan, learned Counsel appearing for some of the Employees" Unions of Factories and Establishments, contended that the Act and the Rules are not applicable as the factories and establishments either belong to the Government or controlled by the Government and as the facilities provided by the employer are either substantially similar or superior to the benefits provided under the Act; and hence proviso to Sub-section (4) of Section 1 of the Act is attracted. He called our attention to certain Annexures filed by him to show that the facilities similar or superior to those provided under the ESI Act. He submitted that the Act did not provide a forum to adjudicate on these aspects and invited us to look into the Annexures in order to arrive at a conclusion on the said aspect. Mr. Papanna, learned Counsel appearing for the ESI Corporation disputed this assertion and urged that since the question raised by the learned Counsel and other Counsels who raised similar contentions involve a detailed enquiry into disputed questions of fact, we should decline to consider the same.

6. Mr. Narasimhan took us through the relevant provisions of the ESI Act, namely, Sections 75,90,91,92 and 99A in support of the contention that no forum is constituted under the Act to adjudicate upon the question as to whether substantially similar or superior facilities are provided by the employer, in comparison with the facilities provided under the ESI Act.

7. The relevant portions of Section 1 read as follows:

1. xxx xxx xxx

2. xxx xxx xxx

3. xxx xxx xxx

4. It shall apply, in the first instance, to all factories including factories belonging to the Government other than seasonal factories.

Provided that nothing contained in this sub-section shall apply to a factory or establishment belonging to or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.

5. xxx xxx xxx xxx

6. xxx xxx xxx xxx

A reading of Sub-section (4) would show that the provisions of the Act are applicable to all factories which include factories belonging to the Government,

other than seasonal factories. The proviso to Sub-section (4) excludes factories or establishments belonging to or under the control of the Government, whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act. In order to attract the proviso to Sub-section (4), it has to be established that the factory or establishment either belongs to the Government or is under the control of the Government, and it has further to be established that the employees of the factory or establishment are in receipt of benefits substantially similar to the benefits provided under the Act, or the benefits provided by the employer are superior to the benefits provided under the Act.

8. It is thus clear that unless it is shown that the factory or establishment attracts the proviso to Sub-section (4), the provisions of the Act are applicable to all factories, including the factories belonging to the Government. It is further clear that the Act statutory becomes applicable to every factory or establishment from the date of commencement of the Act or the date of the establishment of the factories or the establishments. In order to bring the factory or establishment within the purview of the proviso to Sub-section (4), the employer of the concerned factory or establishment, or the person claiming that the Act is not applicable, has to prove that the factory or establishment either belongs to the Government or is under the control of the Government. It has to be further proved that the employees of such factory or establishment have been receiving benefits which are either substantially similar or superior to the benefits provided under the Act.

9. Contentions similar to those raised in these matters were raised before the Kerala High Court challenging the notification amending Rules, 50, 51 and 54 in *Tata Employees' Union v. Union of India* 1993 82 FJR119, that if in any factory or establishment the employees are in receipt of benefits substantially similar or superior to the benefits provided under the Act, it is for them to claim exemption under Sections 87 to 91 r/w Section 1(4), proviso, or suitable declaration from the Insurance Court under Sections 75 to 78 r/w Section 1(4), proviso, as the case may be. It was contended by Mr. Narasimhan and the other learned Counsel that no machinery is provided under the Act for adjudicating the dispute as to whether the particular establishment or factory falls within the proviso to Section 1(4) of the Act. It is therefore necessary to examine Section 75 of the Act relating to matter to be decided by the Employees' Insurance Court, which is in the following terms:

(i) If any question or dispute arises as to--

(a) whether any person is an employee within the meaning of this Act or whether he is liable to pay the employees' 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 the principal 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 55-A on a review of any payment of dependents' benefits, or,

(f) xxx xxx xxx xxx

(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 employee 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 (2-A)] shall be decided by the Employees' Insurance Court in accordance with the provisions of this Act.

A reading of Clause (g) of Section 75(1) would show that any matter which is in dispute between the principal employer and the Corporation or between a person and the Corporation etc. in respect of any contribution or benefit, or any other matter required to be or which may be decided by the ESI Court ("Court" for short) shall be decided by the said Court in accordance with the provisions of the Act. The Employees' Unions in some of these cases and some of the employees in other cases dispute their liability to pay the contribution under the Act, on the ground that the Act is not applicable to the establishments or factories in which they are employed, by virtue of proviso to Section 1(4). In our opinion this dispute clearly falls within the ambit of Clause (g), which the Court can be called upon to decide in accordance with the provisions of the Act. In a decision of this Court in E.S.I.C Vs. Nirmala Chemical Industries and others, it was held that the dispute whether the Act is not applicable could form part of the adjudication within Section 75(1) of the Act. It is therefore not correct to contend that no forum is provided for adjudication of the dispute raised in these cases.

10. We are in agreement with the decision of the Kerala High Court in Tata Employees' Union (supra) in holding that u/s 75 of the Act, the Court can decide the dispute raised in these cases. So far as the observation in the aforesaid decision that it is open to seek exemption under Sections 87 to 91 of the Act is concerned, we are of the opinion that there is no need to seek exemption under those provisions, if it is established on facts, that the Act is not applicable to the establishments or factories under proviso to Section 1(4). The question of exemption arises only in cases where the provisions of the Act are applicable and not in cases where the provisions are not applicable, by virtue of the proviso to

Section 1(4) of the Act.

11. Placing reliance on Employees of NTC (APKK & M) Ltd. Bangalore v. Regional Director ESI Corporation, Bangalore 1992 Lab. I.C. 1825, it was contended that the Insurance Court has no jurisdiction to adjudicate disputes of the nature which are raised in these cases. A Division Bench of this Court held that the Court has no jurisdiction to grant exemption and therefore it had no power to declare that any particular establishment or factory would be entitled to exemption under the provisions of the Act. In the present case we are not concerned with the grant of exemption and therefore the said decision has no application to the present case.

12. A contention was raised on behalf of the Corporation that it is open to the petitioners and the appellants to approach the Central Government and to seek directions u/s 99-A to remove difficulties, if they are of the view that no forum is prescribed under the Act. In the view we have taken that a forum is provided u/s 75-A of the Act we see no reason to drive the parties to approach the Central Government. If the Insurance Court is of the view that any question of law is required to be decided by the High Court, it may make a reference u/s 81 of the Act.

13. From the foregoing discussion, we are of the view that the persons claiming exception from the Act under the proviso to Clause (4) of Section 1 of the Act, will have to necessarily approach the Court u/s 75(g) and establish that the factory or establishment either belongs to the Government, or is under the control of the Government is further to establish that the employees are in receipt of benefits substantially similar or superior to the benefits provided under the Act. If any question of law arises for consideration, the Court may refer the matter to the High Court u/s 81. We are therefore not inclined to go into the disputed questions of fact raised in these matters in view of the availability of an alternative remedy u/s 75.

14. It was next contended by the learned Counsel appearing for the employers of some of the factories and establishments that during the pendency of the proceedings in this Court, the employers were prevented from making deductions under the Act from the wages payable to the employees, at the same time, they continued to provide the medical facilities to the employees in accordance with the service conditions, and hence they will suffer unnecessary loss and hardship if they have to make the contribution over again under the Act. In short they contended that they should not be made liable for the contribution of the amounts which they have not collected from the employees due to the stay orders. It was further submitted that no Act of Court shall prejudice the party and that the parties should not be made to suffer on account of the delay in disposal of the applications filed for vacating the stay orders. Mr. Papanna contended that the orders staying the notification should not be construed as stay of payment of employer's part of the contribution, inasmuch as it is the liability of the principal employer to make the contribution in the first instance

under the provisions of the Act, and having failed to do so, the employers cannot plead that they are prejudiced by the Act of the Court.

15. Mr. Kasturi, learned Counsel appearing for some of the employers, placed reliance on *Adwait Charan Sahu Vs. Divisional Forest Officer, Athmallik and Others*, and contended that by mistake of the Court a party should not suffer and that the act of a Court shall not prejudice any one. He submits that the applications for vacating stay were not disposed, resulting in the continuance of the orders of stay by which the employers were prevented from collecting the employee's contribution from the employer's. He submits that nobody should suffer for the action of the Court namely, the delay in disposals of the applications and placed reliance on *Mithilesh Kumar and Another Vs. Prem Behari Khare*, . There is no dispute regarding the propositions, of law laid down in the aforesaid decisions. The only question for consideration on this aspect is, whether the employers were prevented from discharging their obligation u/s 40 of the Act.

16. Unless a case is made out before the appropriate forum that the Act is not applicable, all the employees in factories or establishments to which the Act applies shall be insured in the manner provided by the Act, subject to the provisions of the Act u/s 38. The contribution payable under the Act in respect of an employee shall comprise the contribution payable by the employer and contribution payable by the employee which shall be paid to the Corporation u/s 39(1). Under Sub-section (4), the contribution shall be paid at such rates as may be prescribed by the Central Government, which is 4% by the employer, and 1.5% by the employee. u/s 40(1), the principal employer shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution.

17. As seen from the above provisions, the principal employer has to contribute both the employer's as well as the employee's contribution in the first instance. In *Employees State Insurance Corporation Vs. M/s. Hotel Kalpaka International*, , the object of making a deeming entrustment under Sub-section (4) of Section 40 was held to be rendered nugatory, if the employer is not made liable to pay the employee's contribution by contending that he had not deducted the employee's contribution on the wages of the employees and that he could not be made liable for the same. It was held that u/s 40, the primary liability is of employer to pay, not only the employer's contribution but also the employee's contribution.

18. The stay orders issued pending disposal of the writ petitions had no effect on the obligation of the principal employer to pay contributions as required by Section 40. If any hardship is caused to the employers by their understanding of the implications of the stay orders, it is open to them to make representations to the appropriate Government and seek exemptions under the provisions contained in Chapter VIII of the Act.

19. For all the aforesaid reasons, the writ appeals and the writ petitions are dismissed with the observations mentioned above.

20. No order as to costs.