

Esic .. Vs. Vijay Grover.

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Court : Delhi

Decided On : Nov-25-2010

Judge : Mool Chand Garg, J

Acts : Employees State Insurance Act - Section 82; ESI Act - Sections 2(12), 75

Appeal No. : FAO 214/1999

Appellant : Esic ..

Respondent : Vijay Grover.

Advocate for Def. : Mr. B.R. Madan, Adv.

Advocate for Pet/Ap. : Mr. K.P. Mavi, Adv.

Judgement :

1. Whether the Reporters of local papers may be allowed to see the judgment?
Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

1. Taking into consideration the total number of employees with the establishment of the respondent, the appellant corporation has filed this appeal under Section 82 of the Employees State Insurance Act. It has been pleaded that the employees employed by the respondents in its manufacturing unit and in the sales office

pertains to the same management and as such the applicability of the ESI Act, the employees employed on various places i.e. at the respondent factory and sales office are to be clubbed together though they are at different place. It is stated that the order of the ESI court holding that the two units i.e. factory premises and sales office are to be treated separately and independently, as such the appellant was not justified in clubbing the employees of the respondent working in both units together for the purpose of covering them under the Act. It is thus stated the order of the ESI Court deserves reversal.

2. Briefly stating the facts of the present case are:

(i) The respondent has a factory of manufacturing Ayurvedic medicines under the name and style of M/S. Kamal Pharmacy at 14, Najafgarh Road industrial Area, New Delhi. They also have a sales office at bhagirath Place Delhi where the medicines manufactured by them are sold.

(ii) After carrying out an inspection of the establishment the appellant raised a demand calling upon them to pay ` 49015.55 along with interest as their contribution by presuming that the respondent were covered under the Act, taking into consideration the total number of employees working in the factory and the sales office for the period 01.09.1984 to 31.12.1987.

(iii) The respondent then filed a petition under Section 75 of the ESIC Act and stated that they never employed more than 8 persons in the factory and similarly the persons employed at the sales office never exceeded 9. It was thus pleaded that the respondent was not covered under the provisions of ESI Act. It was further stated by the respondent that for the welfare of the employees and for his own benefits, respondents decided to get the factory and the sales office covered under the ESI Act from 5.4.1988. However, despite the voluntary coverage of the factory as well as the sales office, the appellant herein insisted the respondent to make compliance of the ESI Act w.e.f. 1.9.1984.

(iv) It is also the case of the respondent that vide order dated 10.08.1988 they challenged the illegal coverage of the factory and the sales office for the aforesaid period and contended that the order covering them under the Act was illegal. They

also stated that the work of factory was different from the sales office and in the factory only the medicines are manufactured which are then sold to various customers in the sales office. It was further stated that the nature of job performed by the persons in the two units is quite different and the persons employed in one unit are not transferrable to the other unit because of nature of job performed by each unit.

(v) It was further stated that the appellant covered the respondent factory and sales office by wrongly interpreting the relevant provisions of the ESI Act as the definition of factory as defined under Section 2(12) of the ESI Act.

3. The respondent thus prayed that it may be declared that the respondent factory and sales office are not covered under the ESI Act.

4. The petition was contested by the appellant by filing a written statement. According to the appellants the persons employed at manufacturing unit and the sales office pertain to the same management and, as such, the total number of employees for the purpose of the ESI Act include the employees at both the units and, hence, the respondent factory and sales office are to be treated as one and the same though they are at different premises. It was further stated that the persons working at the factory and the sales office are to be treated collectively for the implication of the ESI Act and, as such, the decision to cover both the units collectively w.e.f. 1.9.1984 is proper and is in accordance with the law. The appellant had vehemently denied other allegations as alleged by the respondent in its application.

5. The insurance Court accepted petition filed by the respondent and held that once there was no functional integration and the services of the employees working in the factory and the sales office was not interchangeable or transferable, and also taking into consideration the admitted position that prior to 01.01.1988 the appellants had not employed more than 8 persons in the factory and a similar number of employees in the sales office, the establishment of the respondent was not covered under the Act. It was further held by the ESI Court that under the circumstances, the respondent is not liable to be covered under the provisions of the ESI Act w.e.f. 1.9.1984 to 31.3.1988 and hence declared that the respondent

is not liable to pay the contribution as demanded by the appellant herein.

6. According to the appellant it has been stated that:

(i) The findings returned by the ESI Court that since no manufacturing activity is carried on at the sales office & as such it is not coverable under the definition of factory under Section 2 (12) of the ESI Act is an error of law. It is submitted that since both the units i.e. manufacturing and sales office were functioning in an integral manner connected with the manufacturing and marketing of one particular product of the same employer and hence there being unity of ownership and purpose for which both the units are being run, the employees can be clubbed together for the purpose of ESI Act.

(ii) It has also been stated that for the purpose of covering an establishment under ESI Act what is to be seen is that work carried out in different units should be interconnected and conducted by some concern. The ESI Court, however, made an error in taking the two units independently for the purpose of ESI Act in the facts of the present case.

(iii) It was also stated that the employees of the sales office had a direct relationship with the factory as they were principally connected with the work of the factory itself.

(iv) It was also the case of the appellant that the consensus of the judicial decisions for interpretation of definition of factory and the employee under the provisions of ESI Act, emphasis is given on unity of purpose for which different units are being run i.e. to say if units are working in a integral fashion connected with manufacturing and marketing of one particular product of the same employer, then aggregate number of employees engaged in different units are to be clubbed together for the purpose of coverage of the unit.

7. It was also submitted that the present appeal raises following substantial questions of law which needs to be determined by this Court i.e.

(i) Whether the employees of the two units under the same management which are functioning in an integral manner connected with the manufacturing and

marketing of one particular produce being manufactured and sold under the same management/ ownership are not liable to be clubbed for the purpose of ESI Act.?

(ii) Whether the respondent is not liable to pay contribution for the period pertaining to 1.9.1984 to 31.3.1988 when the employees employed by the respondent in its two units exceeded the statutory limit of 10 employees as admitted by the respondent?

(iii) Whether the admission on the part of the respondent admitting that the sales office was selling the products manufactured in the factory was not a conclusive evidence to

come to the conclusion that the two units were inter-connected apart from being under the same management?

(iv) Whether the employees employed by the same management but working at two different premises could not be clubbed together for the purpose of the ESI Act?

8. The appellant have relied on the following judgments delivered by the Honble Supreme Court.

(i) Associated Cement Companies, Ltd. v. Their Workmen Civil Appeal No. 87 of 1958, dated 11.09.1959

(ii) Gopi Chand & Ors. v. Employees State Insurance Corporation 172 (2010) DLT 565.

9. On behalf of the respondents it has been submitted that factually the appellants have not been able to establish on record that the respondents were employing 10 or more than 10 persons in their factory or even in their sales office. They have also relied upon a chart which has been filed along with the list of documents filed in the ESI Court which goes to show that right from 1984 till 1988 the number of employees employed by the respondent at their factory in Najafgarh Industrial Area never exceeded 10 and it is only in April 1988 they were employing more than 10 when they themselves got the establishment covered under the ESI Act.

As far as sales office is concerned the number of employees never exceeded more than 9. It is thus submitted that the work being carried out at factory and in the sales office have no functional integration so as to enable the appellants to cover them under the Act.

10. They have relied upon the following judgments delivered by the Apex Court, Bombay High Court and Kerala High Courts. These judgments are:

(i) Hyderabad Asbestos Cement Products Ltd. v. Employees Insurance Court and Anr. AIR 1978 SC 356

(ii) Transport Corporation of India v. Employees State Insurance Corporation AIR 2000 SC 238

(iii) H. Fillunger & Co. (Pvt.) Ltd. v. Employees State Insurance Corporation 2005 LLR 1165 Bombay High

Court.

(iv) Managing Partner, M/s Shanthi Flour Mills v. Regional Director, Employees State Insurance 2008 LLR 1192 Kerala High Court.

11. I have given my thoughtful consideration to the rival submissions. At the outset I would like to take note of the admitted facts i.e. the respondent is running the business of manufacturing Ayurvedic medicine at the Najafgarh Industrial Area New Delhi. He also has a sales office at 1498 Bhagirath Place, Chandni Chowk Delhi where the manufactured medicines are sold. The respondents never employed more than 9 persons in his factory till April 1988. Similarly the employment strength at the sales office never exceeded 9 throughout. Inspection of the factory of the respondent was conducted by an inspector of the appellant on 31.08.1984 when also the number of employees were not found more than 8 and 9 persons and the combined strength of both the units was 17. It is also a matter of record that since April 1988 the respondent factory is covered under the ESI Act on a request made voluntarily by the respondent w.e.f. 01.04.1988 and also because the combined strength of the employees of the respondent since that day stood 20.

12. As far as the claim of the appellant to cover the establishment of the respondent under the Act w.e.f. 01.09.1984 the said intent of the appellant was always questioned and after the appellant insisted for payment of a sum of ` 49015.55 as contribution along with interest by deeming the respondents establishment covered under the Act for the period from 01.09.1984 to 31.12.1987 the respondent filed the petition under Section 75 of the ESI Act.

13. Now it will be appropriate to take note of the provisions contained under Section 2 (12) of the Act which is the charging Section inasmuch as the aid provision defines a factory which reads as under:

Factory means any premises including the precincts thereof-

(a) Whereon ten or more persons are employed or were employed for wages on any dates of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or in ordinarily so carried on, or

(b) Whereon twenty or more persons are employed or were employed for wages on any 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 shed.

14. According to the appellants for the purpose of covering the establishment under the Act, the persons employed at the manufacturing unit and in the sales office under the same management have to be taken into consideration and have to be clubbed and by clubbing the number of employees working in the two establishments. It was thus submitted that the establishment of the respondent was coverable under the Act and for that reason the respondent became liable to pay the amount as claimed as per the ESI Act w.e.f. 01.09.1984.

15. It may be observed here that RW1 S.C. Talwar, Section Officer. Who was examined on behalf of the appellant in his statement never disputed that the number of employees working at the factory were never 10 or more than 10.

However the tenor of statement goes to show that what they are doing is to cover the establishment of the respondent even for the earlier period is by clubbing the employees in the two establishments. It may be observed here that in his deposition the witnesses have stated that since the strength of the employees taken together was more than 10, the establishment was found to be coverable from the day of verification of the record i.e. 1.9.1984. His survey report is Ex.RW-1/1. However in his cross-examination he stated that "since the strength of the employees taken together was more than 10 the establishment was found to be coverable from the day of verification of the record i.e. 01.09.1984". However, in his cross-examination he has deposed that the employees of both the places are different. He recommended the coverage of the establishment only on the basis of the instructions referred to in his report Ex.RW-1/1 and there is no other basis for the coverage of the establishment, except the said instructions referred to in his report. He admitted that the factory and office at Bhagirath Palace are not coverable independently.

16. In his statement Shri S.K. Baluni, the second witness examined by the appellant i.e. RW2 has stated that the respondent firm had two units i.e. one under the name of Vijay Pharmacy and other sales office. On the date of survey only 8 employees were found working in the factory and 4 employees were engaged in the sales office and 5 were medical representatives. The respondent firm was covered, only by clubbing the employees of both the units. He admitted in his cross-examination that the factory of the respondent is at Najafgarh while its office is at Bhagirath place and if taken independently they are not coverable under the ESI Act.

17. Now coming to the judgments cited by the parties I may observe that in the case of Associated Cement Companies Ltd. v. Their Workmen the controversy involved was the size of the establishment. The question which arose for consideration was whether a particular unit is a part of bigger or another establishment within the meaning of the Industrial Disputes Act. While answering the aforesaid question, taking note of other provisions of Industrial Disputes Act the Honble Supreme Court observed:

"The Act not having prescribed any specific tests for determining what is "one establishment," we must fall back on such considerations as in the ordinary industrial or business sense determine the unity of an industrial establishment, having regard no doubt to the scheme and object of the Act and other relevant provisions of the Mines Act, 1952, or the Factories Act, 1948. What then is "one establishment" in the ordinary industrial or business sense? The question of unity or oneness presents difficulties when the industrial establishment consists of parts, units, departments, branches, etc. If it is strictly unitary in the sense of having one location and one unity only, there is little difficulty in saying that it is one establishment. Where, however, the industrial undertaking has parts, branches, departments, units, etc., with different locations, near or distant, the question arises what tests should be applied for determining what constitutes "one establishment." Several tests were referred to in the course of arguments before us, such as geographical proximity, unity of ownership, management and control, unity of employment and conditions of service, functional integrality, general unity of purpose, etc. To most of these we have referred while summarizing the evidence of Mr. Dongray and the findings of the tribunal thereon. It is, perhaps, impossible to lay down any one test as an absolute and invariable test for all cases. The real purpose of these tests is to find out the true relation between the parts, branches, units etc. If in their true relation they constitute one integrated whole, we say that the establishment is one; if on the contrary they do not constitute one integrated whole, each unit is then a separate unit. How the relation between the units will be judged must depend on the facts proved, having regard to the scheme and object of the statute which gives the right of unemployment compensation and also prescribed a disqualification therefor. Thus, in one case the unity of ownership, management and control may be the important test; in another case functional integrality or general unity may be the important test; and in still another case, the important test may be the unity of employment. Indeed, in a large number of cases several tests may fall for consideration at the same time. The difficulty of applying these tests arises because of the complexities of modern industrial organization many enterprises may have functional integrality between factories which are separately owned; some may be integrated in part with units or factories having the same

ownership and in part with factories or plants which are independently owned. In the midst of all these complexities it may be difficult to discover the real thread of unity. In an American decision *Donald I. Nording v. Ford Motor company* 91950) 28 AIR 2d. 272) there is an example of an industrial product consisting of 3,800 or 4,000 parts, about 900 of which came out of one plant, some came from other plants owned by the same company and still others came from plants independently owned, and a shutdown caused by a strike or other labour dispute at any one of the plants might conceivably cause a closure of the main plant or factory.

Fortunately for us, such complexities do not present themselves in the case under our consideration. We do not say that it is usual in industrial practice to have one establishment consisting of a factory and a mine; but we have to remember the special facts of this case where the adjacent limestone quarry supplies the raw material, almost exclusively, to the factory; the quarry is indeed a feeder of the factory and without limestone from the quarry, the factory cannot function. Ours is a case where all the tests are fulfilled, as shown from the evidence given on behalf of the appellant to which we have earlier referred. There are unity of ownership, unity of management, supervision and control, unity of finance and employment, unity of labour and conditions of service of workmen, functional integrality, general unity of purpose and geographical proximity. We shall presently deal with the legal difficulties at which the tribunal has hinted and which have been elaborated by learned counsel for the respondent. But apart from them, the only fair conclusion from the facts proved in the case is that the Chaibasa Cement Works consisting of the factory and the limestone quarry form one establishment. The existence of two sets of standing orders and a separate attendance register for the limestone quarry have already been adverted to. They have been sufficiently explained by Mr. Dongray, particularly the existence of two sets of standing orders by reason of the statutory requirement of approval by different authorities one set by the Labour Commissioner, Bihar, and the other by the relevant central authority."

18. Apparently this judgment may not strictly apply to the facts of the case. Therefore, it will be necessary to also examine the second judgment delivered in the case of *Gopi Chand and Ors.*(supra) by this Court which is a judgment which

directly applies to the issue of coverage under the Act. In this case it was the stand of the corporation that in a survey conducted by the corporation of the appellants business on 03.05.1993 they found 52 persons working with them. It was also the case of the corporation that all the appellants were carrying on their business together and under the supervision and control of the business as one single unit and therefore

the appellant was covered under the Act. It was in these circumstances the learned single Judge made the following observations:

14. For the aforesaid reason, it is safe to presume that since the appellants were operating from the same cabin and had six trucks in all, the survey report indicating that they were together employing 52 employees appear to be correct and could not be disbelieved. This is also owing to the disclosure made by the appellant No.1 in the petition itself that one truck could employ seven employees namely i.e. one driver, one cleaner and five labourers. The decision of the Apex Court in *Associated Cement Companies Ltd. vs. Their Workmen* (supra) supports this view.

15. In addition, since the facts with regard to the employment of employees were especially within the knowledge of the appellants themselves, the burden of proving the fact that they in fact employed less employees, then the number covered under the Act, was cast on them. Further as held by the Apex Court in *Employees' State Insurance Corporation vs. F. Fibre Bangalore (P) Ltd.* (supra) where the employer denies the liability or applicability of the provisions of the Act, it is for him to approach the Insurance Court and seek adjudication. Consequently, it was for the appellants to establish that they did not employ the number of employees requisite to fall within the purview of the Act. However, the appellants have failed to discharge this burden by withholding the best evidence in their possession by way of register of employees and register of salary of employees.

16. Thus, for the reasons aforesaid it is held that the appellants have rightly been clubbed together and covered under the Act. In view of this finding, there is no infirmity in the order under challenge passed by the ESIC Court so as to warrant interference in appeal. Consequently, the appeal is dismissed. No order as to

costs.

19. No doubt reference has also been made in this judgment to the case of Associated Cement Companies Ltd. in para 9 of the judgment the decision basically raised on the survey report which found 52 persons working together in one cabin and therefore the judgment of the Ld. Single Judge cannot be of any application to the peculiar facts of this case.

20. However in the case of Hyderabad Asbestos Cement Products Ltd. (supra) relied upon by the respondent themselves, after taking note of amendment of Section 2 (9) introducing the inclusive definition of the employee enacted by Act of 1966 which came into force on 28.01.1968, the employees connected with the administration of factory, the purchase of

raw material and the distribution or sale of the product also came within the definition of the employee and therefore it has been held that all those employees who are not directly employed in the factory but are employed even in other offices who may be connected with the administration of the factory or any part department or branch thereof or with the purchase of raw material or for the distribution of sale of product of the factory those employees would be covered within the definition of the word employee taking into consideration the inclusive definition of Section 2 (9) of the Act. Observing that in para 11 of the judgment the Honble Supreme Court then further observed:

"11. The amendment to Section 2(9) introducing the inclusive definition referred to above was enacted by Act 44 of 1966 which came into force on 28-1-1968. It may be noted that the decisions of the Bombay and the Madras High Courts referred to above (supra) were rendered before the amendment was introduced and it appears the amendment was introduced for the purpose of covering cases which were held to be outside the scope of Section 2(9) by the two decisions. The amended section includes any person employed for wages on any work connected with the administration of the factory or any part, department or branch thereof or with the purchase of raw materials or for the distribution or sale of products of the factory. It will be seen that the work connected with the administration of the factory, the purchase of raw materials and the distribution or sale of products are

brought within the scope of the definition. After the amendment therefore the plea that employment in connection with the administration of the factory or with the purchase of raw materials or distribution or sale of products cannot be contended to be as not falling within the definition.

12. The contention of the learned Counsel for the appellants is that the word "factory" is confined only to persons who are employed with the manufacturing process. The definition of the word factory is as follows :-

"factory" means any premises including the precincts thereof 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 with 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 or a running shed;

The word factory is confined to the premises including the precincts thereof where the manufacturing process is carried on. The submission on behalf of the appellants is that an employee of the factory should not only be an employee falling within the definition of the word "employee" but also an employee of the factory i.e. of a factory as defined in Section

2(12). In support of their plea reference was made to Section 38 of the Act which requires that all employees of the factories should be insured. Section 38 lays down that all employees in factories, or establishments to which this Act applies shall be insured in the manner provided by this Act. It was submitted that to fall within the charging Section 38 employees should be employees in factories and not employees connected with the work of the factory. Anil Dewan appearing for the Indian Chemical Industries submitted that the words "employees in factories" are significant and that only employees who are employed in the factory are required to be insured and not employees who are employed in connection with the work of the factory. The learned Counsel proceeded to point out that the amendment is confined only to persons employed on any work connected with the administration and not employed in the factory and submitted that the applicability should be strictly confined to the employees in factories. The contention put forward, it was pleaded, is more reasonable as the Act throughout maintains a

distinction between factory and establishments and it is against the tenor of the Act to bring employees in establishments within the meaning of employees of the factories. The learned Counsel also pointed out that in various firms the employees themselves are against their being included within the scope of the Act and the resultant position will be that as between two establishments which are functioning under the same conditions one establishment which is connected with the sale of finished product of the factories will come within the scope of the Employees' State Insurance Act whereas the other establishment would be outside the purview of the Employees' State Insurance Act. On a careful consideration of Section 2(9) Section 2(12), Section 38 and Section 39 we are unable to accept the restricted interpretation sought to be put upon the words "employees in factories". Even before the amendment the word "employee" included persons connected with the work of the factory. The Supreme Court has laid down that a person employed in connection, with the work of the factory would, fall within the definition as it stood before the amendment and it may not be open to the learned Counsel to contend that it is only employees that are employed in the factory that would fall within the definition. The definition before the amendment as well as after the amendment would include not only persons employed in the factory but also in connection with the work of the factory. Thus Section 39 of the Act) makes the position clear. It provides that the contribution payable under the Act is in respect of an employee. It is not confined only to employees in factories. We see no justification for reading the words employees in factories in Section 38 as meaning persons employed in factories only. We are unable to accept the contention that the employees that are required to be insured under the. Act are only those employed in factories defined under Section 2(12) of the Act.

21. In the light of the judgment delivered by the Honble Supreme Court in the case of Hyderabad Asbestos Cement Products Ltd. (supra) and Transport Corporation of India v. ESIL (supra), the stand of the respondent that the employees working in the sales office cannot be taken into consideration for the purpose of arriving at a finding that the establishment of the respondent was covered under the ESI Act or not is not sustainable.

22. In view of that the claim raised by the appellant in directing the respondent to pay a sum of ` 49015.55 towards the contribution for the period 01.09.1984 to 31.12.1987 is justified, more so because as per their own showing the number of employees working in the factory and the sales office of the respondent were more than 10 throughout. In view of the aforesaid the judgment dated 27.01.1999 given by the Senior Civil Judge Delhi cannot be sustained and as such the same is set aside. The respondents are thus directed to pay their contribution to the tune of ` 49015.55 along with interest as claimed within a period of two months from today. With these observations the appeal is disposed of with no orders as to costs.

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