

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

First Appeal No.421 of 1999

- 1) The Joint Regional Director,
Employees State Insurance
Corporation,
"Panchdeep Bhavan",
Ganesh Peth, Nagpur - 18.
 - 2) Deputy Regional Director,
Sub Regional Office,
Employees State Insurance
Corporation,
"Panchdeep Bhavan",
Ganesh Peth, Nagpur - 18.
 - 3) The Recovery Officer,
Sub Regional Office,
Employees State Insurance
Corporation,
"Panchdeep Bhavan",
Ganesh Peth, Nagpur - 18.
 - 4) The Assistant Director,
Employees State Insurance
Corporation, Nagina Ghat Road,
Nanded.
- .. Appellants.**

Versus

- 1) M/s. Munawwar Hotel,
Station Road, Nanded,
Through its Proprietor,
Asad Ali s/o Rajjab Ali,
Age 50 years,
Occupation : Business,
R/o Itwara, Nanded.

- 2) The Authorized Officer,
Sub Regional Office,
Employees State Insurance
Corporation,
"Panchdeep Bhavan",
Ganesh Peth, Nagpur - 18. .. **Respondents.**

Shri. V.D. Sonwane, Advocate, for appellants.

CORAM: T.V. NALAWADE, J.

DATE : 15th JUNE 2015

JUDGMENT:

- 1) The appeal is filed to challenge the judgment and order of ESI Court, Nanded delivered in ESI Application No.1/1996. In the proceeding filed by the respondent, a hotel owner declaration is given in his favour that the notice issued to him of show cause is null and void and the establishment does not fall under the provisions of the Employees' State Insurance Act, 1948 (for short "ESI Act") and the respondent is not liable to pay contribution in respect of the employees. Both the sides are heard.

2) It appears that the appeal was admitted on 13-2-2001 but at the time of the admission no substantial question of law was formulated. From rival contentions this Court has told that following questions will be decided as the substantial questions of law formulated in the proceeding :-

Q. No.1 : *Whether the Court has committed error of not considering the relevant material for establishing that the establishment of the respondent is covered under the provisions of the ESI Act ?*

Q. No.2 : *Whether the trial Court has committed error in giving relief of declaration that there was no sufficient material for issuing show cause notice and giving the decision and the decision is invalid ?*

3) Respondent owns and runs hotel by name Munawwar Hotel which is situated on Station Road, Nanded. The Inspector appointed under the E.S.I. Act namely Shri. Kalayea Pappy Cose visited the hotel on 19-10-1994. He noticed that power was being used for

manufacturing process like grinding of spices by using grinder and for preserving food articles by using refrigerator. He also noticed that at the relevant time more than 10 employees were working in the hotel. In view of these circumstances he called upon the owner to produce register and give particulars of the employees. He collected names of the employees from the son of the respondent. He supplied this information to the officer. Show cause notice then came to be issued to the respondent. Respondent replied the notice and contended that he was not using the power for manufacturing process and at no time in his hotel more than six employees were working. He contended that his signature was obtained on the list by misrepresenting him by the Inspector and those persons were not the employees from his hotel. The appellant gave decision against the respondent and directed to deposit the contribution.

4) By filing proceeding under section 75 of the ESI Act the aforesaid decision was challenged by the present respondent. Before the Court, the respondent examined himself and he examined two witnesses who included a

cook whose name is mentioned in the list and one Mohd. Firoz who is relative of the respondent and whose name is also mentioned in the list. On the other hand, the appellant examined Kalayea Pappy Cose, Inspector who had paid visit.

5) After considering the material produced by both the sides, the trial Court held that the material is not sufficient to prove that power was used for manufacturing process. It is also held that burden was on the appellant to prove that the establishment falls under the provisions of the ESI Act and the appellants have failed to prove that more than 10 employees were working in the establishment at the relevant time.

6) Learned counsel for the appellants placed reliance on some reported cases like (1) **1998 (3) Bom. C.R. 861** (Panaji Bench) (**M/s Garage Kamat v. Regional Director Employees State Insurance**); and, (2) **1985 AIR SC 330 (Assistant Collector of Central Excise v. Dunlop India Ltd.)**. The first case is squarely on the point involved and it is observed by this Court that burden to prove that

particular number of employees were employed on the establishment is on the owner of the establishment if necessary procedure was followed by the Corporation. On the other hand, learned counsel for the respondent placed reliance on one case reported as **1995 (70) FLR 613 (Ritz Hotel Pune v. E.S.I.C. Pune)**. In this case when it was noticed that refrigerator was used for storing eatables in the hotel and it was operated by using power with 3 HP capacity this Court held that the power was not used for manufacturing process and so this circumstance cannot be used to hold that the requirements for giving coverage were complied with.

7) In the present matter there is substantive evidence of the respondent owner. He has given evidence that for preparing food articles he has been using fire wood and he has produced receipt of purchase of fire wood for the hotel. This receipt was of recent origin. It is not the case of the Corporation that food was prepared by using electricity i.e. by using oven or electrical stove etc. Thus, admittedly for cooking food electricity was not being used.

8) The evidence of the Inspector shows that he did not prepare panchanama to note the material things. Though he has deposed that there was one refrigerator he has not given description of the refrigerator or its capacity. Though he has deposed that he found one grinder he did not give description of the grinder, including name of the company and he did not give name of the person who was operating the grinder.

9) Power is given to the Inspector to make enquiry with the owner and persons found present in the campus of the establishment including the so-called employees. The evidence of the Inspector does not show that he personally noted names of any such employees. He tried to say that he noted that there were more than 14 persons present in the hotel as employees. But he collected list of 10 persons that too from a son of the owner. The list was also not containing complete names and addresses of the so-called employees. No noting was made in respect of wages of the persons who were found there.

10) The respondent examined the cook of the hotel and the cook has given evidence that at no time there were more than five persons working in the hotel. He denied that, Mohd. Fayaz, Rashid, Ashok, Anis, Rauf, Amir, Azam Ibrahim, Pandu, Dilip were working in the hotel along with him on that date. These names are mentioned in the list on which the Corporation is placing reliance. Though the hotel owner has admitted his signature appearing on the list, he has contended that in hurry his signature was obtained on this list. This list was got prepared from the son of the owner by the Inspector but as already observed even complete names of these persons were not mentioned. One more person is examined by the owner. He is close relative of the owner and his occupation is auto rickshaw driver. He has given evidence that he is not working in the hotel and he never worked as employee in the hotel.

11) For proving that more than 10 persons were working as employees necessary particulars need to be collected. Though it is true that under the provision of the ESI Act register of names of the employees is required to

be maintained. If register is not maintained action can be taken and criminal case can be filed. Such action is already taken. However only due to absence of such register inference cannot be drawn that more than 10 persons were working in the hotel.

12) The aforesaid material is considered by the ESI Court. Finding given by the ESI Court is the finding on question of fact. Thus, it cannot be said that relevant material is not considered by the ESI Court. In view of nature of material which is available with the Corporation and which is referred to above, this Court holds that it is not possible to interfere in the order made by the ESI Court. One more circumstance was argued by the learned counsel for the Corporation that Court Commissioner was appointed by the ESI Court for collecting some material and this report is considered by the ESI Court. Even if this record is ignored, the fact remains that the material available with the Corporation is not sufficient to prove that the establishment falls under the provisions of the ESI Act and it is liable to pay contribution. Size of the hotel was also not so big , it was only 25 x 10 ft and so it is

not possible to believe that there were 14 persons working in the hotel at the relevant time. It is already observed that there is no evidence to show that power was being used for manufacturing process in the hotel. Thus, both the points are answered in negative.

13) In the result, the appeal stands dismissed. No order as to costs.

Sd/-
(T.V. NALAWADE, J.)

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