IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

TUESDAY, THE 11TH DAY OF AUGUST 2015/20TH SRAVANA, 1937

Ins.APP.No. 27 of 2011 ( )

IC.NO. 74/2007 OF EMPLOYEES' INSURANCE COURT, ALAPPUZHA DATED 12-08-2010

APPELLANT/APPELLANT :

LOURDES HOSPITAL,
ERNAKULAM, COCHIN, KERALA,
REPRESNTED BY ITS DIRECTOR REV. FR. FRANCIS.

BY ADVS.SRI.BECHU KURIAN THOMAS
SRI.PAUL JACOB (P)
SMT.INDU SUSAN JACOB

RESPONDENTS/RESPONDENTS :
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1. THE REGIONAL DIRECTOR
ESI CORPORATION, PANCHDEEP BHAVAN,
NORTH SWARAJ ROUND
THRISSUR - 680001.

2. INSURANCE INSPECTOR,
EMPLOYEES STATE INSURANCE CORPORATION,
TEMPLE ROAD, COCHIN -20.

R1 & R2 BY ADV. SRI.T.VAJAYAKUMAR, SC

THIS INSURANCE APPEAL HAVING BEEN FINALLY HEARD ON 29-07-2015, THE COURT ON 11-08-2015 DELIVERED THE FOLLOWING:

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P.B.SURESH KUMAR, J.

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Ins.Appeal.No.27 of 2011

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Dated this the 11th day of August, 2015.

J U D G M E N T

The decision of the Employees' Insurance Court, Alappuzha in I.C.No.74 of 2007 is under challenge in this appeal. The applicant before the Employees' Insurance Court ('the Insurance Court' for short) is the appellant.

2. The applicant is a hospital. There were inspections in the premises of the applicant by the Inspectors attached to the Employees State Insurance Corporation ('the Corporation' for short) on various dates during the year 2001. In the course of the inspections, it was detected that the applicant is engaging 16 persons for wages in the canteen attached to the hospital. It was also detected that the applicant is using various equipments like Grinder, Mixie, Freezer etc. for the activities in the canteen. According to the Corporation, in the meanwhile, on 19.12.2001, the applicant submitted Ext.P7 declaration as provided for under Regulation 10B of the Employees' State Insurance (General) Regulations, 1950, stating that they are

engaging 16 employees in the canteen attached to the hospital. Thereupon, the Corporation issued Ext.P8 notice calling upon the applicant to comply with the provisions of the Employees' State Insurance Act, 1948 ('the Act' for short) in relation to the employees engaged by them in the canteen attached to the hospital. As there was no response to the said notice, Ext.P10 notice was also issued requiring the applicant to comply with the provisions of the Act. Since the applicant had not complied with the requirements in Exts.P8 and P10 notices, proceedings have been initiated to assess the contributions payable by the applicant in respect of their employees as provided for under Section 45A of the Act. Ext.P13 is a notice issued by the Corporation to the applicant in that connection. The application was filed, in the circumstances, seeking, among others, a declaration that the applicant is not bound to pay contributions in respect of the employees engaged by them in the canteen. It is alleged in the application by the applicant that the applicant is engaging only 7 employees in the canteen attached to the hospital and therefore, the canteen cannot be treated as a "factory" within the meaning of Section 2(12) of the Act. As regards Ext.P7 declaration claimed to have been given by the applicant, it was contended by the applicant that the same was an involuntary statement obtained by the Inspector attached to the Corporation from the Manager of the applicant.

3. The application was opposed by the Corporation contending, among others, that the applicant is engaging 16 employees in the canteen attached to the hospital from April, 2001 and that the employees of the canteen are, therefore, liable to be covered under the Act with effect from 1.4.2001. The allegation in the application that Ext.P7 declaration was an involuntary statement obtained from the Manager of the applicant was however denied in the objection filed by the Corporation.

4. The Insurance Court, on an elaborate consideration of the materials on record, found that the canteen attached to the hospital of the applicant satisfies the definition of “factory” within the meaning of Section 2(12) of the Act and that therefore, the coverage of the canteen with effect from 1.4.2001 is in order. Upon the said finding, the Insurance Court dismissed the application. The applicant is aggrieved by the said decision of the Insurance Court.

5. Heard the learned counsel for the appellant and the learned counsel for the Corporation.

6. Any premises including the precincts thereof whereon ten 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, would satisfy the definition of “factory” as contained in Section 2(12) of the Act. The question to be decided is as to whether the canteen of the applicant satisfies the aforesaid definition. In Ext.P7 declaration given by the applicant, they have stated categorically that they are using power for the activities in the canteen attached to the hospital from the year 1990 onwards and that they are engaging 15 female workers and one male worker in the canteen from April, 2001 onwards. Ext.P7 declaration was given on 19.12.2001. Ext.B5 is the report of the Inspector attached to the Corporation dated 27.12.2001. Ext.B7 is a report submitted by the Inspector to the Regional Director of the Corporation. In Ext.B7 report, it is categorically stated by the Inspector of the Corporation that the documents made available to him by the applicant indicates that the applicant is engaging more than 14 employees in the canteen. It is thus evident that the canteen attached to the applicant satisfies the definition of “factory” from

April, 2001.

7. The learned counsel for the applicant contended that there were only 7 employees in the canteen of the hospital and other workers referred to in the various registers and muster rolls collected by the Inspector are the workers engaged in other departments of the hospital. He relied on the evidence of PW2, an employee engaged in the canteen in support of that contention. He also contended, relying on the evidence tendered by PW1, that Ext.P7 declaration cannot be relied upon to hold that the applicant is engaging more than 14 employees in the canteen attached to the hospital as the same was not a voluntary statement. The learned counsel, relying on the decision of the Apex Court in **Hotel New Nalanda v. E.S.I. Corporation** [2009 (3) KLT 414 (SC)] further contended that merely for the reason that Freezer, Mixie and Grinder were found in the premises of the canteen, it cannot be said that power is used for the manufacturing process carried on in the premises of the canteen. According to the learned counsel, it is for the Corporation to establish by adducing evidence that manufacturing process is carried on in the premises of the canteen using power and in the absence of any evidence in that regard, it cannot be said that the

canteen is a factory.

8. As regards the contention that the applicant was engaging only 7 employees in the canteen, I have already held that Ext.P7 declaration and the various registers and muster rolls of the applicant as collected by the Inspector attached to the Corporation indicate beyond doubt that they were engaging more than 14 employees from April, 2001 onwards. When documentary evidence in the nature of statutory registers were available indicating the strength of the employees engaged in the canteen, the oral evidence tendered on behalf of the applicant as regards the strength of the employees contrary to the documentary evidence cannot be accepted. It is all the more so since the applicant themselves gave Ext.P7 declaration stating that they are engaging 16 employees from April, 2001 onwards. Even otherwise, the evidence tendered by PW2 is of no use to the applicant. In the cross examination, PW2 has categorically stated that about 15 persons are engaged in the canteen of the hospital. The learned counsel for the applicant pointed out that PW2 was examined in the year 2009 and while giving the aforesaid answer in cross examination, she was referring to the strength of the employees in the canteen at the time of her examination and the

said fact has been clarified by her in the re-examination. I am unable to accept the said explanation offered by the learned counsel for the applicant as in the re-examination, she only clarified that 15 employees referred by her in the cross examination are persons employed at the time of giving evidence and earlier there were only 5 to 8 employees. It is not clear from the re-examination as to the period during which she claimed that there were only 5 to 8 employees in the canteen.

9. Coming to the contention of the applicant that Ext.P7 is not a voluntary declaration given by the applicant, I must notice at once that the Manager of a mighty establishment like the applicant cannot be presumed to be a person who would give statements in the nature of Ext.P7 for the mere sake of asking by an Inspector attached to the Corporation. When the applicant has a specific contention that Ext.P7 declaration is vitiated by collusion, it is for them to establish the said fact. There is nothing on record to indicate that Ext.P7 was an involuntary document given by the Manager of the hospital, except the oral evidence tendered by PW1.

10. As regards the contention of the applicant based on the decision of the Apex Court in **Hotel New Nalanda v.**

E.S.I. Corporation (supra), it is seen that the Apex Court had held in the said case that for holding an establishment to be a “factory” within the meaning of Section 2(12) of the Act, it must be established that some work or process is carried on in any part of the establishment that amounts to manufacturing process as defined under Section 2(k) of the Factories Act and that mere presence of a Freezer, Mixie and Grinder in the premises of a hotel does not lead to an inference that the establishment is a factory. The decision of the Apex Court in **Hotel New Nalanda v. E.S.I. Corporation**(supra) is a decision relating to a hotel. A close reading of the said judgment indicates that there were no materials in the said case to indicate that Freezer, Mixie, Grinder, etc., found in the premises of the hotel were in use. The establishment challenged the proceedings before the Insurance Court on the ground that they are only engaged in letting out rooms on monthly and daily basis and that there was no manufacturing process in that premises. It is in the context of the said contention, the Apex Court held that merely for the reason that Freezer and Grinder were found in the premises of an establishment, it cannot lead to an inference that it is a factory. The said judgment, according to me, only lays down the proposition that an establishment can be treated as a factory on the basis that there is manufacturing process using power only if some work or process is carried on in any part of the establishment that amounts to manufacturing process with the aid of power. In the case dealt with by the Apex Court, other than the mere presence of the Grinder and Freezer, there was no material to show that some work or process was being carried on in the premises of the hotel making use of the said equipments. As far as the present case is concerned, as pointed out above, the applicant itself has stated in Ext.P7 declaration that they are using power for the activities in the canteen attached to the hospital from the year 1990 onwards. Further, in the application filed before the Insurance Court, they do not state that power is not being used for the activities in the canteen attached to the hospital. PW1 who gave evidence on behalf of the applicant has also not deposed that power is not being used in the canteen attached to the hospital. In other words, the fact that power is being used for the activities in the canteen is a fact which was admitted by the applicant. That apart, the Inspector of the Corporation who gave evidence as DW1 has categorically stated in his evidence before the Insurance Court that he found on inspection that food articles were being prepared using the equipments functioning with the aid of power. In the said circumstances, I do not think that the decision of the Apex Court has any application to the case of the applicant.

The appeal, in the circumstances, is devoid of any merits and it is, accordingly, dismissed.

Sd/-
P.B.SURESH KUMAR, JUDGE.

Kvs/-

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PA TO JUDGE.