

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

FRIDAY, THE 24TH DAY OF JULY 2015/2ND SRAVANA, 1937

Ins.APP.No. 53 of 2010 ()

IC. NO.40/2007 OF EMPLOYEES' INSURANCE COURT, PALAKKAD.

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APPELLANT:

**THE MATHRUBHUMI PRINTING & PUBLISHING CO. LTD.,
M.J. KRISHNAMOHAN MEMORIAL BUILDING,
K.P. KESAVA MENON ROAD, KOZHIKODE - 673 001.**

**BY SRI.U.K.RAMAKRISHNAN, SENIOR ADVOCATE.
ADV. SRI.PRINSUN PHILIP.**

RESPONDENT(S):

- 1. THE EMPLOYEES STATE INSURANCE CORPORATION,
PANCHDEEP BHAVAN, NORTH SWARAJ ROUND,
THRISSUR - 680 020.**
- 2. THE RECOVERY OFFICER, ESI CORPORATION,
PANCHDEEP BHAVAN, NORTH SWARAJ ROUND,
THRISSUR - 680 020.**
- 3. VIJEESHMON P. (VIJU.P.), PULIKKANCHARI HOUSE,
POST ATTASSERI, SREEKRISHNAPURAM (VIA),
PALAKKAD - 679 513.**
- 4. DHANEESH M.B., DHANASREE, P.O. NAIKKATTY,
SULTHAN BATHERY, WAYANAD - 673 592.**

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

**THIS INSURANCE APPEAL HAVING BEEN FINALLY HEARD
ON 23-06-2015, ALONG WITH CO. NO. 62 OF 2011, THE COURT
ON 24/07/2015 DELIVERED THE FOLLOWING:**

rs.

P.B.SURESH KUMAR, J.

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Insurance Appeal No.53 of 2010

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Cross Objection No.62 of 2011.

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Dated this the 24th day of July, 2015.

J U D G M E N T

The decision of the Employees' Insurance Court, Palakkad in I.C.No.40 of 2007 is under challenge in this appeal. The applicant in the proceedings is the appellant.

2. The applicant is a newspaper establishment covered under the Employees' State Insurance Act, 1948 ('the Act' for short). As per notices dated 28.3.2007 and 29.5.2007, the employees of the Employees' State Insurance Corporation ('the Corporation' for short), claimed contributions payable by the applicant under the Act in respect of a few of its employees. It was alleged in the notices that among them, some are engaged as trainees by

the applicant and the remaining are employees engaged by the contractor supplying food to the employees of the establishment. The applicant challenged the said notices before the Employees' Insurance Court contending that the persons engaged as trainees are apprentices engaged in accordance with the standing orders applicable to the establishment and, therefore, they are not liable to be covered under the Act. As far as the employees engaged by the food supply contractor are concerned, the contention was that the said employees are persons not engaged in any work which is incidental to the purpose of the establishment.

3. The Corporation contested the application, contending, among others, that there were no records in the establishment at the time of inspection to indicate that the trainees referred to in the notices were apprentices engaged under the standing orders applicable to the establishment. As regards the employees engaged by the food supply contractor, it was contended by the Corporation that the

said workers can only be regarded as persons engaged for works which are incidental to the purpose of the establishment.

4. The evidence in the case consists of the oral testimony of AW1 and Exts.A1 to A46 on the side of the applicant and the oral testimony of RW1 and Ext.B1 on the side of the respondents.

5. The Insurance Court, on an elaborate consideration of the materials on record, found that seven out of the ten employees required to be covered by the Corporation are trainees who are not liable to be covered under the Act. The Insurance Court also found that the applicant is liable to pay contribution in respect of the employees of the food supply contractor. Consequently, the Insurance Court exonerated the applicant from the liability to pay contribution in respect of the seven trainees/apprentices named in the impugned order and confirmed the notices issued by the Corporation directing

the applicant to pay contribution in respect of the remaining employees. The applicant is aggrieved by the said decision of the Employees' Insurance Court and hence this appeal. The Corporation is also aggrieved by the decision of the Employees' Insurance Court in so far as it relates to the exoneration of the liability of the applicant to pay contributions in respect of the seven persons named in the order. They have, therefore, raised a Cross Objection in the appeal challenging the said part of the order.

6. Heard the learned Senior Counsel for the appellant and the learned Standing Counsel for the Corporation.

7. The learned Senior Counsel, relying on Exts.A6 to A11 food supply orders issued by the applicant to their food supply contractors, contended that the applicant is not running any canteen by engaging any intermediary contractor/immediate employer and that the arrangement made by the applicant with the food supply contractor is

only an arrangement for supply of specified food items to its employees at a prescribed tariff. As such, according to the learned Senior Counsel, the food supply contractor cannot be regarded as an immediate employer as defined under the Act to bring the employees engaged by him under the Act. The learned Senior Counsel also contended, relying on the decision of this Court in Ins.Appeal No.1 of 2013, that even if the food supply contractor is considered as the immediate employer, the employees engaged by him cannot be regarded as the persons employed for works which are incidental to the work of the establishment as the establishment is not statutorily obliged to run a canteen.

8. Per contra, the learned Standing Counsel for the Corporation contended that the object of the enactment is to cater to the welfare of the persons employed in or in the work of the establishment to which the statute applies and as such, the food supply contractor is to be regarded as an immediate employer and the employees engaged by him

is to be regarded as employees engaged in the works which are incidental to the purpose of the establishment. He also contended that although considering the number of employees in the establishment, a canteen is not required to be maintained under any statute, in so far as the canteen caters to the needs of the employees, the workers therein are liable to be treated as workers engaged in the works which are incidental to the purpose of the establishment. He relied on the decisions of this Court in **Regional Director, E.S.I. Corporation v. Kerala Kaumudi** (1987(1) KLT 79) and in **E.S.I. Corporation v. United Electrical Industries** (1975 KLT 714) in support of the said contention. He further contended that there is virtually no difference between a canteen contractor and the food supply contractor and therefore there cannot be any distinction between the employees engaged by them.

9. The issues fall for consideration, in the circumstances, are, (i) whether the Insurance Court is

justified in law in exonerating the applicant from the liability to pay contributions under the Act in respect of the seven employees referred to in the impugned order and, (ii) whether the Insurance Court is justified in holding that the applicant is liable to pay contribution in respect of the employees engaged by its food supply contractor.

10. Issue No.(i): The definition of 'employee' contained in Section 2(9) of the Act which stood prior to the amendment brought to the Section by virtue of Act 18 of 2010, reads thus:

"'employee' means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and -

(i) who is directly employed by the principal employer, on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or

(ii) who is employed by or through an immediate employer, on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;

and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment or any person engaged as apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment; but does not include -

(a) any member of the Indian naval, military or air forces;
or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government a month:

Provided that an employee whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government at any time after [and not before] the beginning of the contribution period, shall continue to be an employee until the end of that period."

There cannot be any dispute to the fact that the trainees

engaged in the establishment are apprentices. It is evident from Section 2(9) of the Act that apprentices engaged under the standing orders of the establishment are excluded from the definition of 'employee'. The specific case of the applicant is that the employees referred to in the notices impugned in the proceedings are apprentices engaged in accordance with the standing orders applicable to the establishment. Ext.A12 is the standing order applicable to the establishment. Ext.A12 authorises the establishment to engage apprentices. What is noted by the Corporation in Ext.B1 report and in Ext.A1 visit note is only that though the employees referred to therein were claimed to have been engaged as apprentices, documents in support of the said stand were not made available to the Corporation by the applicant. Ext.A13 to A20 are the proceedings by which the aforesaid persons were engaged as trainees in the establishment. The Insurance Court found that as per the terms of the said documents, the aforesaid employees were

taken as trainees on payment of a fixed amount as stipend. The Insurance Court also found that they were not eligible for any other benefits such as VDA, HRA, Bonus, incentives, etc. The Insurance Court further found that the said employees were paid only a fixed stipend for the period of training. It is in the said circumstance, the Insurance Court came to the conclusion that the aforesaid employees are persons engaged as apprentices as permitted in the standing orders applicable to the establishment. I do not find any illegality in the said decision. The issue is found accordingly.

11. Issue No.(ii): In **E.S.I. Corporation v. United Electrical Industries** (supra), this Court considered the question whether the employees in a canteen run by an independent contractor within the premises of a factory are liable to be treated as the employees of a factory for the purpose of the Act. Having regard to the object of the statute, this Court held that the employees of the

canteen are persons engaged in works incidental to the purpose of the factory and therefore, even if they are employed by an independent contractor, if they are working in the premises of the factory, they are liable to be treated as employees under the Act. Paragraphs 6 and 7 of the judgment read thus:

“6. A canteen run in the premises of the factory is so run for the purpose of providing amenities to the employees of the factory. S.46 of the Factories Act, 1948 enables the State Government to make rules requiring that in any specified factory wherein more than two hundred and fifty workers are ordinarily employed, a canteen or canteens shall be provided and maintained by the occupier for the use of the workers. Even where the number of workers is less than 250, it is open to the occupier to provide canteens. The object of providing such facilities is to make more amenities available to the workmen so as to increase their efficiency and also to provide them with conditions conducive to the bringing out of the best in them. The provision of hospitals, shelters, rest rooms, lunch rooms and the like are all intended to better the working conditions in factories. It cannot be said that the maintenance of these is not incidental to the work of the factory since the factory is concerned only with production. If persons concerned in such work are those employed in work incidental to the work of the factory or incidental to the purpose of the factory, it is difficult to say that the work of the employees in canteens falls outside the purview

of the term. The Supreme Court had occasion to consider the position of a gardener in the premises of a factory in relation to the plea whether he is engaged in work incidental to the factory. The question there was whether certain gardeners employed in a garden attached to a mill could claim to be employees within the meaning of the term in the Bombay Industrial Relations Act. Dealing with the question, the Supreme Court in *Ahmedabad Mfg. & Calico Ptg. Co. v. Ramtahel* (AIR. 1972 S. C. 1598) quoted the following passage from the judgment of the High Court which was under appeal before that Court, at page 1601:

"A garden when attached to a mill is an amenity that is provided to the workers employed in the mill and it is not necessary that an amenity should arise from a statutory requirement or obligation and it hardly makes any differences if the garden was provided for voluntarily or under a statutory obligation. The activities in an undertaking such as a textile mill are not confined purely to factory work of manufacturing textile fabric within the mill premises, but various other incidental and connected institutions such as hospital, a canteen, a playground and a garden might be maintained by the mill to provide amenities to its workers and these activities could be considered as the activities made in relation to and in the usual course of conducting the affairs of the mill. Not merely within the turning of the wheels of the machine which, no doubt, is directly responsible for the production of the article for which the plant of the particular industry was installed and not merely in utilising the power to move the machine to action, the field of activities of the undertaking is restricted and exhausted, but there are many more varieties though allied and complementary activities which are being carried on by the management and which help, though in an indirect manner, in creating a healthy atmosphere of well being and co-operation amongst the workers by providing essential facilities such as means for treatment of their ailments, for general entertainment and care not only of the workers but of the children who are left unattended while their parents are engaged in their work in the factory. While, therefore construing the words "in the course of" and

"ordinarily a part of the undertaking' we must give them a meaning which is natural and consistent with the working of a factory as it exists in the present times and while doing so, an approach should not be theoretical and academic but pragmatic and practical. The activities that are usually conducted as a part of an undertaking by which not only workers participate in the actual running of the machinery but also activities which conduce to the smooth working of the plant as a whole must be considered to fall within the ambit of the definition. We are, therefore, unable to agree with the contention of Mr. Patel that the application of the Act must be restricted to only those workers who are directly engaged in the manufacture of textile fabric."

Referring to this, the Supreme Court said:

"The respondents' learned counsel, apart from urging that the High Court has sent the case back for deciding the nature of work done by the malis in this case and that, therefore, the appellant cannot appropriately ask this court to determine these questions which are awaiting decision by the Industrial Court, also relied on *Basti Sugar Mills Ltd. v. Ram Ujagar*, (1964) 2 SC R.838 = (AIR. 1964 SC 355) and on *J.K. Cotton Spg & Wvg. Mills (Supra)*. In the former case the respondents there employed by a contractor to remove press mud from the sugar factory were held to be workmen employed by the factory because removing press mud was considered ordinarily to be a part of the sugar industry. The latter case is an authority for the proposition that an employee engaged in any work or operation which is incidentally connected with the main industry is a workman if other requirements of S.2(s) of the Industrial Disputes Act, 14 of 1947 are satisfied and that the malis in that case were workers within the meaning of S.2 of U.P Industrial Disputes Act 28 of 1947. The bungalows and gardens on which the malis in that case worked were a kind of amenity supplied by the mills to its officers and on this reasoning the malis were held to be engaged in operations incidentally connected with the main industry carried on by the employer. It was by relying on the ratio of this decision that the High Court in the present case came to the conclusion that the workers in order to come within the definition of "employee" need not necessarily be directly connected with the manufacture of textile fabrics. This decision is binding on us and indeed Shri Desai also fairly accepted

its ratio. He only contended that the malis employed by a contractor unless directly connected with the textile operations cannot get the benefit of this decision".

This decision is referred to by the Supreme Court and followed in *Saraspur Mills Co.v. Ramanlal* (AIR. 1973 S.C. 2297), a case concerning coverage relating to employees in canteens

7. The High Court of Andhra Pradesh in the decision in *Sirsilk Ltd. v. Regional Director, E.S.I. Corporation* (AIR 1964 AP 291) was concerned with the question of coverage of workmen in a canteen attached to the factory and the learned Judges took the view that such workmen are employees as they are concerned with the work incidental to the work of the factory. We are in respectful agreement with this view.

If the workmen in the canteen are employed in connection with any work incidental to the purpose of the factory, then, even if they are employed by an independent contractor, they will be employees if they are working on the premises of the factory, which is the case here. Therefore, the canteen employees are liable to be covered. To that extent, the appeal succeeds. A declaration is granted in respect of the canteen employees. No declaration can be granted as prayed for in respect of casual workers as they are persons held to be not covered by the Act. The appeal is disposed of as above. No costs."

In **Regional Director, E.S.I. Corporation v. Kerala Kaumudi** (supra), in the context of a newspaper establishment, this Court held that the employees of a

canteen run by the newspaper establishment through an intermediary contractor are to be treated as employees for the purpose of the provisions of the Act. Paragraph 11 of the judgment reads thus:

"11. The object of the enactment is to cater to the welfare of persons employed in or in connection with the work of the factory or establishment to which the statute applies. The employees of the contractor, who is the "immediate employer", as defined under S.2(13), being engaged in work which is "incidental" to the work of the establishment, in the sense in which that expression is understood by the Supreme Court, are employees entitled to the benefit of the Act. The canteen in which they are employed, and situated on the premises of the respondent's establishment, caters to the needs of its employees, although, considering the number of persons employed in the establishment, a canteen is not required to be maintained under any statute. The contractor runs the canteen at the behest of the members of the club who are themselves employees of the respondent, although there is no direct contractual relationship between the respondent and the contractor's employees. The canteen is very much a part of the cultural life of the establishment and relevant to the welfare of its employees. Its work is not only consistent with the purpose of the establishment, but it positively serves its interest."

The case dealt with by this Court in **Regional Director, E.S.I. Corporation v. Kerala Kaumudi** (supra), was also a

case where the employer was not obliged to run a canteen under any statutory provision. Thus, it is evident that merely for the reason that the applicant is not obliged by any statutory provision to run a canteen, it cannot be said that the employees of the contractor engaged by the applicant are not employees engaged in the works incidental for the purpose of the establishment. True, this Court has held in Ins. Appeal No.1 of 2013 that when an employer is not obliged statutorily to run a canteen, the employees engaged by the canteen contractor cannot be regarded as employees engaged in works incidental to the purpose of the establishment. The judgment in Ins.Appeal No.1 of 2013 was rendered without referring to the above referred decisions as the same were not brought to my notice at the time of the hearing of the said appeal. As such, the decision rendered by me in Ins.Appeal No.1 of 2013 shall not fetter me from deciding the issue raised in this appeal following the binding decisions referred to above.

12. Coming to the contention that the food supply contractor of the applicant cannot be regarded as an immediate employer as defined under the Act to bring the employees engaged by him under the Act, it is seen that the arrangement entered into by the applicant with the food supply contractor is to provide specified items of food at a particular tariff. The food supply orders produced by the applicant indicate that the contractor has been provided by the applicant all the infrastructures for running a canteen. He is provided with a place within the premises of the establishment for preparation and supply of food. He is provided with the utensils for preparing the food items. He is provided with the LPG cylinders required for preparation of the food items. He is provided with the furnitures, appliances, fixtures, etc. for supply of food items. In the said circumstances, I do not find any difference between a food supply arrangement as in the instant case and a canteen. The employees of the food supply contractor and

the employees of the contractor engaged in running the canteen cannot, therefore, be viewed differently for the purpose of the provisions of the Act. I have, therefore, no hesitation to hold that the food supply contractor is liable to be regarded as an immediate employer as defined under the Act so as to bring the employees engaged by him within the purview of the Act.

In the aforesaid circumstances, there is no merit in the appeal and the Cross Objection and they are, accordingly, dismissed.

**Sd/-
P.B.SURESH KUMAR,
(JUDGE)**

Kvs/-

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PA TO JUDGE.