

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON:28.07.2017
DATE OF DECISION: 04.08.2017
CRAM
THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

CMA.No.733 of 2015

The Employees State Insurance Corporation
Rep by its Deputy Regional Director
143, Sterling Road, Nungambakkam,
Chennai 34.

... Appellant

Vs

I.T.C.Ltd
Proprietors of Hotel Chola Sheraton
No.10, Cathedral Road, Chennai 600 086.

... Respondent

This appeal is filed under Section 82 (2) of the Employees' State Insurance Act, 1948, to set aside the order dated 30.07.2013 passed in EIOP No.14/2001 on the file of the Employees State Insurance Court (Principal Labour Court), Chennai.

For Appellant : Mr.G.Bharadwaj

For Respondent : Mr.Sanjay Mohan,
for M/s.S.Rama Subramaniam &
Associates

J U D G E M E N T

This appeal is filed by the ESI Corporation against the order of the Employees Insurance Court allowing an application filed by the respondent challenging the proceedings under Section 45(A) of the Employees State Insurance Act 1948.

The brief facts as set out in the petition filed by the ESI Corporation in EI OP No.14 of 2001 as follows:

2. The respondent namely ITC Limited, proprietors of Hotel Chola Sheraton, a Five Star Hotel in Chennai, which has now been renamed as My Fortune, Chennai, was served with a notice in Form C-18, demanding contributions for the period from 1.9.75 to 3/89. The annexure to the Form C-18 notice discloses that contribution is demanded for the employees working in various shops located in the Hotel premises. The said Form C-18 notice was followed with an order under Section 45(A) dated 29.06.1990

in an by which the Regional Director of the appellant Corporation held that the shops situate inside the Hotel premises are functioning after obtaining license from the Hotel and maintenance of shops being incidental to the Hotel business, the authority chose to treat the employees working in the said shops as the employees of the Hotel Chola Sheraton and levied contribution.

3. Aggrieved by the said order dated 29.06.1990 the respondent filed EI OP No.100 of 1990 which happen to be renumbered as EI OP No.14 of 2001. In the said original petition the principal contention of the respondent herein was that the shops are run by separate owners who are licensed to occupy the said shops in the Hotel premises. It is further contended that the workers in the shops are not employees of the Hotel. It was also contended that the shops in question are not meant to be patronized exclusively by the guests of the Hotel. All the shops, according to the respondent, are open to the public and therefore the employees of the shops cannot be treated as the employees of the Hotel in order to make the Hotel liable to pay contribution for those employees also. It was also further contended that the claim for contribution from the period 1975 cannot be sustained, in view of the fact that the catering establishment came under the cover of the Employees' State Insurance Act only from 16.01.1977.

4. The said claim of the respondent was resisted by the appellant contending that the shops in question being incidental to the main business of the Hotel the employees in the shops are to be treated as the employees of the Hotel. The appellant Corporation relied upon the Judgment of the Hon'ble Supreme Court in Royal Talkies, Hyderabad and others v. Employees State Insurance Corporation, reported in [AIR 1978 SC 1478]. Certain observations of the Hon'ble Supreme Court in the said decision were taken as laying down the Law relating to coverage employees of such shops in a Five Star Hotel. The appellant Corporation also referred to the stipulations in the lease agreement to contend that the persons working in the shops are bound to be treated as employees of the Hotel and the Hotel Management is bound to pay contribution under the Employees' State Insurance Act.

5. The Employees Insurance Court (Principal Labour Court), Chennai after hearing the parties framed the following points for determination:

1. Whether the petitioner is entitled to a declaration that the order of the respondent passed under Section 45A of the ESI Act dated 29.06.1990 is liable to be set aside as illegal?
2. To what relief the petitioner is entitled?

6. It is found from the records that P.W.1 was examined and Exs.P1 to P10 were marked on behalf of the petitioner in EI OP No.14 of 2001, On behalf of the Corporation R.W.1 was examined Exs.R.1 to R.15 were marked.

7. The learned Trial Judge concluded that the observations of the Hon'ble Supreme Court in Royal Talkies case referred to supra, cannot applied to the case on hand inasmuch as the shops in question are open to public and they are not exclusively intended for the guests of the Hotel. The learned Trial Judge also relied upon the judgment of this Court in ESI Corporation v. The Management of Kamadhenu Super Market, wherein it was held that the workers of shops in the premises of the Super market are not employees of the Super market and the ESI Corporation is not justified in making demand for the contribution from the Management of the Kamadhenu Super Market. By drawing analogy the Employees Insurance Court held that the Order under Section 45(A) is liable to be set aside as illegal.

8. Aggrieved by the said decision the Corporation is on appeal.

9. I have heard Mr.G.Bharadwaj, learned counsel appearing for the appellant and Mr.Sanjay Mohan, learned Counsel for M/s.RamaSubramaniam Associates appearing for the respondent.

10. Mr.G.Bharadwaj, learned Counsel appearing for the appellant/Corporation would draw my attention to the observations of the Hon'ble Supreme Court in Royal Talkies, Hyderabad and others v. Employees State Insurance Corporation, reported in [AIR 1978 SC 1478] and contend that in as much as the business of the shops is incidental to the main business of the respondents the workmen in the shops have to be treated as employees of the Hotel. The learned Counsel would contend that in Royal Talkies case, the Hon'ble Supreme Court has observed that in case of a Five Star Hotel, a barber shop or an arcade, massage parlour, foreign exchange counter or tourist assistance counter may be run by some one other than the owner of the establishment or the hotel even though there is no obligation for a hotel to maintain such an ancillary attraction. Relying upon the said observation of the Supreme Court, Mr.G.Bharadwaj, would vehemently contend that the Corporation was right in construing the workers in the shops situate within the premises of the hotel as employees of the Hotel itself and the Management of the Hotel is liable to pay contribution for the employees.

11. Per contra Mr.Sanjay Mohan, learned counsel appearing for the respondent/Management would contend that the definition of employee under Section 2(9) of the Employees' State Insurance Act cannot be stretched in order to include a person who is not directly or indirectly employed by the Principal

employer. The learned counsel would also point out that the observations of the Supreme Court in Royal Talkies case are only obiter and the same may not be construed as a binding precedent. He would further point out that the question that arose in Royal Talkies case was whether the employees of an contractor of cycle stand in a movie theatre could be said to be employees of the management of the theatre, so as to make the Management of the theatre liable to pay the compensation under the Employees' State Insurance Act. According to Mr.Sanjay Mohan, learned counsel appearing for the respondent/Management, the Hon'ble Supreme Court while deciding the workers under the contractor of a cycle stand in a cinema theatre would come within the definition of an employee under Sub Section 9(2) of the Employees' State Insurance Act, took note of the fact that the cycle stand could be used only by patrons of the cinema theatre and not by the general public. In the case on hand the shops as well as the other establishments situate within premises of Hotel Chola Sheraton are open to the general Public and in the absence of exclusivity, it cannot be said that the workers in the shops situate within hotel premises could be termed as employees of the hotel within the meaning of Sub Section 9 Section 2.

12. Inviting my attention to the Judgment of the Hon'ble Supreme Court in The Managing Director, Hassan Co-operative Milk Producer's Society Union Limited v. The Assistant Regional Director, Employees State Insurance Corporation, wherein the Hon'ble Supreme Court pointed out that in order to make a worker to come within the meaning of an employee defined in Sub Section 9 Section 2, it should be shown that the workers work under the direct supervision of the Management and that there was "consistency of vigil" by the principal employer. Contending that the judgment of the Hon'ble Apex Court in Hassan Co-operative Milk Producer's Society Union Limited, would alone apply to the case on hand the learned counsel would submit that the Employees Insurance Court was right in allowing the application under Section 75 (1) of the Act and setting aside the order under Section 45(A) of the Act. Mr.Sanjay Mohan, learned counsel appearing for the respondent/Management would also further contend that in view of the judgment of the Hon'ble Supreme Court in Bharat Heavy Electrical Ltd. v. ESI Corporation, reported in [2008 (4) MLJ 95], the actual employers namely owners of the shops are also necessary parties to the proceedings under Section 45(A), in their absence the ESI Corporation cannot conclude that the person employed by them are workman or employee within a meaning of Section 2(9) of the said Act.

13. On the above contentions the following points arise for determination in this Appeal:

Whether the workers in the shops which are run by third parties under license from the respondent/Management within the premises of the Hotel would be termed as employees within a meaning of Section 2(9) of The Employees' State Insurance Act, 1948, in order to enable the Corporation to claim contribution from the Management of the Hotel?

ON THE POINT:-

14. All the 12 shops are run within the premises of the Hotel under a license agreement between the owners of the shop and the hotel management. The agreement christened as license agreement stipulates the names of the persons employed in the shops must be provided to the Hotel Management. The Hotel Management may not have any kind of control over them. This has been aptly described as "consistency of vigil" by the Hon'ble Supreme Court in Hassan Co-operative Milk Producer's Society Union Limited case. It is also not shown that the facilities available or provided by the shops are restricted to the guests of the hotel. The Corporation also does not dispute that the premises of the shops inside the Hotel are open to the general public also.

15. No doubt it is true that the following observations of the Hon'ble Supreme Court in Royal Talkies case which reads as follows.

"....in case of a Five Star Hotel, a barber shop or an arcade, massage parlour, foreign exchange counter or tourist assistance counter may be run by some one other than the owner of the establishment or the hotel even though there is no obligation for a hotel to maintain such an ancillary attraction....."

The above observation would seem to suggest that the workers of such shops situate within the terms of a Five Star Hotel could be employees under Section 2(9) of the Employees' State Insurance Act. But in the very same judgment the Hon'ble Supreme Court has also pointed out that

"....a bookstall where scientific works or tools are sold or a stall where religious propaganda is done, may not have anything to do with the cinema establishment and may, therefore, be excluded on the score that the employees do not do any work in connection with the establishment, that is, the theatre...."

The Hon'ble Apex Court had further observed as follows:

"16. Merely being employed in connection with the work of an establishment, in itself, does not entitle a person to be an 'employee'. He must not only be employed in connection with the work of the

establishment but also be shown to be employed in one or other of the three categories mentioned in Section 2(9)."

16. Therefore, unless it is shown that the worker falls within any of three categories of employees stipulated under Section 2(9) of the Act the ESI Corporation cannot treat them as an employee of the Hotel and demand contribution.

Sub Section 9(i) of the Act deals with persons

(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;

Sub Section 9(ii) of the Act deals with persons

(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;

Sub Section 9(iii) of the Act covers those persons

(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;

Therefore in order to be called as an employee, within the meaning of Section 2(9) of the Act the workers should be an employee within the meaning of any of the three categories stated above.

17. In Hassan Co-operative Milk Producer's Society Union Limited case the question involved was whether employees who worked in transportation of milk under the contractors who are engaged by the society for the said purpose would be covered by Section 2(9). After reproducing the relevant Clauses of the agreement and referring to the judgment of the Supreme Court in C.E.S.E Limited v. Subhash Chandra Bose and others reported in [1992 (1) SCC 441], the Hon'ble Supreme Court observed as follows:

"22. Although, E.S.I. Court in respect of the appellants in separate orders, has recorded a finding that such workers work under the supervision of the principal employer and the said finding has not been interfered with by the High Court but we find it

difficult to accept the said finding. The ordinary meaning of the word 'supervision' is 'authority to direct' or 'supervise' i.e., to oversee. The expression 'supervision of the principal employer' under Section 2(9) means something more than mere exercise of some remote or indirect control over the activities or the work of the workers. As held in C.E.S.C. Ltd. 7 that supervision for the purposes of Section 2(9) is 'consistency of vigil' by the principal employer so that if need be, remedial measures may be taken or suitable directions given for satisfactory completion of work. A direct disciplinary control by the principal employer over the workers engaged by the contractors may also be covered by the expression 'supervision of the principal employer'. The circumstances, as in the case of HCMPSU Ltd., that the authorized representatives of the principal employer are entitled to travel in the vehicle of the contractor free of charge or in the case of BURDCMPS Union, that the principal employer has right to ask for removal of such workers who misbehave with their staff are not the circumstances which may even remotely suggest the control or interference exercised by the appellants over the workers engaged by the contractor for transportation of milk. From the agreements entered into by the appellants with the contractors, it does not transpire that the appellants have arrogated to themselves any supervisory control over the workers employed by the contractors. The said workers were under the direct control of the contractor. Exercise of supervision and issue of some direction by the principal employer over the activities of the contractor and his employees is inevitable in contracts of this nature and that by itself is not sufficient to make the principal employer liable. That the contractor is not an agent of the principal employer under Section 2(9) (ii) admits of no ambiguity. This aspect has been succinctly explained in C.E.S.C. Ltd. 7 with which we respectfully agree. No evidence has been collected by the E.S.I. Corporation during the inspection of the appellants' establishments or from the contractors that the appellants have any say over the terms and conditions of employment of these employees or that the appellants have any thing to do with logistic operations of the contractors. As a matter of fact, there is nothing on record to show that principal employer had any knowledge about the number of persons engaged by the contractors or the names or the other details of such persons. There is also no evidence that the appellants were aware of the amount payable

to each of these workers. In the circumstances, even if it be held that the transportation of milk is incidental to the purpose of factory or establishment, for want of any supervision of the appellants on the work of such employees, in our opinion, these employees are not covered by the definition of 'employee' under Section 2(9) of the Act."

18. In view of the above observations of the Hon'ble Supreme Court unless it is shown that there was a constant supervision or consistency of vigil by the principal employer the employees of the contractor cannot be said to be employees covered by Section 2(9) of the Employees' State Insurance Act. There could be no doubt that the transportation of milk was an activity of a Milk producer's Society, similar to those who are having shops for selling artifacts, massage parlour and health clubs inside a Five Star Hotel which may be called incidental to the business of the hotel. But the hotel is under no obligation to maintain such ancillary services/attractions, therefore, those services cannot be called as essential service to the business of the hotel. If the workers employed in such incidental service are to be brought within the meaning of employees as defined under Section 2(9) of the Employees' State Insurance Act the Corporation must go further prove that the workers of such establishments are working under the supervision of the management concerned. The clauses of the agreements between the hotel and the owners of the shops has been reproduced by the corporation in its counter filed before the Employees Insurance Court. A reading of those clauses do not show that the employees are either paid by the Hotel Management or that there is any direct supervision of their activities by the Hotel Management. Therefore, in the light of the pronouncement of the Hon'ble Supreme Court in Hassan Co-operative Milk Producer's Society Union Limited case referred to supra it cannot be said that the workers in the shops situate within the premises of the hotel could be called employees of the Hotel for the purposes of levy of contribution under the Act.

19. The other contention of Mr. Sanjay Mohan, learned counsel appearing for the respondent/Management, is that the owners of the shops are to be notified under Section 45(A) of the Employees State Insurance Act, therefore, in the absence of such notice the proceedings under Section 45(A) of the Employees State Insurance Act, are not sustainable. I am not going into the said contentions, in view of the conclusion reached by me on the point framed for determination in this appeal. In fact even after referring to the judgment of the Royal Talkies case, the Hon'ble Supreme court has in Hassan Co-operative Milk Producer's Society Union Limited case, come to the conclusion

that the workers who are employed by contractors for transportation of milk, which is essentially an incidental business to the main business of the society namely Production and Distribution of Milk and Milk Products are not employees of the society as defined under Section 2(9) of the ESI Act.

20. I do not think the observations in the judgment of Royal Talkies case relating to the incidental or ancillary facilities provided by a Five Star Hotel would be taken as binding as they appear to be only passing remarks with which the Supreme Court not actually concerned and there is no material to establish that the workmen of such ancillary services/attractions were under the actual control of the Management. Therefore, I conclude that the Employees Insurance Court was right in holding that the employees of such shops within the Hotel premises are not employees within the meaning of Section 2 (9) of the Employees' State Insurance Act.

21. In the result the order of the Employees Insurance Court declaring that the order under Section 45(A) of the Employees State Insurance Act is illegal is confirmed and the appeal is dismissed. However in the light of the facts and circumstances, there will be no order as to costs in this appeal.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

jv

To
The Employees State Insurance Court
(Principal Labour Court),
Chennai.

+1 cc to M/s.G.Bharadwaj Advocate sr 57869
+1 cc to M/s.S.Ramasubramaniam Advocate sr 55869

CMA.No.733 of 2015

sj(co)
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