



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 06.11.2017

CORAM :

WEB COPY

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

C.M.A. (MD) No.534 of 2017

and

C.M.P. (MD) Nos.5730 & 7713 of 2017

1.FCI Workers Union,
WGC Road, Opposite to Taluk Office,
Tuticorin. ..1st Appellant/Respondent No.2

2.FCI Workers Union,
(Tamil Nadu Region),
Mayor Sathiamoorthy Road,
Chetput, Chennai - 600 031. ..2nd Appellant/Respondent No.3

Vs.

1.Food Corporation of India,
Rep.by its Area Manager,
Public Sector Undertaking,
District Office, 3rd Mile,
M.G.Complex, Tuticorin - 628 008. ..Respondent No.1/Petitioner

2.ESI Corporation, Salai street,
Sindupoondurai, Vannarapettai,
Tirunelveli,
Rep.by its Joint Director. ..Respondent No.2/Respondent No.1

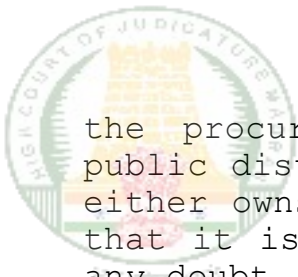
Prayer: This Civil Miscellaneous Appeal is filed under Section 82(2) of the Employees State Insurance Act, 1948 against the order of the Labour Court, Tirunelveli in ESIOP.No.2 of 2015, dated 19.08.2016.

For Appellants : Mr.R.Srinivas for
Mr.N.Dilipkumar

For Respondents : Mr.S.Vijayakumar for R1
Mr.R.Ravindran for R2

JUDGMENT

Heard the learned counsel for the parties.



the procurement, storage and distribution of food grains under public distribution system. In order to store the food grains FCI either owns or hires large warehouses throughout India. Therefore, that it is also a warehousing establishment cannot really admit of any doubt.

WEB COPY

3.The Corporation employs a large body of labour who fall under various categories. The regular employees are called departmental labour. The appellants represent another category known as DPS workers (Direct Payment System). The Corporation had formerly engaged contract labour. The same was abolished and the system of direct payment by employer was introduced. When the management attempted to re-introduced contract labour system, the same was frowned upon by the Hon'ble Supreme Court in the decision reported in (1985) 2 SCC 136 (Workmen Vs. Food Corporation of India). There is also other categories such as "No work No pay" employees and casual labour.

4.The Central Government by notification dated 20.07.2009 extended the provisions of The Employees State Insurance Act, 1948 to certain specified classes of establishments. Establishments engaged in warehousing are covered by the said notification. But the said notification issued under sub Section 1(5) of the ESI Act states that the extension is to the category of employees specified in Column (3) of the schedule to the notification. In Column 3, the term "Casual" and "Contract employees" is mentioned. Therefore, on a fair reading of the said notification, one can come to the safe conclusion that the entire establishment is not brought within the purview of the ESI Act, 1948. The provisions of the Act have been made applicable to the establishment only in respect of the category of employees mentioned in Column 3.

5.The learned standing counsel appearing for the ESI corporation would fairly concede that till the issuance of the notification dated 20.07.2009, Food Corporation of India did not come within the ambit of the Act.

6.The second respondent ESI Corporation issued notice dated 13.12.2013 to the Area Manager, Food storage Depot of Tuticorin area, Food Corporation of India calling upon the establishment to remit contribution by including those employees who come under the category of DPS(Direct Payment System). Food Corporation of India submitted its explanation to the said show cause notice. But, not satisfied with the said explanation, an order came to be passed under Section 45 A of the ESI Act on 22.01.2014 whereby FCI was directed to make contribution to the tune of Rs.5,37,691/- for the period from October 2012 to October 2013. This was challenged by FCI by filing ESIOP.No.2 of 2015 before Labour Court, Tirunelveli.

7.The workers Unions were impleaded as parties. The Labour Court by order dated 19.08.2016 dismissed the said petition. Interestingly, the establishment chose not to assail the said order of dismissal. Instead the workers Union has come before this Court questioning the order of the ESI Court.



8. This Court admitted the appeal since the following substantial questions of law arose for determination.

a. Whether the Food Corporation of India (FCI) is covered by the Notification dated 20.07.2009 of the Government of India, Ministry of Labour ?

b. Whether the FCI is a warehousing establishment ?

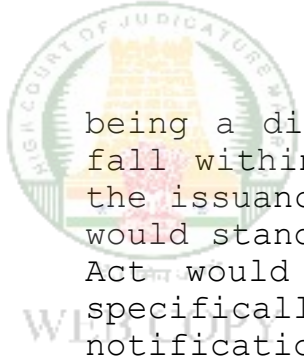
c. Whether the DPS Workers of the FCI are covered by the Notification dated 20.07.2009 of the Government of India, Ministry of Labour Department.

9. The locus standi of the appellant union to file this appeal cannot be doubted. The Hon'ble Supreme Court of India in the decision reported in (2009) 10 SCC 671 (*Employees State Insurance Corporation vs. Bhakra Beas Management Board*) following an earlier decision held that in any petition filed under Section 75 of the ESI Act, the workers must be made as parties either in individual capacity or in a representative capacity. This is because it is not the ESIC which will be affected by the outcome of the proceedings but only the workers.

10. In this case, the Food Corporation of India rightly impleaded the appellant Union. In fact, the appellant union took the stand supporting the FCI before the Labour Court. Following the dismissal of the petition by the Labour Court, the paths of the management and the appellant Union appear to have diverged. While the management wants to bring the DPS employees also within the fold of ESI Act, 1948, the appellant Union is not amenable to the said idea. That is why the workers' Union is before this Court.

11. The learned counsel appearing for the Food Corporation of India would submit that the Act as a whole would be applicable to the entire establishment. But, the regular employees or the departmental labour are not covered because, they are already enjoying and in receipt of benefits superior to the statutory benefits provided under the Act. Since the DPS employees alone are not getting the said benefits, they have to be necessarily covered. This is something that is in their interest. He would draw the attention of this Court to the proviso to Section 1(4) of the Act. He also placed reliance on the decision of the Hon'ble Supreme Court reported in (2016) 4 SCC 521 (*Royal Western India Turf Club Limited Vs. Employees' State Insurance Corporation*).

12. This was stoutly opposed by the learned counsel appearing for the appellant. While the DPS employees are agitating for pay parity with departmental labour and for extension of medical assistance and have moved the industrial Tribunals at Mumbai and Chennai in this regard, the same cannot be put against the DPS workers. The question is not whether DPS employees by virtue of



being a distinct category from departmental labour are to perforce fall within the ambit of the Act. The question is whether due to the issuance of the notification dated 20.07.2009, the DPS employees would stand covered by ESI Act. He would contend that while the ESI Act would automatically apply to all factories, it has to be specifically extended to establishments. In other words, separate notification will have to be issued by the appropriate Government in consultation with the ESI Corporation. In the present case, such a notification was issued only on 20.07.2009. It is useful to extract the notification in its entirety.

Whereas, by a notification of the Government of India in the Ministry of Labour & Employment number S.O.47 dated 22nd December, 2008, the Central Government, in consultation with the Employees' State Insurance Corporation, gave notice of its intention to extend the provisions of the Employees' State Insurance Act, 1948 (34 of 1948) to certain classes of establishments specified in the Schedule to the said notification after six months from the date of that notification.

And whereas, the copies of the said notification were made available to the public on 3rd January, 2009.

And whereas, no objections and suggestions have been received within the said period of six months in respect of the said notification.

Now, therefore, in exercise of the powers conferred by sub-section (5) of section of the Employees' State Insurance Act, 1948 (34 of 1948), the Central Government, in consultation with the the Employees' State Insurance Corporation, hereby extends the provisions of the said Act to the classes of establishments specified in column (1) and situated within the area, specified in column (2) of the Schedule to the category of employees specified in column (3) of the said Schedule.

13.A plain reading of the aforesaid notification would show that the Central Government has extended the provisions of the Act to FCI only insofar as the casual and contract employees engaged by FCI. When this Court posed a question as to whether it is open to the Central Government to partially extend the provisions of the Act to an establishment, the learned counsel for the appellant answered in the affirmative by placing reliance on the decision reported in 1985 2 LLN 313 (*Modi Rubber Limited vs. Employees State Insurance Corporation*). In the said case, the main factory of the appellant was not brought within the scope of the Act. Only the branch office at Hyderabad was sought to be covered. When the question arose as to



whether this was possible, the Division Bench of the Andhrapradesh High Court held that there was nothing in Section 1(5) of the Act putting fetter on the power of the Government to do so.

14. Reference can be made to Section 21 of the General Clauses Act, 1897. Where there is a power to issue notifications or orders, the said power would include a power to add to, amend, vary or rescind also.

15. In the present case, Section 1(5) of the ESI Act gives power to the appropriate Government to extend the provisions of the Act or any of them to any other establishment or classes of establishment. This therefore includes the power to extend the provisions of the Act only to a class of employees in the establishment and not to the entire establishment. The notification dated 20.07.2009 unambiguously states that only the casual and contract employees of the warehousing establishment are brought within the fold of the Act.

16. The decision of the Hon'ble Supreme Court reported in (2016) 4 SCC 521 (*Royal Western India Turf Club Limited Vs. Employees' State Insurance Corporation*) would not advance the case of the FCI. In the said decision, it was held that the definition of the term "Employee" as set out in Section 2(9) of the Act is very wide and that therefore the casual workers would also be covered under the said definition. The expression "Employee" can be compared to a large circle. The casual labour being a smaller circle will fall within it. But, the question that arises in this case is whether within the smaller circle of casual labour, the DPS labour would also be included. The said decision cannot be of any assistance to decide the issue on hand.

17. Shri. Vijayakumar, learned counsel for the Food Corporation of India fairly admitted that DPS employees cannot be termed as casual labour or contract workers. A casual worker in the very nature of things is employed for the day. There is no permanency attached to his status. On the other hand, the DPS worker has been conferred with a certain status. They are conferred with a number of benefits such as Gratuity, Bonus, Production linked incentives, leave etc., More than anything else, there is even a scheme for compassionate appointments. In other words, if a DPS employee dies in harness, his dependent is given appointment on compassionate grounds. Therefore, by no stretch of imagination can he be called as casual or contract labour.

18. When once it is concluded that the DPS employees are not casual or contract labour, they are automatically out of the purview of the notification dated 20.07.2009. I therefore answer the third question of law in favour of the appellant. I hold that the DPS workers of Food Corporation of India, are not covered by the notification dated 20.07.2009.



19. The order dated 19.08.2016 passed by the Labour Court, Tirunelveli in ESIOP.No.2 of 2015 is set aside. This Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected miscellaneous petitions are closed.

/True Copy/

Sd/-
Assistant Registration (CSII)

Sub-Assistant Registrar

To

1. The Presiding Officer,
The Labour Court,
Tirunelveli.

2. The Record Keeper, V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+One cc to Mr.N.Dilipkumar, Advocate, SR.No.85727

+One cc to Mr.R.Ravindran, Advocate, SR.No.85556

+One cc to Mr.S.Vijayakumar, Advocate, SR.No.85605

SKM
RL/6C/6P/SV/MMS/SAR1/30/11/2017

C.M.A. (MD) No.534 of 2017
and
C.M.P. (MD) Nos.5730 & 7713 of 2017