

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**MA No. 34 of 2001**

Regional Director, Employees State Insurance Corporation, Pradeep Bhawan,
Nangan Nagar, Indore (MP)

---- Appellant**Versus**

1. Singh Engineering Works, 65-66, Light Industrial Area, P.O. Industrial Estate, Bhilai – 490 026
2. State Employees Insurance Court, Labour Court, Durg (MP)

---- Respondents

For Appellant	:	Shri Pradeep Saxena, Advocate
For Respondents	:	None

Hon'ble Shri Justice Manindra Mohan Shrivastava**Hon'ble Smt. Justice Rajani Dubey****Order On Board****13/07/2018**

This appeal, at the instance of Employees State Insurance Corporation, filed under Section 82 (2) of the Employees State Insurance Act, 1948, was admitted by this Court on 16/01/2017 on following two substantial question of law -

“i) Whether the Employees' State Insurance Court / the Labour Court was justified in entertaining challenge to the demand notice without the Principal employer complying with the provisions contained under Section 75 (2B) of the Employees' State Insurance Act, 1948 (for short 'the ESI Act, 1948') ?

ii) Whether the ESI Court / Labour Court was justified in holding that provisions of ESI Act, 1948 was not applicable to the applicant i.e. Singh Engineering Works and in consequence setting aside the

demand notice ?”

2. The respondent / establishment carries out industrial activities and involved in engineering work in its factory / establishment. It is said that inspection was carried out in the establishment of the respondent by the officers of ESI on 19/09/1989 and in all, 21 workers were found working in the factory premises. The inspection note records that there were six staffs and labour, two watchmen and 13 contractual employees, in all 21 in number. Accepting said inspection report, the appellant complied with the provisions of the ESI Act in the establishment and issued registration notice dated 09/10/1989 (Ex.P/2) followed by notice requiring employees' contribution to be deposited vide notice Ex.P/3. The respondent / establishment, aggrieved by such proceedings, raised a dispute before the Employees' State Insurance Court / Labour Court by moving application under Section 75 of the said Act on the pleadings *inter alia* that in the establishment of the respondent, number of employees was less than ten. Therefore, in view of the provisions contained in Section 12 (2) of the Act, the provision of ESI Act could not be made applicable to the said establishment and the provident fund scheme could not be enforced so as to require the employer to make contribution towards creation of provident fund in respect of the workers working in the factory.

The appellant filed its reply stating that the appellant formed an opinion with regard to the applicability of the provisions of the ESI Act in the respondent / establishment on the basis of its inspection report (Ex.P/1) as 21 employees were found working in the factory premises.

3. After allowing the parties to lead oral and documentary evidence, the Insurance Court came to the conclusion that the provisions of the Act were not applicable. To record its conclusion, the Insurance Court recorded findings that 13 contract workers could not be treated to be employees within the meaning of the said word under

Section 2 (9) of the ESI Act as they were employees of the contractor. The Insurance Court also held that before taking decision to comply the provisions of the ESI Act, the respondent was not afforded opportunity of hearing as mandatorily required under the law.

4. First question of law is whether the Employees' State Insurance Court / the Labour Court was justified in entertaining challenge to the demand notice without the Principal employer complying with the provisions contained under Section 75 (2B) of the Employees' State Insurance Act, 1948 (for short 'the ESI Act, 1948') ?

In this regard, learned counsel for the appellant argued that the Insurance Court committed grave illegality in entertaining the dispute on merits even without there being compliance of the mandatory requirements of pre-deposit to the extent of 50% of the due amount claimed from the Corporation. He would submit that unless the said amount is deposited or duly waived, the application itself would not be maintainable and liable to be rejected.

True it is that under Section 75 (2-B) of the ESI Act, there is a statutory prohibition to raise a dispute unless 50% of the amount due from the employer as claimed by the Corporation is deposited, proviso to the aforesaid provision confers discretion on the Court that it may, for reasons to be recorded in writing waive or reduce amount to be deposited under the said provisions, from the records of the Court below, we find that the prayer for waiver made by the respondent before it was accepted and order was passed by the Insurance Court on 13/03/1997 rejecting appellant's application under Section 75 (2-B) of the Act for dismissal of the claim application on account of non-deposit. The reasons assigned for non-deposit is that at that time, per force the order passed by the Supreme Court in SLP No. 8485/1990, as the issue whether ESI Act is applicable in the area is pending and stay has been granted, pre-deposit need not be insisted upon. It is, thus, clear that there was, infact,

an order which amounts to waiver of pre-deposit.

5. Though learned counsel for the appellant raised an issue with regard to correctness of this order, as no question of law in that regard has been framed, we would refrain from examining this issue as to whether waiver was justified in law. First question of law is, therefore, accordingly answered.

On account of waiver having been granted in the year 1997, application filed by the respondent was maintainable before the ESI Court.

6. It now takes us to the second question of law as to whether provisions of ESI Act were applicable to the respondent / establishment.

The crux of the issue is as to whether the factory of the respondent employed minimum number of employees as required under Section 2 (12) of the Act so as to make applicable ESI Act and create a statutory obligation on the employer to contribute towards creation of employees' provident fund. Section 2 (12) of the Act reads as under -

“Section 2 (12) - Factory means any premises including the precincts thereof whereon ten or more persons are employed or were employed on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on or is ordinarily so carried on, but does not include a mine subject to the operation of the Mines Act, 1952.”

It is, thus, clear that in order to comply with the provisions of the ESI Act and create a statutory obligation on the employer to make contribution towards creation of provident fund of the employees, there has to be at least 10 employees working in the factory / establishment.

7. The controversy in the present case revolves around as to whether in

respondent establishment / factory, more than 10 employees were employed or not. According to the appellant, an inspection was carried out on 19/09/1989 by a team of three members and based on such inspection, note was prepared in which, it was recorded that on inspection, total 21 persons were found working in the factory premises. It further records that out of 21, 6 were staff and labour, 2 watchmen and 13 contract employees, thus, making it a total of 21 persons found working in the factory. The appellant / Corporation examined its sole witness Shri Pramod Kumar Shrivastava who was then working as Regional Director, Regional Office, Patna. He has deposed that he along with Shri I.D.Verma and Shri S.C.Gilani inspected the establishment / factory of the respondent and counted number of employees working and according to him, all of them were either engaged by the principal employer or by contractor or were working as Security Guard. He further deposed that on the basis of this inspection, the inspection report (Ex.P/1) was prepared and number of employees mentioned in the inspection report were based on their inspection. He has further deposed that Ex.P/1 is prepared on his instructions by Shri S.C.Gilani, Inspector, who has also signed. In his cross examination, though it has been elicited that he himself did not prepare report nor signed it, his evidence that he inspected the premises of the respondent along with Shri S.C.Gilani and Shri I.D.Verma, has not been controverted. Therefore, the report (Ex.P/1) is an admissible and reliable piece of evidence of the fact that at the time of inspection, a total of 21 employees were found working in the factory premises, out of which, 13 were contract employees.

8. On this factual premise, the legal issue arises for consideration is whether those employees, who were said to be engaged through contractors could be treated as employees within the meaning of word as defined under Section 2 (9) of the ESI Act. For this purpose, it would be apposite to extract herein below the relevant portion of Section 2 (9) of the Act.

“Section 2 (9) - “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 an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), [and includes such person engaged as apprentice whose training period is extended to any length of time] 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] a month 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;]"

9. On a rational, logical and fair interpretation of the provision, what is revealed is that the definition of employee is very wide and it not only includes a person who may be directly employed by the principal employer but also those employees who are engaged through any other immediate employer like the contractor. It would also include those who are employed under the supervision of the employer or its agent. The third enumerated category is of those, whose services were temporarily rendered through principal employer. Moreover, the three enumerated category of employees do not seem to be exhaustive because after clause- (iii), an inclusive definition has also been provided which only indicates that legislature intended to give widest possible meaning and import to the word 'employee', obviously because it is a piece of socially beneficent legislation to secure poor workers working in exploitative conditions in various establishment / factories and ensure that wherever more than 10 workers are employed, the employer is obligated under the law to contribute towards provident fund. Creation of provident fund for the security of poor labourer is itself a beneficent legislation founded on constitutional theme of social justice. Therefore, definition of employee has to be given widest possible meaning.

In the present case, the factual base emerging from the pleadings and oral and documentary evidence on record is that 13 labourers engaged by the contractor were actually found working in the factory. Though the report does not satisfy the kind of work which has been carried out by these 13 workers nor is there any evidence led by both the parties, the endorsement made in that report by the Clerk of the establishment is that those workers are working in the factory since 16/09/1989 who are paid wages / pay as per rules. Therefore, the aforesaid report clearly proves that 13 contractual employees were found working in the factory and they were being paid

wages. If that be so, in our considered opinion, even though they are treated to be contract employees, would be covered within the widest definition of the employee as provided under Section 2 (9) of the Act quoted herein above. Under Section 2 (9) (ii) of the Act, one who is employed by or through an immediate employer on the premises of the factory or establishment is also included within the definition of employee. Here, the “immediate employer” is required to be understood as defined under the Act itself in clause 13 which is reproduced as below -

“13. “immediate employer”, in relation to employees employed by or through him, means a person who has undertaken the execution, on the premises of a factory or an establishment to which this Act applies or under the supervision of the principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer [and includes a contractor]”

The aforesaid definition undoubtedly includes a contractor. Therefore, the aforesaid two provisions, if read conjointly, lead to inevitable conclusion that if there are certain workers who are actually found working in the factory premises, though they have been engaged by the contractor, would definitely be included within the definition under the employee and for this, it would not require independent proof that they were directly working under the supervision of the principal employer. Perhaps, such requirement is necessary to prove the statutory relationship of employer and employee where persons are employed outside the premises of the factory establishment. This is clear from the reading of provisions contained in Section 2 (9) (ii) of the Act that a person may be employed by or through an immediate employer of the factory premises / factory establishment or he may be employed by the super

employer or its agent, he would be treated as an employee. There may be cases where a person is not actually working within the premises of the factory yet if it is found that he is working under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment, he would be treated as an employee. However, in respect of those class of workers who have been engaged through an immediate employer like a contractor and working in the premises of the factory or establishment which is ordinarily part of the factory or establishment, they will have to be treated as employee as defined therein.

10. Adopting the aforesaid interpretation, we have no doubt in mind that the employees / workers working within the premises of the factory of the respondent were employees and it was not necessary for the appellant to further establish any other fact. The Insurance Court has adopted a wrong approach. In fact, during inspection, the name of contractor was not disclosed and therefore, it is quite probable that only in order to defeat the beneficent provisions of law, some of the employees were wrongly shown as contractual employees. The burden was on the employer to prove as to whether the names were registered or not, whether there was any agreement between principal employer or contractor. We also find that even though the respondent did not whisper anything regarding non-affording of opportunity of hearing in his application under Section 82 (2) of the ESI Act, much less any evidence in that regard, the Insurance Court of its own, assumed, without there being any issue in this regard that the respondent was not afforded any opportunity of hearing. This, if we may say so, is completely perverse. It was neither raised nor any issue framed in this regard. The appellant had, therefore, no opportunity to establish such facts in the proceedings before the Insurance Court.

11. We accordingly answer the second question of law in the manner that the provisions of ESI Act were applicable to the establishment of the respondent.

12. In the result, the impugned order passed by the Insurance Court is held illegal and unsustainable in law and set aside. Consequently, the application under Section 75 of the Act filed by the respondent before the ESI Court deserves to be rejected and is accordingly rejected. The appeal is accordingly allowed.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Rajani Dubey)
Judge