

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 16.07.2018

CORAM

THE HONOURABLE MR. JUSTICE N.SESHASAYEE

C.M.A. No.1379 of 2018 and
C.M.P. No.11036 of 2018

M/s.K.M.A.Finished Leathers Private Limited,
rep. by its Director K.M.Mohamed Ismail Sait
.. Appellant/ petitioner

versus

The Employees' State Insurance Corporation,
rep. by its Regional Director,
143, Sterling Road, Nungambakkam,
Chennai-600 034. .. Respondent/Respondent

Appeal filed under Section 82(1) of the Employees' State Insurance Act against the judgment and decree dated 29.12.2017 made in E.I.O.P. No.152 of 2005 on the file of the Employees Insurance Court (Principal Labour Court), Chennai.

For appellant : Mr.Haroon for
M/s.T.S.Gopalan and Co.

For respondent : Mr.T.N.C.Kaushik,
Standing Counsel for ESI

JUDGMENT

This appeal is preferred against the judgment and decree dated 29.12.2017 made in E.I.O.P. No.152 of 2005 passed by the Employees Insurance Court (Principal Labour Court), Chennai.

2.The brief statement on the facts that are necessary for disposing this appeal may be stated as below:

- The appellant is a private company registered under the Companies Act, 1956. It is engaged in the manufacture and export of leather shoe uppers and finished leather. Part of its manufacture is outsourced, but the respondent herein determined the contribution payable by the appellant by including those to whom its job was outsourced. There were other claims too regarding which the appellant has satisfied

the respondent.

- As regards the contribution claimed for those to whom the appellant has outsourced its job, was challenged in the E.I.O.P. The Principal Labour Court has dismissed the O.P.

3. This case was admitted on the following substantial questions of law are framed:

1) Whether the ESI Court was right in upholding the 45A order when the appellant had not exercised any supervision in respect of employees of third party agents.

2) Whether the order of ESI Court is in line with the law laid down by the full bench judgment of Madras High Court reported in 2008(2) LLJ-278.

4. The learned counsel for the appellant submitted that an inspection report based on which the contribution was disputed under Section 45-A of the ESI Act itself says that the appellant herein had incurred heavy amount on job work. However, this factor was ignored by the Employees State Insurance Corporation at the first instance and by the Labour Court at the second instance. Given the circumstance where the appellant is admittedly outsourcing part of the manufacture was made available as an indisputable fact, it necessarily leads to an inference that no supervisory control over is exercised by the appellant over such employees who are engaged by the one to whom job had been outsourced. The appellant, having denied that he has no supervisory control on such employees, cannot establish the negative, and it is for the Corporation to establish that the appellant had exercised supervisory control over them. Therefore, at the initial stage, ESI Corporation was in error in ignoring the report of its own inspectors. So far as the Labour Court is concerned, learned counsel submitted that the order is a testimony of non-application of mind by the Presiding Officer. In support of his submission, learned counsel for the appellant placed reliance on the following judgments : Managing Director, Hassan Cooperative Milk Producer's Society Union Limited Vs Assistant Regional Director, Employees' State Insurance Corporation [2010 11 SCC 537] and Employees' State Insurance Corporation vs. Bethall Engineering Company [2007 (3) LLN 934].

5. Per contra, the counsel for the respondent would argue that the appellant was under a statutory obligation to maintain all records, and that the burden is on it to prove

that it is not the principal employer of those to whom it claim part of its manufacturing job had been outsourced.

6. In Managing Director, Hassan Cooperative Milk Producer's Society Union Limited Vs Assistant Regional Director, Employees' State Insurance Corporation [2010 11 SCC 537], the Hon'ble Apex Court has held as follows:

'7. It is thus clear from the dicta of the Supreme Court that where the job work is entrusted to a third party contractor and such third party contractor has engaged independent workers, the fact that the principal employer has power to reject the end product manufactured by the contractor, does not constitute an element of supervision within the meaning of S.2(9) of the Act. The judgment of the Division Bench in Poonam Easwardas, Proprietrix, Kaleel Corporation v. Employees' State Insurance Corporation (vide supra) relied upon by the appellant-Corporation is concerned with the direct employees of the establishment and has no application to the facts of the instant case which is about the contract employees.

8. The judgment of the Division Bench in South India Surgical Company v. Regional Director, Employees' State Insurance Corporation, Madras [1997 (2) L.L.N. 909] (vide supra), relied upon by the Employees' State Insurance Corporation is also concerning the liability to pay the ESI charges in respect of the contractor/employees. The appellant in that case was a trading concern dealing in surgical instruments. They had erected some machines necessary for the manufacture of surgical instruments and lend them to some contractors for the manufacture of surgical instruments. The Bench after referring to the decision in Calcutta Electric Supply Corporation v. Subhash Chandra Bose, [1992 (1) L.L.N.353] (vide supra), held that the contractor employees cannot be said to be the employee within the meaning of S.2(9) of the Act merely because the supervisory controls were exercised by the manufacturers over the contractors for quality reasons. The relevant observations of the Division Bench are reproduced below, in para 18, at page 919:

"In our opinion, so long as the appellant had arrogated to itself the right to reject the end product manufactured by the disputed workmen, those workmen could not be claimed to be falling within the meaning of S.2(9) of the

Act. In fact, the Supreme Court, in its judgment reported in Calcutta Electric Supply Corporation, Ltd. v. Subhash Chandra Bose [1992(1) L.L.N. 353] (vide supra), gone to the extent of holding that even in cases, where supervisory controls were exercised by the manufacturer over the contractors for quality reasons, that by itself would not lead to a conclusion that the workmen of those contractors to become employees of the manufacturer within S.2(9) of the Act. In this context, the appellant's case is an a fortiori one in the sense that the appellant does not exercise supervisory control and simply rejects the materials manufactured by the disputed workmen."

In Bethall Engineering Company case [2007(3) LLN 934], this Court has held as follows:

'27. Now, the next question is, can these workers, in the facts and circumstances of the case, be said to be working under the supervision of the appellants. It is appropriate to refer to a decision of this Court in CESC Ltd. v. Subhash Chandra Bose. In that case, the question that fell for consideration was, whether on the facts found, the right of the principal employer to reject or accept work on completion, on scrutinising compliance with job requirements, as accomplished by a contractor, the immediate employer, through his employees, is in itself an effective and meaningful "supervision" as envisaged under Section 2(9) of the 1948 Act. The majority view explained:

"14. In the textual sense 'supervision' of the principal employer or his agent is on 'work' at the places envisaged and the word 'work' can neither be construed so broadly to be the final act of acceptance or rejection of work, nor so narrowly so as to be supervision at all times and at each and every step of the work. A harmonious construction alone would help carry out the purpose of the Act, which would mean moderating the two extremes. When the employee is put to work under the eye and gaze of the principal employer, or his agent, where he can be watched secretly, accidentally, or occasionally, while the work is in progress, so as to scrutinise the

quality thereof and to detect faults therein, as also put to timely remedial measures by directions given, finally leading to the satisfactory completion and acceptance of the work, that would in our view be supervision for the purposes of Section 2(9) of the Act. It is the consistency of vigil, the proverbial 'a stitch in time saves nine'. The standards of vigil would of course depend on the facts of each case. Now this function, the principal employer, no doubt can delegate to his agent who in the eye of law is his second self i.e. a substitute of the principal employer. The immediate employer, instantly, the electrical contractors, can by statutory compulsion never be the agent of the principal employer. If such a relationship is permitted to be established it would not only obliterate the distinction between the two, but would violate the provisions of the Act, as well as the contractual principle that a contractor and a contractee cannot be the same person."

33.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 CESC Ltd. with which we respectfully agree.

34.No evidence has been collected by ESI 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 anything to do with logistic operations of the contractors. As a matter of fact, there is nothing on record to show that the 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.'

7.This Court perused the material papers and it satisfied with the submissions made by the learned counsel for the appellant. As rightly submitted, the ESI Corporation at the first instance has not reasoned why the Inspection Report of its own inspector has been ignored, and why it chose not to probe anything based on it . The impugned order of the Principal Labour Court, Chennai is concerned, it is an apology for the judicial reasoning that is required to justify a conclusion that a Tribunal should arrive. The only paragraph that deals with the reasoning of the Court is in paragraph 11 that disclose nothing on the merit of the case put forward by the appellant herein.

8. In the end, this Court finds merit in this appeal and the same is allowed and the order dated 29.12.2017 made in E.I.O.P. No.152 of 2005 on the file of the Employees Insurance Court (Principal Labour Court), Chennai is set aside, and the matter is remanded back to Court below for fresh consideration. No costs. Consequently, connected C.M.P. is closed.

Vga

Sd/-

Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

To

1.The Employees Insurance Court
(Principal Labour Court), Chennai.

2.The Section Officer,
V.R.Section, High Court, Madras.

+1 CC TO MR.T.N.C.KAUSHIK Advocate SR.NO. 46765

+1 C.C. to MR.T.S.GOPALAN & CO SR.NO. 46340

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KK(CO)

ASK(20/08/2018)