

* HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

+ CMA No.124 of 2007

% 16-03-2018

M/s. Nagarjuna Health Care Centre,
A Partnership Firmk, rep.by its Managing Partner,
Devender.

... Appellant/
petitioner

v.

\$M/s. Employees State Insurance Corporation,
rep.by its Regional Director,
and another.

... Respondents/
respondents

! Counsel for the appellant: Sri D. Kasim Saheb

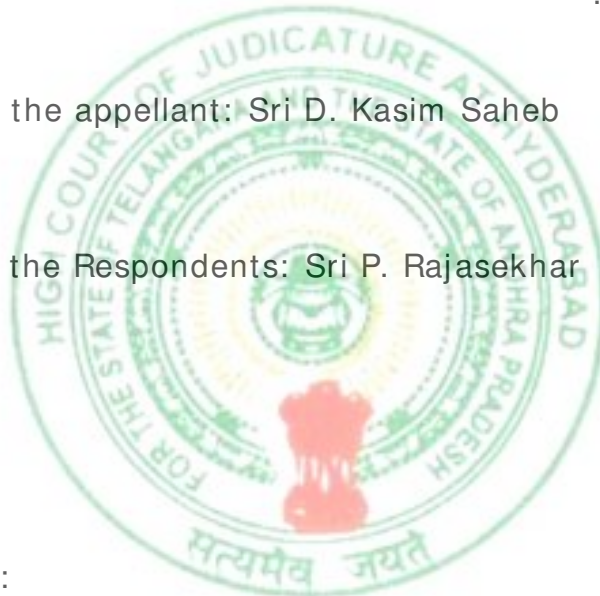
Counsel for the Respondents: Sri P. Rajasekhar

< Gist:

> Head Note:

? Cases referred:

1. 2006-II-LLJ 443 (171)
2. 1988-II-LLN-452
3. AIR 1960 SC 335



HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

C.M.A.No.124 of 2007

JUDGMENT:

This Civil Miscellaneous Appeal is filed by a Health Care Centre, which is a registered partnership firm against the orders dated 05.12.2006 in E.I.C.No.4 of 2003 passed by the Employees State Insurance Court and the Chairman, Industrial Tribunal-I, Hyderabad.

2. Before the Employees State Insurance Court, the present appellant filed a petition under Section 75 (1)(g) of the Employees State Insurance Act, 1948 (for brevity 'ESI Act') seeking a declaration that ESI Act has no application to the appellant and for a consequential relief that the respondents are not entitled to recover any amount as claimed by them under the order dated 17.12.2002. This order dated 17.12.2002 was passed by the Employees State Insurance Corporation (ESIC), Hyderabad after giving a show cause notice to the appellant, pursuant to a site inspection dated 03.09.1997. In the ESI Court, PW.1 was examined and Exs.P.1 to P.13 were marked. For the respondents, RWs.1& 2 were examined and Exs.R.1 to R.10 were marked. Thereafter, after considering the submissions made and the evidence, the impugned order was passed.

3. This Court has heard Sri D. Kasim Saheb, learned counsel for the appellant/petitioner and Sri P. Rajasekhar, learned counsel for the respondents/respondents.

4. The two important questions that were raised and argued in this case are a) about the applicability of ESI Act to the appellant establishment; and b) the issue of limitation and the procedure adopted by the appellant.

5. As far as the issue of applicability of ESI Act to the appellant is concerned, it is the submission of the learned counsel for the appellant that the appellant is a diagnostic laboratory. It is merely collecting blood and other samples which are being analyzed by the Doctors. In fact, it is the contention of the learned counsel for the appellant that they are not physically running the establishment itself and that a set of doctors have hired the establishment from them and are running the said medical diagnostic centre. It is the specific contention of the appellant that there is no 'manufacturing process' that is carried out in the premises of the appellant and that the appellant is not a 'factory'.

6. The learned counsel for the appellant drew the attention of this Court to the definition of a manufacturing process in the Factories Act stating that the word 'manufacture' has not been defined under the ESI Act. The contention of the learned counsel for the appellant is that unless and until 'manufacturing process' is carried out with the use of power by employing 10 or more persons, the establishment will not be covered under the ESI Act. It is his specific contention that there is no manufacturing process being carried out in the appellant premises at all. On the

other hand, the learned counsel for the respondent/ESIC contends that preserving and storing an article in cold storage would bring the premises within the definition of manufacturing process. The learned counsel also contends that the blood and other samples are being collected and stored in the premises of the appellant.

7. The learned counsel for the appellant drew the attention of this Court to two cases viz., a) **Vijaya Diagnostic Centre v. ESIC**¹ and b) **ESIC v. Sneha Ultra Sound and Diagnostics** pronounced by a Division Bench of this Court in CMA No.681 of 2012. In **Vijaya Diagnostic Centre's** case, a learned single Judge of this Court went into the issue whether diagnostic centres and pathological centres carry on manufacturing process. The learned single Judge came to a conclusion that manufacturing process is not carried out in such establishments and that they do not come within the definition of a factory as defined in the ESI Act. In **Sneha Ultra Sound and Diagnostic's** case, a Division Bench of this Court clearly held that a pathological laboratory that carries on tests on blood, urine, stools etc. is not a factory and that no manufacturing process is carrying out. The appeal in the Division Bench was preferred by ESIC. After considering the definition of manufacturing process, the Division bench clearly held that a medical and pathological laboratory is not covered by the definition of a factory. The Division Bench

¹ 2006-II-LLJ 443 (171)

clearly held that to bring such a pathological laboratory within the definition of a factory carrying on manufacturing process, there should be clear evidence of collecting and drawing blood samples for its further use etc.

8. This Court is bound by the Division Bench judgment, which also approves the earlier decision of a learned single Judge in **Vijaya Diagnostic Centre's** case. Therefore, this Court holds that the appellant is not covered by the definition of a factory and that they do not carry out any manufacturing process.

9. The other important issue related to this is the method in which the inspection note has been prepared. In the case on hand, the respondents relies upon Ex.R.1, which is an inspection note dated 03.09.1997 prepared by RW.1. This note contains a list of 10 people along with the signature of one Sri H.M. Prasad, who is identified as a Lab Technician. The case of the respondents rests on the contents of this document, which shows that there are 10 people employed in the appellant's premises. According to the respondents, the data/information contained in this document is supplied by Sri H.M. Prasad and he has signed the same. Therefore, the entire demand starts with this inspection report.

10. On the other hand, it is the contention of the learned counsel for the appellant that many of these people are not even employees. He also relies upon the decision of a Division Bench of Karnataka High Court in **E.S.I. Corporation**

*v. Subbaraya Adiga*². The said Division Bench was dealing with the quality of evidence necessary to fix the liability on an employer for paying contribution. The Karnataka High Court came to a conclusion that an inspection note prepared by an Inspector (like Ex.R.1 in the present case) should contain the names, father's name, designation, length of service, emoluments and the signature or the thumb impression of the employee. Once such a list is prepared the signature of the Proprietor/Manager or the person in-charge of the establishment should be obtained at the end of the list and a copy should be furnished to the establishment immediately. If persons other than the employees are present at the time of inspection, their names and addresses along with the signatures of two persons should also be taken. This Court agrees with the Division Bench judgment in ***Subbaraya Adiga***'s case. This inspection note in most cases is the first or the initial document leading to a monetary claim or even prosecution under the ESI Act. Therefore, this Court is of the opinion that unless and until the inspection note contains such details, it cannot be said to be a valid document. Since it is the basis or origin for all actions, it should contain details like the name; age; designation/possible service details of the employee and also the signature or a thumb impression of the employees. The same should be counter-

² 1988-II-LLN-452

signed by a responsible person from the side of the establishment also.

11. The last point that survives for consideration is about the limitation. The learned counsel for the respondents very strenuously argued that the claim in this case is hopelessly barred by limitation. He drew the attention of this Court to Section 77 (1) (a) and (b) of ESI Act and argues that the case should be filed within three years from the date of the claim. The learned counsel also argues that vide Ex.R.1 dated 03.09.1997 the claim was made and therefore, he argues that the case that is filed in 2002 before the ESI Court is hopelessly barred by time. He relies upon the plain language of the section to argue this point. In reply thereto, the learned counsel for the appellant argues that the claim in this case is only made by Ex.R.10 dated 07.12.2002. It is his submission that this document contains the actual claim and that is the reason why they have challenged this order dated 17.12.2002 in prayer (b) of the application filed.

12. This Court has examined the documents filed. Ex.R.1 dated 03.09.1997 is an inspection report by the Inspector. The heading itself says it is a preliminary inspection report. Therefore, the Inspector recommends to his superior officers to allot the code number, since in his opinion the establishment is covered by ESI Act. Ex.R.3 is the follow up to this document issued by the Regional Office indicating the code number. This is followed by Ex.R.4, in

which a demand is made on an ad-hoc basis. Form-C.18 is marked as Ex.R.4. The calculation at page-2 of Ex.R.4 also says a demand of Rs.32,533/- is made on an ad-hoc basis. The appellant is directed to appear before the Deputy Director, ESIC for finalizing the case. This is followed by Ex.R.5, as the appellant did not appear before the Deputy Director, ESIC. Another opportunity of hearing was given and a meeting was fixed on 11.03.2002. Vide Ex.R.6 the appellant addressed a letter stating that they are not covered by ESI Act and therefore, they are not liable to pay contribution. So, on 14.02.2002 an order was passed by which a sum of Rs.85,979/- was demanded as the contribution payable. This document also gave an opportunity to the appellant to show cause against the calculation made. The appellant addressed a letter dated 22.02.2002 (Ex.R.8) in reply to Ex.R.7 reiterating their contentions. Ultimately, an order dated 17.12.2002 came to be passed (Ex.R.10) under Section 45 (A) by which the contribution was demanded. This demand for contribution u/s.45 (A) lead to the claim being filed under EIC No.4 of 2003 before the ESI Court, Hyderabad in January, 2003.

13. This Court on examination of all the facts and figures comes to the conclusion that the cause of action arises on this day i.e., on the date of Ex.R.10 when the claim proper is made by ESIC. There is a crystallization of the claim and a firm demand to pay the same in Ex.R.10 order

passed under Section 45 (A) of ESI Act. Till then a process of decision making was being carried on, as can be seen from the contents of the document. The preliminary inspection report does not indicate the quantum or the figure. Thereafter, notices were issued to the appellant to appear and show cause. Ultimately, the order was passed u/s. 45 (a) of ESI Act only on 17.12.2002.

14. Therefore, this Court holds that it is the final quantification in the case that gives raise to a claim or a cause of action for filing the case. The judgment of the Hon'ble Supreme Court of India reported in ***Rukhmabai v. Laxminarayan***³ is also germane and relevant here. The Hon'ble Supreme Court clearly held as follows:

“There can be no ‘right to sue’ until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted.

The legal position may be briefly stated thus: The right to sue under Art. 120 of the Limitation Act accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right.”

This Court relies upon this judgment of the Hon'ble Supreme Court to hold that the cause of action for this case and this application arises only on the clear quantification of the claim by ESIC under Section 45 (A) of ESI Act. Hence, this Court holds that the claim is filed within time.

³ AIR 1960 SC 335

15. In conclusion this Court holds that a) the appellant is not covered by the ESI Act as there is no manufacturing process carried on and it is not a factory; and b) the claim is not barred by time. Hence, the impugned order of the lower Court is liable to be set aside.

16. In the result, the Civil Miscellaneous Appeal is allowed. The order dated 05.12.2006 in EIC No.4 of 2003 passed by the Employees State Insurance Court, Hyderabad, is set aside. However, there shall be no order as to costs. Miscellaneous Petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 16.03.2018
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