(2006) 12 KAR CK 0059

Karnataka High Court

Case No: M.F.A. No. 5226 of 2003

The Deputy Director ESI Corporation		APPELLANT
	Vs	
The Proprietor Summer Palace Restaurant		RESPONDENT

Date of Decision: Dec. 6, 2006

Acts Referred:

- Employees State Insurance Act, 1948 - Section 2 (9), 2 (A), 85 (b)
- Employees State Insurance Regulations, 1950 - Regulation 10 (B) (b)

Citation: (2007) 2 KarLJ 81 : (2007) 1 KCCR 711 : (2007) 2 LLJ 1024

Hon'ble Judges: V. Jagannathan, J

Bench: Single Bench

Advocate: V. Narasimha Holla, for the Appellant; A Lobo and Vidyashankar R., for the Respondent

Final Decision: Allowed

Judgement

V. Jagannathah, J.

M/s Summer Palace Resorts situated at Ullal, Mangalore, was covered under the ESI scheme from 1.1.1999 based on Form No. 01 submitted by the establishment and as the said Form No. 01 indicated the total number of employees working in the establishment was eleven, the ESI Corporation (appellant herein) issued a Form C-II notice dated 19.2.1999, regarding coverage from 1.1.1999 and this was followed by another notice C-18 dated 20.12.2000, demanding Rs. 25,063/- paid towards security service and the last of the notices D-18 was issued on 24.1.2002, demanding damages u/s 85(b) of the Employees Stats insurance Act, 1948 (for short "the Act"). The respondent-Hotel challenged the said notices before the ESI Court contending that the respondent is not coverable under the Act as the number of employees did not exceed more than seven at any point of time. It was also contended before the

ESI Court that the security personnel numbering four were not the employees of the respondent, but they belong to security agency namely Sai Security Agency and therefore, the ESI Corporation could not have covered the establishment under the purview of the ESI Act. The said contentions put forward was accepted by the Court below and all the three notices mentioned above were set-aside. Aggrieved by the said order of the ESI Court, the Corporation is in appeal.

2. I have heard the submissions made by the learned Counsel Shri Shri V. Narasimha Holla for the appellant-corporation and the learned Counsel Shri Vidyashankar for the respondent-restaurant.

3. The appellant''s counsel contended that the Court below was in error in setting aside the notices issued to the respondent, because the very respondent has furnished information in Form No. 01 as per Ex. P25 and the said information reveals that there were 7 + 4 persons employed in the establishment and therefore, when that was the information furnished by the employer himself coupled with the fact that power is being used by the establishment, there was no doubt as to the coverage of the establishment within the purview of the ESI Act, but unfortunately, the ESI Court lost sight of the said document but has gone to take notice of employees actually employed by the respondent and therefore the ESI Court held that as there were only seven employees engaged by the employer, the question of coverage under the Act will not arise. The said finding of the ESI Court is unsustainable in law having regard to the law laid down by the Apex Court in the case of Saraswath Films v. Regional Director, ESI Corporation, Trichur 2002 III LLJ 191.

4. On the other hand, the learned Counsel for the respondent contended that it is not in dispute that there were seven employees engaged by the respondent but however, having regard to the definition of the term ''employee'' and the fact that security personnel were the employees of the Sai Security Agency, the question of coverage under the ESI Act will not arise and rightly, the ESI Court has taken the said view. In support of the submission of the learned Counsel, reliance on the decision of the supreme Court in the case of Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc., and also another decision of the Apex court in the case of Employees'' state Insurance Corporation and Anr. v. Tata Engineering and Locomotive Co. Limited and Anr. reported in 1976 I LLJ 61. The point which the learned Counsel sought to drive home by relying on the aforesaid decisions is that the security personnel cannot be considered as employees for the purpose of coverage under the ESI Act.

5. Having heard the submission made as above and after perusal of the entire records in this case as well as the evidence let in by the parties, the only point for consideration is "whether the security employees could be brought within the fold of definition of employees under the ESI Act for the purpose of coverage".

6. It is not in dispute that the respondent did furnish information as per Form No. 01, which has been marked as Ex. R25. It is also an admitted fact that the said Form No. 1 discloses at column No. 12 that the total number of parsons employed were 7+4. In other words out of eleven persons engaged by the establishment in question, four were security personnel. Whether the security personnel can be considered as employees for the purpose of coverage under the ESI Act came for consideration before the Hon''ble Supreme Court in the case of Saraswath Films v. Regional Director, ESI corporation, Trichur. In the aforesaid decision, the Apex court considered the question of the establishment coming within the purview of the Act and observed that the answer to the said question has to be found on the determination of the question whether the security guards are the employees within the meaning of Section 2(9) of the Act. The Apex Court answered the said question by referring to Section 2(9) of the Act in particular and confirmed the decision of the insurance court that security guards were employees as per the definition of employees under the Act. At paragraph No. 5 of the aforesaid decision, it has been observed thus:

From the provision in Section 2(9) it is clear that the definition is wide and of comprehensive nature. It includes any person employed for wages in or in connection with work of the establishment to which the Act applies and also includes any person employed by or through immediate employer on the premises of the establishment or under the principal employer or his agent on work which is ordinarily a part of the work of establishment or which is preliminary to work carried on in or incidental to the purpose of the establishment. In Clause (iii) the position is further clarified; a person 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 is also brought within the purview of the statute. on a plain reading of the definitions of the expressions "principal employer" and "immediate employer", the position is manifest that the appellant, is the principal employer of the security guards in the case. It may be that their immediate employer is the security agency with whom there has been a contract either by the lessor or the lessee of the cinema hall for purpose of the service. On a fair reading of relevant statutory provisions and keeping in view the object and purpose for which the legislation was enacted it is clear to us that in this case the security guards come within the purview of the expression "employee" as defined in Section 2(9) of the Act.

7. Thus it is clear from the aforesaid interpretation of definition of employee as found u/s 2(9) of the Act, that the security persons will have to be treated as employees for the purpose of coverage under the Act. Following the aforesaid law laid down by the Apex Court, it has to be held that in the case on hand also, for the purpose of coverage under the ESI Act, the security personnel will have to be brought within the ambit of employees as defined u/s 2(9) of the Act. The decisions cited by the learned Counsel for the respondent in my considered opinion are not

applicable to the case on hand in as much as in those two decisions, the question did not concern as to whether security personnel can be considered as employees for the purpose of coverage under the ESI Act.

8. As far as Form No. 01 filed by the employer is concerned, this Court in M.F.A. No. 5681/2001 disposed of on 25.10.2006, has held that Form No. 01 will have to be read with the light of Section 2(A) of the Act as well as Regularisation 10(B)(b) of the ESI Regulations, 1950.

9. As far as the contention put forward by the learned Counsel for the respondent that no substantial question of law is involved in the instant case is concerned, I am not impressed by the said contention put forward because, the very question concerning security personnel being treated as employees for the purpose of Section 2(9) of the Act, is the question of law and not of fact an this is very much evident from the interpretation given by the Apex Court in Saraswath Films'' case.

For the foregoing reasons, I am of the view that the ESI Court was totally in error, not only in appreciating the material placed before it in proper perspective but also for having failed to follow the law laid down by the Apex Court in the decision cited by the learned Counsel for the corporation, consequently, the impugned order has to be set-aside and hence, I pass the following order:

ORDER

The appeal is allowed. The impugned order of the ESI Court. is set-aside, If the contribution in respect of the security personnel has been paid by the security agency concerned, the respondent-employer need not pay the contribution towards the said security personnel.