Goa Bottling Co. Pvt. Ltd. Vs Dy. Regional Director, Employees State Insurance Corporation Porvorim Goa, Mamlatdar Salcete Taluka, Margao Goa, Mr. Prakash Naik, Contractor, Arlem, Salcete Goa and Mr. G. P. Kirtani, Margao Goa

Court: Bombay High Court (Goa Bench)

Date of Decision: March 20, 2012

Acts Referred: Employees State Insurance Act, 1948 â€" Section 2(9), 75, 82

Citation: (2012) 6 ALLMR 390 : (2013) 1 BomCR 399 : (2012) 134 FLR 518 : (2012) 4 LLJ 572 : (2012) LLR 1024 : (2012) 4 MhLj 814

Hon'ble Judges: F.M. Reis, J

Bench: Single Bench

Advocate: V. Palekar, for the Appellant; A. Agni, for the Respondent

Final Decision: Dismissed

Judgement

F.M. Reis, J.
Heard Shri V. Palekar, learned Counsel appearing for the appellants and Mrs. A. Agni, learned Counsel appearing for the

respondents. The above Appeal Under ESI Nos. 10 and 11 of 2003 challenge the judgments dated 27.06.2003 passed by the learned

Employee"s Insurance Court at Margao, in EIC No. 3/1989(old), EIC No. 3/2000(new) and EIC No. 7/1989 (old), EIC No. 4/2000(new).

2. The above Appeal Under ESI No. 10 of 2003 was admitted by this Court dated 20.09.2003 on the following substantial questions of law :

(a) Whether it is not obligatory to pass a final order of assessment containing the reasons and mode of computation of contributions so that the

employer can have an opportunity to know these details and if necessary question them u/s 75 of the ESI Act of 1948 or on Appeal u/s 82

(b) Whether failure to reply to the show cause notice absolves the respondent Corporation to give reasons and show the mode of computation

(c) Whether the employees of the contractor are deemed to be employees of the principal employer within the meaning of section 2(9) of the

Employees State Insurance Act of 1948

(d) Whether the provision of the Employees State Insurance Act of 1948 obliterate the immediate employer

(e) Whether supervision and control by the principal employer on the employees of the contractor/immediate employer is necessary to establish

that the employees of the contractor/immediate employer are employees as defined u/s 2(9) of the Employees State Insurance Act of 1948

(f) Whether the burden of proof is on the party who makes a demand namely the Employees State Insurance Corporation

(g) Whether the casual workmen engaged by the loading contractor are the employees of the principal employer within the meaning of the

employee as defined u/s 2(9) of the Employees State Insurance Act of 1948

(h) Whether in an event where the expenses includes the cost of material also, is it permissible to consider the entire amount accounted under a

particular head can be considered as wages for the purpose of ESIC Act

3. The above Appeal Under ESI No. 11 of 2003 was admitted by this Court dated 20.09.2003 on the following substantial questions of law :

(a) Whether it is not obligatory to pass a final order of assessment containing the reasons and mode of computation of contributions so that the

employer can an opportunity to know these details and if necessary question them u/s 75 of the ESI Act of 1948 or on Appeal u/s 82

(b) Whether failure to reply to the show cause notice absolves the respondent Corporation to give reasons and show the mode of computation

(c) Whether the employees of the contractor are deemed to be employees of the principal employer within the meaning of section 2(9) of the

Employees State Insurance Act of 1948

(d) Whether the provision of the Employees State Insurance Act of 1948 obliterate the immediate employer

(e) Whether supervision and control by the principal employer on the employees of the contractor/immediate employer is necessary to establish

that the employees of the contractor/immediate employer are employees as defined u/s 2(9) of the Employees State Insurance Act of 1948

(f) Whether the burden of proof is on the party who makes a demand namely the Employees State Insurance Corporation

(g) Whether the casual workmen engaged by the loading contractor are the employees of the principal employer within the meaning of the

employee as defined u/s 2(9) of the Employees State Insurance Act of 1948

4. At the hearing of the above appeals, Shri Palekar, learned Counsel appearing for the appellants upon instructions pointed out that he shall not

press for all the substantial questions of law framed in the above appeals but however it is his contention that an additional substantial question of

law be framed considering the facts and circumstances of the case. The learned Counsel has proposed the following substantial questions of law:

(a) Whether in the absence of any bifurcation of the payments made to the labour contractor on account of loading and unloading charges, the total

amount paid can be considered as wages for the purpose of fixing the contribution payable by the employer

(b) Whether the Circular dated 26.06.1982 is applicable in cases of payments towards the loading and unloading of the charges paid to the labour

contractor

5. Shri Palekar, learned Counsel appearing for the appellants has assailed the impugned judgments passed by the Court below to the effect that in

view of the Circular dated 26.06.1982, it was incumbent upon the respondents to only consider 25% of the amount paid to Shri Prakash Naik

who is a labour contractor to fix the amount of contribution payable by the appellants. The learned Counsel has taken me through the evidence of

RW1 and pointed out that the said witness has admitted that the wages which have been paid to said Shri Prakash Naik were inclusive of the

amount towards the profit and other expenses. The learned Counsel further pointed out that though the appellants have not replied to the show

cause notice, nevertheless, it was incumbent upon the authorities to fix the contribution only after making a bifurcation of the amount towards the

labour charges and towards the profit made by such a labour contractor. The learned Counsel has further taken me through the evidence on record

and pointed out that Shri Prakash Naik though was a hired stockist nevertheless, in view of the agreement entered into between the parties, the

appellants were paying the amount towards the labour charges to the said Shri Prakash Naik. The learned Counsel has further taken me through

the impugned judgments and pointed out that the learned Judge has erroneously refused to accept that the said Circular was applicable to the

appellants in the facts and circumstances of the case. The learned Counsel as such submitted that only the amount assailed by the appellants in the

present cases is a sum of Rs. 16,952.40 which was the amount paid to the labour contractor Shri Prakash Naik which according to the learned

Counsel only 25% of the said amount is to be considered for the contribution payable by the appellants. The learned Counsel as such submitted

that the impugned judgments to that extent deserve to be quashed and set aside.

6. On the other hand, Mrs. A. Agni, learned Counsel appearing for the respondents has supported the impugned judgments. The learned Counsel

pointed out that the appellants have failed to reply to the show cause notice nor produced any evidence on record to substantiate the bifurcation to

be effected towards the payment of labour charges to Shri Prakash Naik who is a labour contractor towards the wages of the workers and his

profit. The learned Counsel further pointed out that the learned Judge whilst appreciating the evidence on record has found that the appellants have

not even produced the agreement between the said Shri Prakash Naik and the appellants to demonstrate the relationship between the parties and

the terms upon which such loading and unloading work was carried out. The learned Counsel further pointed out that the learned Judge has rightly

drawn an adverse inference against the appellants in view of the fact that Shri Prakash Naik was not examined as a witness in the proceedings. The

learned Counsel has taken me through the Circular relied upon by the appellants dated 26.06.1982 and pointed out that such Circular is not

applicable to the payments made to the labour contractor on account of loading and unloading charges. The learned Counsel further pointed out

that in any event, the point in issue has already been settled by the learned Single Judge of this Court in the judgment passed in Appeal Under ESI

Act No. 9 of 2006 dated 13.10.2006 in the case of Employees State Insurance Corporation & Anr V/s Goa Bottling Co. Pvt. Ltd. The learned

Counsel has laid emphasis on the findings of the learned Single Judge of this Court at para 11 of the judgment. The learned Counsel as such

submitted that the appeals deserve to be dismissed.

7. Having heard the learned Counsels and on perusal of the records, with regard to the first additional substantial question of law framed at the

instance of the appellants, I find that considering the fact that the appellants have failed to reply to the show cause notice and adduce evidence on

record to establish any such bifurcation towards the payment of wages and profit of the said Shri Prakash Naik, it is not open to the appellants to

now contend that such bifurcation of charges should be made whilst fixing the contribution by the appellants. The learned Judge whilst appreciating

the evidence on record has found that the said Shri Prakash Naik has not been examined by the appellants in support of their contention nor any

agreement was produced to substantiate such contention. In view of the failure of the appellants in adducing such evidence, I find that there is no

material on record for the authorities to carry out such exercise of bifurcation as sought to be contended by the appellants. The first substantial

question of law is answered accordingly against the appellants as in the absence of any material on record adduced by the appellant the total

amount paid to the contractor are to be considered as wages.

8. With regard to the second substantial question of law to consider whether the Circular dated 26.06.1982 is applicable to the payments made to

the labour contractor, it would be appropriate to consider the said Circular.

9. On perusal of the said Circular, I find that the Circular contemplate inter-alia as under:

Attention of the Regional Director is invited to this office memo of even number dated 16th November, 1981 wherein it was advised that in cases

where the employer is unable to give the details separately for payment made towards labour charges, cost of material, share of profit etc., the

Regional Director may assume 25% of the total amount of such bills towards ""labour charges"" and recover contribution thereon. It was clarified in

the memo that these instructions would apply only in cases of such payments which relate to repair/maintenance etc., of the factory/establishment

building and would not apply to other payments. On receipt of references from some of the Regional Directors the position in regard to repair and

maintenance of factory machinery repair of furniture, packing charges etc., has been reviewed and it has been decided that those item of work

which are ordinarily the work of the factory and are got done either through contractors or persons on contract basis and the bill includes apart

from labour charges, the cost of material, profit etc., of the contractor or the persons doing the job, the instructions contained in this office memo of

even number dated 16.11.81 would apply mutatis-mutandis in all cases of the type referred above e.g. ''Repairs & Maintenance of factory

Machinery'', ''Repairs to furniture, Packing charges'' etc., where the principal employer is not in a position to produce any relevant records in

regard to wages element in the bills. Thus contributions may be charged on the 25% of the amount of bills. However, in cases where the payment

has been made to the individuals each such case may be decided on merit keeping in view the principle of ""Contract for service"" and ""contract of

service"". These instructions may be brought to the notice of the Inspecting Officers with the advice that these may be kept in view while

recommending the contributions on the omitted wages. However while claiming contributions in accordance with these instructions the employer

may be specifically told that the assessment has been made as a special case and he should in future cover all such employees and pay

contributions in accordance with the provisions of ESI Act and Regulations otherwise contributions will be charged on the full amount booked in

the Accounts Books. This is necessary so that the employer may not have the impression that he could discharge his liability by paying contribution

on 25% of the amount of total payments and evade proper compliance

10. This Court whilst considering the earlier Circular dated 16.11.1981 in the judgment of the learned Single Judge in the case of Employees State

Insurance Corporation (supra) has held at para 11 thus :

11. the appellants have further submitted that trial Court has adjudicated the entire dispute on the basis of contents of Circular dated 16/11/1981.

In fact it refers to payments which related to repairs and maintenance of the factory/ establishment building and will not apply to other payments.

The Circular is on the subject of payments of contribution on items of which employer is not in a position to bifurcate labour charges vis a vis

material charges therefore, it is obvious that in the present case the amount due towards loading and unloading would never come within the

purview of impugned Circular, as it is the respondents'' own case that independent arrangement for separate billing was made. Similarly, freight

charges, repairs and maintenance of the machinery, cleaning expenses also would not come within the purview of the said Circular. However, it

appears that the learned Employees State Insurance Court did not go into details of the impugned Circular itself and thought it fit to make

wholesale application thereof to the disputed amounts which would not be permissible. It is quite obvious that the activities like loading and

unloading, freight charges were with regard to the movements of soft drinks and aerated drinks and had no connection with other items sought to

be saddled with contribution amount. The only item which would be covered within the purview of the Circular would be repairs and maintenance

of the building.

11. The learned Single Judge has come to the conclusion that the payments made towards the loading and unloading are not covered in the earlier

Circular dated 16.11.1981. On perusal of the new Circular dated 26.06.1982 relied upon by the learned Counsel appearing for the appellants, I

find that by the new Circular additional activities were sought to be included besides the earlier activities which were restricted only to the building

structures. By the new Circular dated 26.06.1982, fresh considerations were brought within the ambit which included inter-alia the repair and

maintenance of factory machinery, repair of furniture, packing charges etc. On minute examination of the said Circular, I find no reference in the

said Circular that such concessions are to be given also to the payments made for loading and unloading work carried out in the present cases.

There is nothing on record to show that the amount which has been paid to Shri Prakash Naik was towards the loading and unloading charges

which was inclusive of any material which was supplied by the appellants. Hence, the contention of Shri Palekar, learned Counsel appearing for the

appellants to the effect that only 25% of such amount paid is to be considered for fixing the contribution payable by the appellants cannot be

accepted. The learned Judge whilst passing the impugned judgments has come to the conclusion that the payments have been effected to Shri

Prakash Naik on account of wages of the workers and as such the authorities were entitled to fix the contribution on the basis of such payment.

Hence, considering the facts and circumstances of the case and taking note of the fact that the appellants have not adduced any evidence to

establish the relationship between the appellants and the said Shri Prakash Naik and the terms upon which such loading and unloading activities

were being carried out by him, I find that the learned Judge was justified to pass the impugned judgments and refused the concession claimed by

the appellants. Hence, the second substantial question of law is also answered against the appellants.

12. Another contention sought to be raised by Shri Palekar, learned Counsel appearing for the appellants that the judicial notice has to be taken

that no contractor works for charity is totally misconceived. No such judicial notice is to be taken on the basis of material on record. The

appellants have failed to adduce evidence to establish the terms of the contract and as such the question of taking judicial notice would not arise in

the present cases. The said contention of the learned Counsel appearing for the appellants is as such rejected. In view of the above, I find no merit

in the above appeals which stand accordingly dismissed.