Employees State Insurance Corporation, Bombay Vs Western India Theatres Ltd., Bombay

Court: Bombay High Court

Date of Decision: June 20, 1995

Acts Referred: Employees State Insurance Act, 1948 â€" Section 1, 2, 45A, 75, 8

Citation: (1995) 71 FLR 969

Hon'ble Judges: K.G. Shah, J

Bench: Single Bench

Judgement

K.G. Shah, J.
This appeal u/s 82 of the Employees'' State Insurance Act, 1948 (''the Act'' for short) is directed against the decision of the

Employees'' State Insurance Court, Bombay in Application ESI No. 84/1984 by which that Court has held that the establishment of the

Respondent is not liable to be covered u/s 1(5) of the Act with effect from 12th November 1978 to 31st December 1979 and hence it is not liable

to pay the amount of the contribution of Rs. 7,022.64 and the interest thereon as asked by the Appellant authority vide its order dated 20th

October 1983. The Appellant proposed to cover the establishment of the Respondent under the Act with effect from 12th November 1978 and

for that purpose addressed to the Respondent a communication some time in June 1982. It may be mentioned here that the establishment of the

Respondent has been covered under the Act with effect from 1st January 1980 and against that the Respondent has no objection. When the

Appellant proposed to cover the establishment of the Respondent under the Act with effect from 12th November 1978 i.e. say for the period

between 12th November 1978 and 31st December 1979, the Respondent raised an objection. In spite of the objection raised by the Respondent

as aforesaid, the Appellant passed an order u/s 45-A of the Act and called upon the Respondent to pay the contribution of Rs. 7,022.64 ps. for

the period between 12th November 1978 and 31st December 1979. The Respondent thereupon moved an application before the Employees''

State Insurance Court at Bombay u/s 75 of the Act.

2. In its pleading before the Court, the Appellant contended that for the relevant period i.e. for the period between 12th November 1978 and 31st

December 1979 not only that the Respondent had employed 19 persons but in addition the Respondent had a Managing Director who also was

required to be included in the Respondent''s set up and so done the Respondent had in all 20 employees in its establishment and was required to

be covered under the Act even for the aforesaid relevant period.

3. At the trial before the Court, evidence was led and in the evidence it transpired that besides the 19 employees regularly employed by the

Respondent and the Managing Director, the Respondent made certain payments against vouchers to the sweepers/the cleaners, the liftmen and the

car cleaner. The court on appreciation of evidence negatived the contention of the Appellant that the Managing Director of the Respondent was

also required to be included in the set up of the Respondent''s establishment for the purpose of bringing the number of employees of the

Respondent to 20 so that the provisions of the Act would be made applicable to the Respondent''s firm. However, the Court took into

consideration the evidence which was led before it to show that the Respondent made payment by way of tips against vouchers to the

sweepers/the cleaners, the liftmen and the car cleaner and found that those workmen, viz. the sweepers/the cleaners, the liftmen were required to

be included in the number of employees of the Respondent and once that is done, the number of employees of Respondent for the relevant period

would be in excess of 19 and therefore the Respondent''s establishment would be liable to be covered under the Act even for the aforesaid

relevant period. In this view of the matter, the court ultimately dismissed the application of the Respondent.

4. The Respondent therefore filed an appeal against the aforesaid decision to this Court. This Court by its judgment and order dated 30th June

1988 remanded the matter to the Court below on the following observations.

In the enquiry held before the learned Judge of E. S. I. Court, the issue that was framed for determination was whether the Managing Director of

the Appellants was an employee and if yes, whether the provisions of the E. S. I. Act would be applicable on account of the employees of the

Appellant being 20 for the purpose of coverage under Sub-section (5) of Section 1 of the said Act. The learned Judge of the trial court after

answering the said issue in favour of the appellants, found that there were certain other employees such as, watchman, liftman and car cleaner who

were employees of the Appellants, thus raising the employees over 20, thereby making the said provisions applicable to the appellants. In view of

the fact that there were no pleadings in regard to the aforesaid part time employees, it will have to be held that Appellants have been taken by

surprise in the matter of arriving at the said findings. In this view of the matter, the impugned order will have to be set aside and the matter will have

to be remanded back to the E. S. I. Court with liberty to the Respondents to amend the written statement, so as to incorporate their case regarding

the aforesaid part time employees. The parties will be at liberty to lead evidence in respect of their respective claims in regard to the said

employees. The trial Judge shall thereafter decide the case in accordance with law. Appeal partly allowed. The impugned order is set aside and the

matter remanded to the trial Court for disposal in light of the above observations and in accordance with the law. No order as to costs.

5. After the remand, some evidence was led and the Court found that the part time employees i.e. the sweepers/the cleaners and the liftmen could

not be counted as employees of the Respondent for the coverage under the provisions of the Act. The Court reiterated its earlier finding that the

Managing Director of the Respondent also could not be counted as the employee of the Respondent for bringing the establishment of the

Respondent under the coverage of the Act. On these findings, the Court allowed the application of the Respondent and passed the impugned

order. Hence the Appellant has filed this appeal.

6. It is required to be noticed that this is an appeal u/s 82 of the Act. Sub-section (2) of Section 82 of the Act which is relevant for the purpose

reads as under.

82(1). An appeal shall lie to the High Court from an order of an Employees Insurance Court if it involves substantial question of law.

Thus it is required to be borne in mind that the appeal provided by Section 82 of the Act is an appeal which would involve a substantial question of

law. Now whether the sweepers/the cleaners, the liftmen and even the car cleaner falling under one group and the Managing Director falling under

the order group could be said to be employees of the Respondent, would be essentially a question of fact depending upon the facts and

circumstances of the case. Such a question normally could not be said to be a question which could be said to involve a substantial question of law.

Sub-section (1) of Section 82 of the Act says that save as expressly provided in that section no appeal shall lie from an order of an Employees''

Insurance Court. Sub-section (2) of Section 82 of the Act, which I have extracted hereinabove, follows the sub-section (1) of Section 82 of the

Act and a joint reading of both these sub-section (1) and (2) of Section 82 of the Act would make it clear that no appeal against the Employees

Insurance Court''s order would lie except in accordance with S. 8(2) of the Act. Sub-section (2) of Section 82 of the Act, as said above, provides

that an appeal shall lie to the High Court from an order of the Employees'' State Insurance Court if it involves a substantial question of law. Prima

facie therefore it has got to be said that unless it is made out by the Appellant that the appeal involves substantial question of law the appeal would

not be maintainable. As said above, the question whether the Managing Director of the Respondent could be said to be the employee of the

Respondent for the purpose of application of the provisions of the Act, would ordinarily be a question of fact not involving any substantial question

of law. Similarly the question whether the sweepers/the cleaners, the liftmen and the car cleaner could be said to be employees of the Respondent

for the purpose of the application of the provisions of the Act to the establishment of the Respondent, would again be a question of fact depending

upon the facts and circumstances of the case and it could not be said to be a question which involve a substantial question of law. Considering the

matter from this angle, I am of the tentative opinion that the appeal would not be maintainable u/s 82 of the Act. The tentative opinion is an

expression which I have used deliberately for even with that opinion I propose to decide the appeal in the matter for earlier in this very matter an

appeal has been entertained by the High Court. It is therefore not necessary for me to give a definite finding whether this is an appeal which could

be said to involve substantial question of law.

7. Coming to the merits of the case, I think the conclusion reached by the Court below cannot be disturbed.

8. The admitted facts are that the Respondent has its establishment in a rented premises in a big building. M/s. Liberty Cinema are the

owners/landlords of the building. The Respondent is a tenant in some portion of the building on the 4th floor. For the purpose of sweeping and

cleaning the building, the owners/landlords i.e. M/s. Liberty Cinema have engaged the sweepers and the cleaners. For operating the lift, the

owners/landlords M/s. Liberty Cinema have engaged the liftmen. Mr. Pai, the witness examined by the Respondent, in his deposition stated that in

the building there are liftmen and cleaners who are paid by M/s Liberty Cinema. The witness of course admitted that the sweeper is paid by the

Respondent on vouchers though of course the sweeper is not the permanent employee of the Respondent. According to this witness, the

Respondent paid Rs. 80/- per month to the sweeper/cleaner against voucher. Similarly the Respondent pays to the liftmen by way of tips against

vouchers Rs. 25/- per month. According to this witness, the Respondent is paying Rs. 60/- per month to the car cleaner. The witness stated that

the however of the building is not concerned with the car cleaner.

9. This then is the evidence on the point as regards the sweepers/the cleaners, the liftmen and the car cleaner.

10. The question is whether the sweepers/the cleaners, the liftmen and the car cleaner could be said to be the employees of the Respondent for the

purpose of the Act. On this question, the Court below has relied upon the relevant principles as deduced from various judgments. I do not think it

is necessary for me to dwell at length on all those judgments referred to by the Court below in its judgment. Suffice it would be for me to say that in

Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, . Their lordships of the Supreme Court have explained the distinction between the

contract of service and contract for service and in that connection their lordships have referred to the pronouncements of the House of Lords in

Short v. J. & W. Henderson Ltd. (1946) 62 T. L. R. 427 where Lord Thankerton recapitulated the four indicia of a contract of service which had

been referred to in the judgment under appeal, viz. (a) the master''s power of selection of his servant, (b) the payment of wages or other

remuneration, (c) the master''s right to control the method of doing the work, and (d) the master''s right of suspension or dismissal.

11. In the case before me the evidence shows that the sweepers/the cleaners, and the liftmen are engaged by M/s. Liberty Cinema who a re either

the owners or the landlords of a multi-storeyed building, on a portion of the 4th floor of which the Respondent has its establishment in a tenanted

premises. As stated by Mr. Dewani, the witness examined by the Appellant, the part-time employees such as the sweepers/the cleaners, and the

liftmen of the building were common for all the tenants. Thus the sweepers/the cleaners, and the liftmen working in the building are common for all

the tenants and, as stated by Mr. Pai, the witness examined by the Respondent, they are being paid by M/s Liberty Cinema, the owners/landlords

of the building. In other words, the sweepers/the cleaners, and the liftmen commonly rendered services to all the tenants occupying different parts

of the building, of which M/s. Liberty Cinema are the owners and M/s Liberty Cinema are the employers of those staff members, viz. the

sweepers/the cleaners, and the liftmen. May be by way of tips or gratuitous payments the Respondent might be paying those staff members some

regular amounts against vouchers. Those amounts are very meagre to the liftmen, as stated by Mr. Pai, the Respondent paid Rs. 25/- per month

and to the sweeper/cleaner the Respondent paid Rs. 80/- per month. On this evidence it would be just not possible to find that the Respondent has

a power of selection of the sweeper/the cleaner, or the liftman. The Respondent also could not be said to have a right to control the method by

which the sweepers/the cleaners and the liftmen would do their work and certainly by no stretch of logic it could be said that the Respondent has a

right of suspension or dismissal over the sweeper/the cleaners and the liftmen. Out of the four indicia as recapitulated by Lord Hankerton, at least

three are not satisfied in the case before me. Mere payments of small amounts by the Respondent to the sweepers/the cleaners and the liftmen

could hardly be said to be payment of wages or other remuneration. Those payments would obviously be in the nature of tips albeit against

vouchers for the Respondent cannot make any payment except against vouchers. Considering the matter from this angle, the relationship between

the Respondent and the sweepers/the cleaners and the liftmen cannot be said to be the relationship arising out of a contract of service. So far as the

Respondent is concerned, the sweepers/the cleaners and the liftmen cannot be said to be the employees within the meaning of that word as defined

in Section 2(9) of the Act. The sweepers/the cleaners and the liftmen therefore could not be counted as the employees of the Respondent for the

application of the Act to the establishment of the Respondent.

12. Then remains the question of car cleaner. The evidence shows that the Respondent pays Rs. 60/- per month to the car cleaner. But as the

evidence shows the services rendered by the car cleaner are purely of casual nature like care cleaners on the road. Such casual service would not

make the person rending the same as an employee of the person to whom they are rendered. This Court in Parle Bottling Co. (P) Ltd. v. Regional

Director, E. S. I. C., Bombay Letters Patent Appeal No. 39 of 1982, has held that the coolies from the road/street who render extra help for

unloading the creates from the trucks of the company to whom payments of the charges were made against vouchers, could not be considered to

be the employees of the company. That judgment, in my opinion, applies to the facts of the case before me also. Here in the case before me the

respondent company accepts the services of some car cleaner on casual basis and make some payment to the car cleaner. On that fact alone, the

car cleaner cannot be said to be the employee of the Respondent so as to bring the total number of employees of the Respondent above 19.

13. So far as the Managing Director of the Respondent is concerned, there again the view expressed by the lower Court cannot be faulted. The

lower court has inter alia relied upon the judgment of the Punjab and Haryana High Court in the case of Bombay Metal Works Pvt. Ltd. Ludhiana

v. Regional Director of Employees'' State Insurance Corporation, Chandigarh & Anr. 1985 Lab I. C. 1318. In that case before the Employees''

State Insurance Court on behalf of the company it was pleaded that the Directors of the company were not covered by the Employees State

Insurance Scheme and therefore qua the Directors no recovery could be made. The court relying upon the judgment of the Calcutta High Court in

B.M. Chatterjee Vs. The State of West Bengal and Another, held that a Director of a limited company was a principal of a limited company was a

principal employer within the meaning of Section 2(17) of the Act and, therefore, whatever payments were made to the Director could not be

considered as a subject matter for assessing the contribution. To that limited extent, the matter was decided in favour of the company. In the

company"s appeal filed before the High Court, the Regional Director, E. S. I. C. filed cross objection challenging the aforesaid findings. The

learned single Judge of the Punjab and Haryana High Court accepted as correct the view expressed by the Court below. The learned single Judge

said that a reading of the definition of the principal employer contained in Section 2(17), shows that it meant the owner or occupier of the factory

and it included the managing agent or any other persons responsible for supervision and control of the establishment. The learned single Judge

further held that the work of a limited company is carried on by the Directors and Managing Director and, therefore they would come within the

definition of the principal employer and cannot be termed as employee within the meaning of Section 2(9). Therefore the payment made to the

Directors could not form the basis for assessing the contributions.

14. The above judgment of the learned single Judge, Punjab and Haryana High Court clearly held that the Managing Director of a limited company

would fall within the definition of the expression principal employer and, therefore, cannot be termed as an employee within the meaning so Section

2(9) of the Act. I am in respectful agreement with the view expressed by the learned single Judge of the Punjab and Haryana High Court.

Accepting that view as the correct one, I hold that the Managing Director of the Respondent Company cannot be said to be an employee of the

Respondent for the purpose of the Act. Therefore the finding on that line recorded by the Court below becomes unexceptionable.

15. In view of what I have said above, the judgment and order of the Court below becomes unexceptionable. The appeal therefore fails and is

dismissed with no order as to costs.