Employees' State Insurance Corporation

Vs

M. M. Suri & Associates (P) Ltd.

Civil Appeal No. 5640 of 1997

(S. Saghir Ahmed, D. P. Wadhwa JJ)

28.10.1998

JUDGMENT

D. P. WADHWA, J. -

1. Dissatisfied with the judgment of the Delhi High Court holding that the notification dated 30-9-1988 issued under sub-section (5) of Section 1 of the Employees' State Insurance Act, 1948 (for short "the Act") was inapplicable to the establishment of the respondent, the Employees' State Insurance Corporation (ESIC) has filed the present appeal after obtaining leave from this Court.

2. Under sub-section (5) of Section 1 of the Act, notification was issued, after complying with necessary formalities, extending the provision of the Act to "shops". It is not disputed that the respondent is a shop and that the notification would be applicable to it if other conditions for application of the Act are fulfilled. The notification is as under :

> # "DELHI ADMINISTRATION (LABOUR DEPARTMENT) Dated : 30-09-1988 NOTIFICATION##
>
> In exercise of power conferred by sub-section (5) of Section 1 of the Employees' State Insurance Act, 1948 (34 of 1948), read with the Ministry of Labour, Government of India Notification No. 55.122(2) dated the 14-2-1949 the Lt. Governor of the Union Territory of Delhi in consultation with the approval of the Central Government, and having previously given the requisite notice vide this Administration's Notification No. F.28(2)87/TMP/LC/Lab dated 9-2-1988 published in the Delhi Gazette (extraordinary) Part IV dated 9-2-1988 hereby extends the provisions of the said Act to the classes of establishments specified in column I of the Schedule below w.e.f. 2-10-1988.
>
> # SCHEDULEDescription of establishments Area in which the establishment are situatedThe following establishmentswherein twenty or more personsare employed or were employed forwages on any day of the precedingtwelve months, namely :'Shops' In the Union Territory of Delhi.##
>
> By order and in the name of the Lt. Governor of the Union Territory of Delhi.
>
> # sd/- (Mrs M. Bassi) Deputy Secretary (Labour) Delhi Administration, Delhi"##

3. Provisions of the Act apply to factories. "Factory" is defined under clause (12) of Section 2 of the

Act. It reads as under :

> "2. (12) 'factory' means any premises including the precincts thereof -
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> (a) whereon ten or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on, or
>
> (b) whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power or is ordinarily so carried on,
>
> but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952) or a railway running shed;"

This definition of "factory" was introduced w.e.f. 20-10-1989. Definition of "factory" as it originally existed prior to amendment by Act 44 of 1966 (w.e.f. 28-1-1968) was as under :

> "2. (12) 'factory' means any premises including the precincts thereof wherein twenty or more persons are working or were working on any day of the preceding twelve months and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on but does not include a mine subject to the operation of the Indian Mines Act, 1923 (IV of 1923) or a railway running shed."

After the amendment by Act 44 of 1966 as aforementioned the words "or were working" in the definition of "factory" were substituted by the words "or employed or were employed for wages". By subsequent amendment, the number of persons have now been reduced to ten or more persons instead of twenty or more persons in the definition of "factory".

4. "Employee" and "wages" have also been defined in clauses (9) and (22) and are as under :

> "2. (9) 'employee' means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and -
>
> (i) who is directly employed by the principle employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or
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> (ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or
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> (iii) 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;
>
> and includes any person employed for wages on any work connected with the

administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment or any person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment; but does not include -

(a) any member of the Indian naval, military or air forces; or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed Rs. 1600 a month;

Provided that an employee whose wages excluding remuneration for overtime work exceed Rs. 1600 a month at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period;

* * *##

(22) 'Wages' means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorised leave, lockout, strike which is not illegal or lay-off and other additional remuneration, if any, paid at intervals not exceeding two months, but does not include -

(a) any contribution paid by the employer to any pension fund or provident fund, or under this Act;

(b) any travelling allowance or the value of any travelling concession;

(c) any sum paid to the person employed to defray special expenses entitled on him by the nature of his employment; or

(d) any gratuity payable on discharge;"

5. Considering these provisions, the High Court was of the view that "the word 'employee' is applicable to those who are not officers. In the instant case, there are five officers and the balance of the workers are less than 20". The High Court was, thus, of the view that the notification was not applicable in the case of the respondent.

6. There is conflict of decisions of the High Courts. One view is that for an Act to be applicable to an establishment, the total number of employees should be 20 or more (now it is 10 or more) irrespective of the fact whether all the employees fall within the definition of "employee" as given in Section 2(9) meaning thereby that drawing of any amount of wages is immaterial. The other view is that these 20 or more persons should be those who fall within the definition of "employee" as given in Section 2(9) of the Act getting wages as prescribed therein. As to what "wages" means has also been defined. The second view commends to us. It was submitted that if there are 18 employees drawing the amount of wages prescribed and only two or more are drawing more than that, the Act should be applicable as in any case this is beneficial legislation. Reliance has been placed on a Division Bench decision of the Andhra Pradesh High Court in A. P. SEB v. ESI Corpn. [1977 Lab IC 1107 : (1977) 2 LLN 356] where the High Court said that the expression "wages" used under Section 2(12) must be understood in a wider sense as meaning any remuneration paid to any person

who is employed in the factory and cannot be restricted only to remuneration paid to the employees, who come within the definition of Section 2(9). Section 2(12), no doubt, use the words "persons are employed or were employed for wages". Stress was, therefore, on the word "persons" and it is submitted that for the Act to be applicable, the only criterion is to see if the establishment has 20 or more persons in its employment. This interpretation ignores the fact of wages as defined in Section 2(22). If we refer to the definition of "factory" when the Act came into force or at least till 1968 when the Act was amended by Amending Act 44 of 1966, "factory" meant any premises "wherein 20 or more persons are working". This definition of "factory" was changed and at the relevant time, it was substituted by the words "employed for wages". The exact amendment we have already noticed above. When the word "wages" is specifically introduced in the section, it can only mean to have reference to what "wages" mean in Section 2(22) of the Act. It cannot be given any other meaning as has been done by the Andhra Pradesh High Court. In our view, therefore, the Act would apply to an establishment only when the number of employees is 20 or more and all those employees and answer the description of employee contained in Section 2(9) of the Act.

7. To controvert the argument that even though the majority of the persons employed are "employees" and their number is less than 20, they should not be deprived of the benefit under the Act, it was submitted that what will happen when the "employees" falling within the definition of Section 2(9) of the Act are only 2 or 3 though the total strength in the establishment is more than 20. How can it be said in that case that the Act should nevertheless apply to such an establishment ? The answer is obviously in the negative that the Act cannot apply.

8. The view which we have taken finds support from two decisions of this Court in Regional Director, ESI Corpn. v. Ramanuja Match Industries [(1985) 1 SCC 218 : 1985 SCC (L&S) 213] and ESI Corpn. v. Apex Engineering (P) Ltd. [(1998) 1 SCC 86 : 1998 SCC (L&S) 178]

9. In Regional Director, ESI Corpn. v. Ramanuja Match Industries [(1985) 1 SCC 218 : 1985 SCC (L&S) 213] the question before this Court was whether a partner of a firm is an employee within the meaning of Section 2(9) of the Act. Three partners of the firm were also getting wages and with them, the strength of the total number of employees was more than twenty. There was thus no dispute that there were twenty or more persons employed for wages. This Court held that the partners were not the employees and rather they were the proprietors of the firm and with the partners being out the total number of employees would be less than twenty, the Act would not be applicable to the establishment of the firm. The Court considered the arguments of ESIC that the Act was a beneficial legislation and said as under : (SCC pp. 224-25, para 10)

> "10. Counsel for the appellant emphasised on the feature that the statute is a beneficial one and the Court should not interpret a provision occurring therein in such a way that the benefit would be withheld from employees. We do not doubt that beneficial legislations should have liberal construction with a view to implementing the legislative intent but were such beneficial legislation has a scheme of its own there is no warrant for the Court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the Scheme. The Act covers all factories or establishments with 20 or more employees and the benefit is intended to be given to institutions with more than that number. It is not the contention of counsel that because the legislation is beneficial it should also apply to factories or establishments with less than 20 employees. If that be not so, in finding out whether a partner would be an employee a liberal construction is not warranted. A person who would not answer the definition

> cannot be taken into account for the purpose of fixing the statutory minimum. We are, therefore, not inclined to accept the contention of counsel that on the basis of the statute being beneficial, a partner should also count as an employee."

10. In ESI Corpn. v. Apex Engineering (P) Ltd. [(1998) 1 SCC 86 : 1998 SCC (L&S) 178] there was challenge to the judgment of the Bombay High Court holding that the Managing Director of the respondent-Company was not an employee within the meaning of Section 2(9) of the Act and since the number of regular employees was less than 19 engaged for wages by the Company, it would not covered under the Act as it would be outside the definition of "factory" under Section 2(12) of the Act. This Court, after examining the provisions of Section 2(9) of the Act, said : (SCC p. 91, para 6)

> "A mere look at the aforesaid provisions shows that before a person can be said to be an employee the following characteristics must exist qua his service conditions -
>
> (1) He should be employed for wages. This would presuppose relationship between him as employee on the one hand and the independent employer on the other;
>
> (2) Such employment must be in connection with the work of the factory or establishment to which the Act applies;
>
> (3) He must be directly employed by the principal employer on any work of, or incidental or preliminary to or connected with work of, the factory or establishment;
>
> (4) In the alternative he should be employed by or through an immediate employer on the premises of the factory or establishment or under supervision of the principal employer or his agent;
>
> (5) We are not concerned with clause (3) of the said definition. But the inclusive part of the definition being relevant has to be noted as Condition 5. He should be employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof. We are also not concerned with the exempted categories of persons in the present case and hence we need not dilate on the same.
>
> (6) This is subject to the further condition that the wages of the person so employed excluding remuneration for overtime should not exceed such wages as prescribed by the Central Government."

The Court then referred to the definition of "wages" as provided in Section 2(22) of the Act. The duties and powers of the Managing Director of the respondent-Company were referred to and this Court said that all these activities of the Managing Director were connected with the administration of the factory. The fifth condition, as aforesaid, was, therefore, satisfied. Then this Court observed as under : (SCC p. 93, para 6)

> "So far as the last condition is concerned it is also not in dispute between the parties that remuneration of Rs. 12,000 per year or Rs. 1000 per month as paid to him for discharging his duties as Managing Director remained within the permissible limits of wages as prescribed by the Central Government at the relevant time for applicability of the definition of the term 'employee' as per Section 2 sub-section (9) of the Act. Thus all the requisite conditions for applicability of the term 'employee' as

defined by the ACt stood satisfied in the case ....."

11. In the present case, there is no dispute that as per the notification in question, the establishment of the respondent is a shop and the number of employees falling within the definition of Section 2(9) of the Act is less than 20. We, therefore, uphold the impugned judgment of the High Court that since in the establishment of the respondent, the employees number less than 20, the notification dated 30-9-1988 extending the Act to the establishment of the respondent is not applicable.

12. Therefore, the appeal is accordingly dismissed. There shall, however, be no order as to costs.