SUPREME COURT OF INDIA

Srinivasa Rice Mill

Vs.

Employees State Insurance Corporation

C.A.No.4774 of 2006

(S.B. Sinha and Dalveer Bhandari JJ.)

10.11.2006

JUDGMENT:

S.B. SINHA, J.

Leave granted.

Applicability of the provisions of the Employees' State Insurance Act, 1948 (for short "the Act") to the rice mills situate in the State of Andhra Pradesh arises for question in these matters. Appellants are owners of various rice mills situate in the State of Andhra Pradesh. The operation in these rice mills is said to be seasonal. The Act admittedly was made applicable in relation to the rice mills with effect from 1.8.2000. Prior to coming into force of the Act, inspections were carried out and allegedly it was found that in the mills more than 10 employees were employed. They were allegedly asked to comply with the provisions of the Act. Without, however, giving an opportunity to explain as to why they have not made any contribution towards insurance, by a notice dated 20th October, 2000, they were asked to show cause stating:

"I therefore call upon to explain the reasons if any as to why you should not be prosecuted, within a week of receipt of this letter. If no reply is received within stipulated time it will be presumed that you have no valid reasons to explain and further action will be taken accordingly without any further notice."

Suits were filed before the Employees' Insurance Court under Section 75(1)(g) of the Act. The question which inter alia was raised therein was as to whether the aforementioned notice was legal. By reason of a judgment and order dated 30.6.2003, the learned Employees' Insurance Court dismissed the applications. Aggrieved thereby and dissatisfied therewith, appeals were preferred before the High Court purported to be in terms of Section 82 of the Act. The said appeals, by reason of the impugned order, have been dismissed.

Mr. C. Mukund, learned counsel appearing on behalf of Appellants would raise three contentions in support of these appeals, viz.,

(i) Having regard to the definitions of "employees" and "wages" as also the applicability of the Act in relation to the factories, it was obligatory on the part of the authorities under the Act to determine

the question as to whether the establishments are covered under the Act or not.

(ii) The principles of natural justice, as are required in terms of Sections 44 and 45 of the Act, having not been complied with, the impugned notice proposing criminal action against them is void ab initio.

(iii) Having regard to the provisions contained in Regulation 10B of the Employees' State Insurance (General) Regulations, 1950 (for short "the Regulations") framed under the Act, it was obligatory on the part of the Inspector to disclose the details of the employees as also the wages drawn by them and the said mandatory provisions having not been complied with, the impugned notice was liable to be set aside.

Mr. C.S. Rajan, learned senior counsel appearing on behalf of Respondent, on the other hand, submitted:

(i) The provisions of the Act as contained in Sections 38 to 45 of the Act lay down a scheme in terms whereof statutory obligations are on the employer not only to pay the amount of insurance but also to furnish the details and as the said statutory obligations have not been carried out, the impugned notice issued by the Employees' State Insurance Corporation (for short "the Corporation") must be held to be legal.

(ii) Keeping in view the statutory obligations on the part of the employer, it is idle to contend that the authorities under the Act while issuing notice must disclose the details as regards the employees as also the wages drawn by them. (iii) The Employees' Insurance Court as also the High Court has rightly arrived at a finding that the rice mills run by Appellants are factories within the meaning of Section 2(12) of the Act and, thus, it is covered.

Before we embark upon the rival contentions raised by the learned counsel for the parties, we may notice certain provisions of the Act.

The Act was enacted to provide for certain benefits to employees in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto. The Act although extends to whole of India but in terms of Sub-section (3) of Section 1 of the Act, it may come into force on such date or dates as the Central Government may, notify in the official gazette, appoint and different dates may be appointed for different provisions of the Act and for different States or for different parts thereof.

However, Sub-section (4) of Section 1 states that the Act at the first instance shall apply to all factories other than seasonal factories provided that nothing contained in this sub-section shall apply to a factory or establishment belonging to or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.

"Contribution" is defined in Section 2(4) of the Act to mean "the sum of money payable to the corporation by the principal employer in respect of an employee and includes any amount payable by or on behalf of the employee in accordance with the provisions of this Act".

"Factory" is defined under Section 2(12) of the Act which reads as under:

"2. (12) 'factory' means any premises including the precincts thereof

(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;"

"Employee" and "wages" have been defined in Sections 2(9) and 2(22) of the Act 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 principal 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 (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

(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 entailed on him by the nature of his employment; or

(d) any gratuity payable on discharge;"

Section 38 occurring in Chapter IV of the Act provides that all employees are to be insured in the manner provided by the Act. Section 39 provides for contributions payable under the Act in respect of the employees. Sub-section (4) of Section 39 of the Act reads as under:

"(4) The contributions payable in respect of each wage period shall ordinarily fall due on the last day of the wage period, and where an employee is employed for part of the wage period, or is employed under two or more employers during the same wage period, the contributions shall fall due on such days as may be specified in the regulations."

Section 40 of the Act enjoins a duty upon the principal employer to pay contribution at the first instance. Section 41 provides for recovery of contribution. Section 42 provides for general provisions as to payment of contributions whereas Section 43 provides for method of payment of contribution. Sections 44 and 45, which are relevant for these matters, read as under:

"44. Employers to furnish returns and maintain registers in certain cases.--(1) Every principal and immediate employer shall submit to the Corporation or to such officer of the Corporation as it may direct such returns in such form and containing such particulars relating to persons employed by him or to any factory or establishment in respect of which he is the principal or immediate employer as may be specified in regulations made in this behalf.

(2) Where in respect of any factory or establishment the Corporation has reason to believe that a return should have been submitted under sub-section (1) but has not been so submitted, the Corporation may require any person in charge of the factory or establishment to furnish such particulars as it may consider necessary for the purpose of enabling the Corporation to decide whether the factory or establishment is a factory or establishment to which this Act applies. (3) Every principal and immediate employer shall maintain such registers or records in respect of his factory or establishment as may be required by regulations made in this behalf.

45. Inspectors, their functions and duties.--(1) The Corporation may appoint such persons as Inspectors, as it thinks fit, for the purposes of this Act, within such local limits as it may assign to them.

(2) Any Inspector appointed by the Corporation under sub-section (1) (hereinafter referred to as Inspector), or other official of the Corporation authorised in this behalf by it, may, for the purposes of enquiring into the correctness of any of the particulars stated in any return referred to in section 44 or for the purpose of ascertaining whether any of the provisions of this Act has been complied with--

(a) require any principal or immediate employer to furnish to him such information as he may consider necessary for the purposes of this Act; or (b) at any reasonable time enter any office,

establishment factory or other premises occupied by such principal or immediate employer and require any person found in charge thereof lo produce to such Inspector or other official and allow him to examine such accounts, books and other documents relating to the employment of persons and payment of wages or to furnish to him such information as he may consider necessary; or (c) examine, with respect to any matter relevant lo the purposes aforesaid the principal or immediate employer, his agent or servant, or any person found in such factory, establishment, office or other premises, or any person whom the said Inspector or other official has reasonable cause to believe to be or to have been an employee; (d) make copies of, or lake extracts from, any register, account book or other document maintained in such factory, establishment, office or other premises;

(e) exercise such other powers as may be prescribed.

(3) An Inspector shall exercise such functions and perform such duties as may be authorised by the Corporation or as may be specified in the regulations."

Section 97 provides for the power of the Corporation to make regulations, pursuant whereto the Corporation framed Regulations. Regulation 10B reads as under:

"10-B. Registration of factories or establishments.- (a) The employer in respect of a factory or an establishment to which the Act applies for the first time and to which an employer's Code No. is not yet allotted, and the employer in respect of a factory or an establishment to which the Act previously applied but has ceased to apply for the time being, shall furnish to the appropriate Regional Office not later than fifteen days after the Act becomes applicable, as the case may be, to the factory or establishment, a declaration or registration in writing in Form 10 (hereinafter referred to as Employer's Registration Form). (b) The employer shall be responsible for the correctness of all the particulars and information required for and furnished on the employer's registration form.

(c) The appropriate Regional Office may direct the employer who fails to comply with the requirement of paragraph (a) of this regulation within the time stated therein, to furnish to that office Employer's Registration Form duly completed within such further time as may be specified and such employer shall thereupon, comply with the instructions issued by that office in this behalf.

(d) Upon receipt of the completed Employer's Registration Form, the appropriate Regional Office shall, if satisfied that the factory or the establishment is one to which the Act applies, allot to an Employer's Code Number (unless the factory or the establishment has already been allotted an Employer's Code Number) and shall inform the employer of that number.

(e) The employer shall enter the Employer's Code Number on all documents prepared or completed by him in connection with the Act, the rules and these regulations and in all correspondence with appropriate office."

Indisputably, in terms of the said Regulation, Form 01 has been prescribed which is required to be filled up by the employer for the purpose of furnishing return.

A notification issued by the appropriate government reads as under:

"S.O. 1842 In exercise of the powers conferred by sub-section (3) of Section 1 of the Employees' State Insurance Act, 1948 (34 of 1948) the Central Government hereby appoints the 1st August,

2000 as the date on which the provisions of Chapter IV (except Section 44 and 45 which have already been brought into force) and Chapter V and VI (except sub-section (i) of Section 76 and Sections 77, 78, 79 and 81 which have already been brought into force) of the said Act shall come into force in the following areas in the State of Andhra Pradesh namely: -

Areas falling within the limits of revenue villages of:

(i) Kovvada and Narsimhapuram in Bheemavaram Manda;

(ii) Vandrum and Cherukuwada in Undi Mandal (iii) Peda Amiram in Kalla Mandal; and

(iv) Akiveedu in Akiveedu Mandal of West Godavari District."

Admittedly, the rice mills are situated within the Narsimhapuram area. The appointed day therefor was 1st August, 2000. The factories of Appellants were inspected prior to that date. Prior to that date, therefore, Appellants were not bound to comply with the provisions of the Act. They could appoint employees at their own sweet will. But the period wherefor the provisions of the Act would be applicable is 12 months preceding the said date, viz., from 1st August, 1999 to 31st July, 2000. Compliance of the requirements of the statutes on the part of the employer, however, would begin from the appointed day, viz., 1st August, 2000.

Before an Act is made applicable, in the event, a dispute is raised, the authorities exercising statutory power must determine the jurisdictional fact. Applicability of the Act would be a jurisdictional question. The Employer is entitled to raise such a question before the appropriate authority. Such a question can also be raised for the first time before a court exercising the power of judicial review although ordinarily the same should be raised before the concerned authority as a preliminary issue. [See Management of the Express Newspapers (P) Ltd., Madras v. Workers and Others, AIR 1963 SC 569, para 15]

What would be a jurisdictional fact has recently been stated by this Court in Arun Kumar & Others v. Union of India & Others [JT 2006 (12) SC 121] in the following terms:

"A "jurisdictional fact" is a fact which must exist before a Court, Tribunal or an Authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non- existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a Court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not posses."

It is further stated:

"it is clear that existence of 'jurisdictional fact' is sine qua non for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter on existence of 'jurisdictional fact', it can decide the 'fact in issue' or 'adjudicatory fact'. A wrong decision on 'fact in issue' or on 'adjudicatory fact' would not make the decision of the authority without jurisdiction or vulnerable

provided essential or fundamental fact as to existence of jurisdiction is present."

The scheme of the Act does not suggest that all the employees would come within the purview of the said Act. Those employees who draw wages as is defined in Section 2(22) of the Act would be the employees who would be covered thereunder. As noticed hereinbefore, inspection of the factories was carried out prior to the date of coming into force of the Act. Such inspections, thus, could have been carried out only in terms of the provisions contained in Section 45 of the Act, which could mean that the Inspector would be appointed for the purpose of the Act. He is authorized under the Act to enquire into the correctness of any of the particulars stated in any return referred to in Section 44 or for the purpose of ascertaining whether any of the provisions has been complied with. It is, therefore, evident that any action taken prior to or in furtherance of a report made on an inspection, prior to coming into force of the Act, would be ultra vires Section 45(2) of the Act. Once the inspection is held to be illegal, Respondent could not have taken any statutory action for imposition of penalty.

The question may be considered from another angle. Appellants could have been directed to file returns or make their contribution in terms of the Act. Had such a notice been served, they could have shown that they have appointed employees who do not draw wages within the meaning of the provisions of the said Act and, thus, they do not come within the purview thereof.

In Employees' State Insurance Corporation v. M.M. Suri & Associates (P) Ltd. [(1998) 8 SCC 111], keeping in view the provisions of the Act as also the definition of "employee" as contained in Section 2(9) of the Act vis-`-vis the definition of "wages" as contained in Section 2(22) thereof, this Court stated the law in the following terms:

"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.1 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, uses 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 answer the description of employee contained in Section 2(9) of the Act."

Section 44 of the Act embraces within its fold the principles of natural justice. Sub-section (2) of Section 44 is explicit. A notice was required to be issued directly in terms of Sub-section (2) of Section 44. However, from a perusal of the notice dated 20th October, 2000, it is evident that Appellants were not directed to comply with the provisions of the Act but were asked as to why the criminal cases should not be instituted against them purported to be in terms of Section 85(g) of the Act.

Mr. V.J. Francis, learned counsel appearing on behalf of Respondent, has drawn our attention to the fact that letters have been issued on 8.9.2000 and 2.9.2000, as would appear from the aforementioned notice dated 20th October, 2000. However, from a perusal of the judgments rendered by the Employees' Insurance Court as also the High Court it does not appear that the records were produced to show that Appellants had been given an opportunity to comply with the provisions of the Act.

What would mean by the terms "the preceding 12 months" has been considered by this Court in the The Employees' State Insurance Corporation v. Balaji Weaving Mills and Others [(1997) 11 SCC 96] wherein this Court opined:

"Section 2(12) defines a "factory" to mean any premises whereupon 10 or more persons are employed or were employed for wages on any day "of the preceding 12 months". In the present case, the finding of the inspector was not that 10 or more persons were employed on the day on which he inspected it, but that on an earlier day, namely, 9- 4-1966, 20 persons had been employed. It was therefore that the words "on any day of the preceding 12 months" assumed importance. There is no provision in the Act to which our attention is drawn relating to the date upon the basis of which "the preceding 12 months" have to be calculated. It seems to us that the only possible answer to the question why this phrase was used is that it was intended to apply upon the date upon which the Act came into force. The Act when it came into force was intended to apply to those factories in which 10 or more persons were employed on that day or had been employed on any day in the preceding 12 months. By making such provision, the legislature meant to prevent escapement from the provisions of the Act. But this does not answer the question that is before us. The counsel has not been able to point out what the provision is in regard to the application of the statute to factories which are found, after the commencement of the Act, to have employed more than 10 workers on any day or days prior to the date of inspection or advance any submission in that behalf."

It may be true that Appellants would be bound to comply with the provisions of the Act, as noticed hereinbefore, for the period 1st August, 1999 to 31st July, 2000, but indisputably they were entitled to show that even for the said period, the provisions of the Act had no application.

The question came up for consideration before the Allahabad High Court in Employees' State Insurance Corporation v. M/s. U.P. Hotel and Restaurants Ltd. and another [1975 Lab. I.C. 1025], wherein a Division Bench of the High Court opined:

"It was contended by learned counsel for the appellant that since the Act sets up an Employees' Insurance Court for decision of certain disputes where the employer can get a hearing, it is not

necessary to give a hearing at the stage of the decision by the Corporation. We are unable to agree with this contention. Whether the function of the Corporation in deciding the question whether the Act applies or not to a particular employer is quasi-judicial or not, does not depend upon whether there is any further remedy open to the employer or not. Learned counsel for the appellant relied upon a decision of the Supreme Court in Chandra Bhawan Boarding and Lodging, Bangalore v. State of Mysore, AIR 1970 sc 2042. In our opinion, the case supports the view that we have taken other than the view which the learned counsel has contended for. It was held in this case that the dividing line between administration power and quasi-judicial power is quite thin and is being gradually obliterated, that the principles of natural justice would apply to the exercise of the administrative power as well. It would follow from this decision that the principles of natural justice would apply even if it were held that the Corporation was only exercising an administrative power in deciding whether the Act applied or not to a particular employer."

We generally agree with the observations made therein.

Our attention has, however, been drawn to a decision of the Karnataka High Court in Employees' State Insurance Corporation v. Karnataka Asbestos Cement Products [1991 (63) FLR 638]. In that case the High Court referred to its earlier decision in E.S.I. Corporation v. Subbaraya Adiga [1988 (57) FLR 612] wherein it was stated:

"A list of employees prepared by the E.S.I. Inspector in the course of his visit to an establishment, in order to find out whether the provisions of the E.S.I. Act are attracted to it, must contain the name, father's name, place from which the employee hails, the designation, the length of service, emoluments and the signature or thumb impression of the employee, as the case may be, if at that time other persons other than the employees are present, the names and addresses of at least two of them with their signatures and also the signatures of the proprietor or manager or the person-in-charge of the establishment should be obtained at the end of the list and a copy of which be furnished to the establishment."

On the basis thereof, in Karnataka Asbestos Cement Products (supra), it was directed:

"Learned counsel for the Corporation, Sri R. Gururajan, submitted that the Employees' Insurance Court erred in setting aside the demand of contribution for the period 1st January 1986 to 31st May, 1986, relying on the evidence relating to earlier period. That argument overlooks the fact that the entire proceedings initiated was on the basis of the report of the inspector in regard to the previous periods. If that report had to go, all that followed on account of the report should also go."

Indisputably, it is the statutory obligation of the employers to furnish the name, father's name, place from which the employee hails, the designation, the length of service, emoluments and the signature or thumb impression of the employee, as the case may be, but the same would not mean that while issuing a notice, the authorities of the Act are bound to disclose the same. They in fact without the names and other details of the employees furnished by the employer would not know thereabout. However, Section 45 of the Act empowers the Inspector to take down the details of such employees. Presumably, only in a case where discrepancy arises between the information furnished by the employer and the report that the Inspector may make pursuant to or in furtherance of these inspections and in such cases such details may have to be furnished.

It is, however, not necessary for us to delve deep into the matter as such a question does not arise in

this case.

We have noticed hereinbefore the findings of the learned Employees' Insurance Court. It has proceeded on the basis that the rice mill is a factory. We will also presume that it was not a seasonal factory. Even otherwise, when the provisions of the Act are extended by issuance of notification, re-course cannot be taken to sub-section (4) of Section 1 of the Act.

We, therefore, are of the opinion that having regard to the facts and circumstances of this case the interest of justice would be subserved if Appellants are given an opportunity of hearing. Keeping in view the fact that Appellants now know the allegations made against them, no fresh notice need be served. Appellants may file their returns and also all other books of accounts before the authorities under the Act within six weeks from date. The authorities shall give an opportunity of hearing to them and determine the question as to whether a jurisdictional fact existed for application of the provisions of the Act in cases of the respective employers. In the event, it is found, upon perusal of all the documents whereupon the employers may rely upon and on the basis of such information as may be sought for or directed to be furnished by the authority to the employer and upon hearing them that the provisions of the Act apply, the authorities may proceed as against them as is permissible in law.

The appeals are allowed to the aforementioned extent. The impugned judgment is set aside. No costs.