SUPREME COURT OF INDIA

Hotel New Nalanda

Vs.

Regional Director, E.S.I. Corporation

C.A.No.7050 of 2002

(Tarun Chatterjee and Aftab Alam JJ.)

15.07.2009

JUDGMENT

Aftab Alam, J.

1. In an inspection held on May 7, 1991, the officers of the Employees' State Insurance Corporation found that there were 15 persons working as employees in the appellant-establishment, called M/s. Hotel New Nalanda. They also found a refrigerator and an electric grinder in use there in the `manufacturing process'. On the basis of the inspection the officers of the Corporation took the view that the appellant-establishment was a factory within the meaning of section 2(12) of the *Employees' State Insurance Act, 1948* and it came within the purview of the Act. They, accordingly, asked the Managing Director of the establishment to comply with the provisions of the Act provisionally with effect from May 7, 1991, the date of the inspection.

2. The appellant did not accept the findings recorded in course of the inspection and filed an application under section 75 read with section 77 of the Act (E.I.C. 55/91) before the Employees' Insurance Court, Kozhikode, seeking a declaration that the establishment in question was not covered by the Act and that the applicant/appellant was not bound to observe the provisions of the Act. According to the applicant/appellant, the establishment called M/s. Hotel New Nalanda was a tourist home where rooms were let out to people on monthly or daily rent basis. The establishment never employed more than 8 persons. No manufacturing process was carried on there, much less with the aid of power. The establishment did not constitute a factory as defined under section 2(12) and it was not covered by the E.S.I. Act. The applicant/appellant also pleaded that at the time of inspection there were only 8 persons working as employees in the establishment; the other 7 persons whose names were mentioned in the inspection report were actually brokers/agents/errand boys who brought prospective clients to the tourist home from the railway station and bus stand etc. for small commission and used to hang around there for carrying out errands for the residents staying there on payment of tips by them.

4. The Regional Director, ESI Corporation, the opposite party in the application filed an objection relying upon the findings recorded in the inspection report. On behalf of the opposite party reliance was also placed on a written statement submitted by the applicant to the Insurance Inspector at the time of inspection stating the names with designation of the 15 persons working as employees in the establishment.

5. Before the Insurance Court, the applicant/appellant examined four witnesses; PW1 was the applicant-appellant himself and PWs 2 & 4 were persons who were shown in the inspection report as employees in the establishment but who came before the court to depose that they were not employees in the tourist home but were only brokers and errand boys. The applicant-appellant also produced a number of documents that were marked as exhibits P-1 to P-18. On behalf of the Regional Director ESI Corporation, the Insurance Inspector who had made the inspection of the establishment was examined as DW1 and three documents were produced that were marked as exhibits D1 to D3; exhibit D1 was the written statement submitted by the applicant-appellant and exhibit D2 the inspection report.

6. On hearing the parties and on a consideration of the materials on record, the Insurance Court found and held that as a matter of fact 14 persons were employed in the establishment; the fifteenth person named in the inspection report was the Managing Partner and he could not be counted among the employees in the establishment. The Insurance Court further held there was no satisfactory evidence that there was a refrigerator and a grinder being used in any manufacturing process being carried on in the establishment. On the basis of the second finding the Insurance Court came to hold that the establishment in question was not a factory within the meaning of section 2(12) of the ESI Act and it was not covered by the Act. It, accordingly, allowed the application filed by the appellant by its judgment and order dated April 2, 1998.

7. Against the aforesaid judgment the Regional Director ESI Corporation preferred an appeal (MFA No. 879 of 1998 B) before the High Court. In appeal, the High Court reversed the Insurance Court's finding in regard to use of power in manufacturing process in the establishment. The High Court observed that exhibit D-2, the inspection report, showed the presence of a grinder and a refrigerator in the establishment and found it sufficient to hold that there was use of power in the manufacturing process. The High Court, accordingly, allowed the appeal of the Regional Director by a brief judgment and order dated November 8, 2001.

8. The appellant then filed a Review Petition (RP No. 647 of 2001 in MFA No. 879 of 1998) on the plea that the High Court order was completely silent on the question of maintainability of the appeal, though on behalf of the Review Petitioner (appellant) it was specifically contended that the appeal was not maintainable. It was submitted that an appeal against the order of the Insurance Court was maintainable under section 82(2) of the Act only on a substantial question of law. It was further stated that the matter before the Insurance Court was concluded by a finding of fact and did not involve any question of law, much less any substantial question of law. The appeal filed by the Regional Director was, therefore, not maintainable and was liable to be dismissed on that score alone. The High Court, however,

overlooked the plea and allowed the appeal without considering the appellant's objections to its maintainability.

9. The High Court rejected the Review Petition by order dated April 12, 2002 observing that even if there was no substantial question of law involved, the Court was competent to entertain the appeal if the judgment of the Court below was perverse. It went on to hold that on the basis of the materials on record the finding of the Insurance Court that in the establishment in question there was no use of power in the manufacturing process, was quite perverse and hence, it was justified in entertaining the appeal and interfering with the finding.

10. The short question that arises for our consideration is whether, having regard to the materials on record, the finding recorded by the Insurance Court can be said to be perverse and fit to be interfered with in appeal under section 82(2) of the Act.

11.On the issue whether power was used in any manufacturing process in the establishment the Insurance Court considered the evidences led by the two sides in considerable detail and rejected the case of the Corporation giving a number of reasons. It pointed out that in the inspection report it was simply stated that a Kelvinator fridge (sic refrigerator) and a one litre grinder were used in the manufacturing process. But the report was completely silent in regard to the activities that were termed as `manufacturing process' and the purpose for which the two electrical appliances were used. The report left it completely for the court to presume that the cooking of food was the `manufacturing process' and the two appliances were used in that connection. The Insurance Court next observed that both PW1, the Managing Director and PW3, the person who was named in the inspection report as operating the grinder, in their deposition before the court denied the use and even presence of the two appliances in the establishment. But neither of them was even cross-examined on that issue. The court further observed that the Insurance Inspector had obtained a written statement from the appellant containing a list of all the fifteen persons who were working in the establishment as employees. In the same way he could obtain a statement about the use of the two appliances in the establishment for cooking food. But there was no such statement and the grinder and the refrigerator found a vague and cryptic mention only in the inspection report. In its order the Insurance Court stated as follows:

> "Next aspect to be considered is whether the applicant has used power in the manufacturing process being carried on there. It is the specific plea of the respondent that the applicant has used a grinder and a fridge in their establishment in order to carry out the manufacturing process. It is refuted by the applicant. The applicant as PW-1 testified before me that no grinder and fridge are used in their establishment. This aspect of his evidence is not controverted in his cross examination by the counsel for the respondent. It is not elicited as to what are all the manufacturing process being carried on in the applicant establishment and how they are got done. It is pertinent to note that there is no mention about the use of power in the manufacturing process in Ext.D-1 letter elicited from the applicant by the Insurance Inspector. It is common case that Govindan was an employee of the applicant establishment. He was

examined as PW-3 before me. He testified before me that there was no grinder or fridge used in the applicant establishment. There is no cross examination at all on the above aspect and therefore his testimony in this regard stands unchallenged.

The DW-1 Insurance Inspector has noted in his Ext.D-2 report that a grinder and a fridge are being used in the applicant establishment. It is pertinent to note that the Ext.D-2 report is silent with regard to what are the manufacturing processes being carried on in the applicant establishment and the purposes for which above equipments are used. A sweeping statement that there is a grinder of 10 litre capacity and a Kelvinator fridge is made in the D-2 report."

The High Court reversed the findings observing as follows:

"Ext.D-2 survey report shows that grinder and fridge there. In Ext.D- 2 it is stated that there was a grinder of 1- liter capacity and a Kelvinator fridge. Merely because the details of which is not stated is not a ground to discard the evidence of DW-1 and Ext.DW-2 report. At the time of examination, DW-1 stated that the grinder was being operated by one Damodaran Nair, a worker of the respondent's establishment. In the application itself it is submitted by the applicant that he is running a Tourist home and the rooms are let out on monthly as well as a daily basis. The name of the establishment is styled as "Hotel New Nalanda". DW-1 found grinder and fridge in the kitchen. Those who occupy a hotel do depend upon the food which are prepared in the hotel. It is not possible to conceive of a hotel without a kitchen. Lodging and boarding are both essential components of the service rendered by a Hotel. Hence, it cannot be denied no manufacturing process is being conducted in the establishment of the respondent.”

12. We are unable to appreciate the way the High Court considered the evidence and deemed fit to interfere with the finding of fact recorded by the Insurance Court. The High Court seems to have taken the inspection report exhibit D2 and the testimony of the Insurance Inspector DW1 as non-rebuttable, conclusive pieces of evidence. Further, for filling-up what remained unsaid in the inspection report and the testimony of DW1, it took recourse to presuming that the establishment must have kitchen where food would be cooked using the two appliances running with the aid of power. The High Court did not even advert to the reasons given by the Insurance Court for not accepting the Corporation's case on that issue. The Insurance Court had rightly pointed out that the inspection report did not state the process or the work that was called `the manufacturing process'. It did not even say that the refrigerator and the grinder were used in connection with cooking food in the establishment.

13. For holding an establishment to be a `factory' within the meaning of section 2(12) of the Act it must first be established that some work or process is carried on in any part of the establishment that amounts to `manufacturing process' as defined under section 2(k) of the Factories Act, 1948. In case the number of persons employed in the establishment is less than twenty but more than ten then it must further be established that the manufacturing process in the establishment is being carried on with the aid of power. Further, the use of power in the

manufacturing process should be direct and proximate. The expression `manufacturing process being carried on with the aid of power' in section 2(12) of the Act does not mean a very indirect application of power such as use of electric bulbs for providing light in the work-area. Unless the links are established, that is to say, it is shown that some process or work is carried on in the establishment which qualifies as `manufacturing process' within the meaning of section 2(k) of the Factories Act and the manufacturing process is carried on with the aid of power, the mere presence of a refrigerator and a grinder there, even though connected to the main power line may not necessary lead to the inference that the establishment is a factory as defined under section 2(12) of the Act.

14. On hearing counsel for the parties and on a careful consideration of materials on record we are satisfied that the Insurance Court had come to a reasonable finding of fact. Against this finding neither any appeal was maintainable under section 82(2) of the Act nor was the High Court justified in interfering with it. We, accordingly, find the judgment of the High Court unsustainable. It is set aside. In the result the appeal is allowed but with no order as to costs.