DELHI HIGH COURT

E. S. I. Corpn.

Vs.

P. S. M. Co. (Delhi)

F. A. O. Nos. 2-D to 4-D of 1961
(V. S. Deshpande, J.)

16.2.1970

JUDGEMENT

V. S. Deshpande, J.

1. This and the connected two appeals (3-D of 1961 and 4-D of 1961) are filed by the Employees' State Insurance Corporation against the decision of the Employees' Insurance Court dismissing the applications of the Corporation, one for the period from 12-11-1956 to 30-6-1958 and the other for the period from 1-7-1958 to 31-3-1959, for the recovery of contributions under the Employees' State Insurance Act, 1948, (hereinafter called the Act) from Sri Dharam Bir, proprietor Messrs. Peter Sewing Machine Company and accepting the counter application of Sri Dharam Bir that he was not liable to pay the contributions. The findings of fact given by the Employees' Insurance Court are that the Peter Sewing Machine Company was carrying on the business of making and assembling sewing machine parts by the use of power. It did not itself employ twenty or more persons. But it allowed at first two contractors, namely, Duaba Sewing Machine Company and Krishan Sewing Machine Company to work in its premises on its machines and with its power.

Subsequently, in place of these two contractors, it allowed Vijay Engineering Works and M.K. Repair Works to carry on their businesses in the factory premises on factory machines and with factory power. The employees of the Peter Sewing Machine Company coupled with the employees of these contractors numbered twenty or more persons. These contractors also manufactured sewing machine parts which were occasionally bought by the Peter Sewing Machine Company. But there was no definite contract between the Peter Sewing Machine Company on the one hand and these contractors on the other hand by which the former was bound to purchase the machine

parts manufactured by the latter. Nor was any raw material supplied by the Peter Sewing Machine Company to these contractors. Nor did the Peter Sewing Machine Company in any way manage the affairs of these contractors. On the other hand, these contractors were said to be the sub-tenants of the Peter Sewing Machine Company. The premises of the Peter Sewing Machine Company were not, therefore, a "factory" within the meaning of Section 2 (12) of the Act.

2. Under Section 82 of the Act, no appeal shall ordinarily lie from the order of an Employees' Insurance Court. The appeal lies to the High Court only if it involves a substantial question of law.

3. The question for decision, therefore, is whether on the facts found by the Employees' Insurance Court, the premises of the Peter Sewing Machine Company were covered by the definition of "factory" in Section 2 (12) of the Act and if so whether this is a substantial question of law.

4. The following provisions of the Act are useful in deciding the above question. Section 1 (4) says that the Act shall apply, in the first instance, to all factories, including factories belonging to the Government other than seasonal factories. The word "belonging" would show that the factory has to belong to somebody so that the owner or occupier of the factory must be a definite person or corporation and must be capable of being identified. Section 2 (12) defines "factory" to mean:-

(1) Any premises including the precincts thereof;
(2) Whereon twenty or more persons are employed;

And (3) in any part of which a manufacturing process is carried on with the aid of power.

The expression "manufacturing process" has the same meaning as is assigned to it by Section 2 (k) of the Factories Act, 1948, i. e., any process for making, altering, repairing etc., or adapting any article or substance with a view to its use, sale, transport, delivery or disposal.

5. Out of the three constituent elements of "factory" described above, the first and the third are satisfied in the present case inasmuch as a manufacturing process is carried on in the premises occupied by the Peter Sewing Machine Company. The question whether the premises are a "factory", therefore, depends on the second requirement being fulfilled, namely, whether twenty or more persons were employed in these premises during the relevant period.

6. The employment of twenty or more persons would require on the one side an employer and on the other side the requisite number of employees. If the requisite number of employees is directly employed by the owner or occupier of the factory, then this employer would be called the "principal employer" as defined in Section 2 (17) of the Act. It is not necessary, however, that the principal employer should directly employ twenty or more persons in the factory. Some or all of these employees may be employed either by or through what are called "immediate employers" defined in Section 2 (13) of the Act. The essentials of the definition of an "immediate employer" are that:-

(1) He has undertaken the execution of the whole or any part of any work;
(2) which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment;
(3) On the premises of the factory.

7. The third essential is satisfied in the present case as the contractors work in the premises of the factory. The first essential is also satisfied inasmuch as the contractors are doing work involving a manufacturing process in the factory premises. It is again the second essential which is in dispute. Can it be said that the whole or any part of the work of the contractors consists of any work which is ordinarily a part of the work of the factory or establishment of the principal employer? The Peter Sewing Machine Company makes and assembles sewing machine parts. The contractors also make sewing machine parts. The contractors, therefore, make goods which are either of the same type or similar to the goods manufactured by Peter Sewing Machine Company. But the finding of fact is that the contractors manufacture their goods independently and not as a part of the goods manufactured by the Peter Sewing Machine Company. It cannot be said, therefore, that the contractors have undertaken to execute "the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer" within the meaning of Section 2 (13) of the Act.

The next question is whether the work carried on by the contractors can be said to be "preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment"? The answer here again depends on the question of the meaning to be attached to the words "preliminary to" and "incidental to". In my view, both these expressions imply that there must be some connection between the work of the contractors and the work of Peter Sewing Machine Company. Such a connection could

be based on a contract by which the contractors have undertaken to do the work which is preliminary to or incidental to the work or the purpose of any such factory. But the finding of fact is that there is no contract by which the contractors would be obliged to sell any of their products to the Peter Sewing Machine Company. The contractors may sell all their products to persons other than the Peter Sewing Machine Company. It, cannot, therefore, be said that the work of the contractors is either incidental to or is preliminary to the work or the purpose of the factory.

8. The same nexus or connection between the contractors and the Peter Sewing Machine Company is necessary before the employees engaged by the Peter Sewing Machine Company and those engaged by the contractors can be covered in a common category of "employees" as defined in Section 2 (9) of the Act. Such an employee is a person employed for wages -

> (1) In connection with the work of a factory or establishment to which the Act applies; and
> (2) 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
> (3) Who is employed by or through an immediate employer 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.

9. The use of the article "a" before the word "factory" again implies that there is a definite factory which employs the employees. Further, these employees must be employed for the work of or incidental or preliminary to the work of the factory. Lastly, they have to be employed by or through the immediate employers for doing the work of the factory or work preliminary to or incidental thereto. The two sets of employees namely those employed by the Peter Sewing Machine Company and those employed by the contractors are not employed by one factory. Nor are they employed to do the work of one factory. Nor are the contractors' employees employed to do the work of the factory in question.

10. On a survey of the above provisions of the Act it seems to me that a "factory" under the Act is a certain definite economic unit which must possess the following unities or identities namely:-

> Firstly, a geographical or physical unity of being confined to its premises including the precincts thereof. In the present case, the "factory" in question possesses only this unity. But the concept of a "factory" is not confined merely

to a geographical or physical entity. It cannot be said that any premises would be regarded as a factory if twenty or more persons are employed therein on a manufacturing process. For, if these employees are not working either under a "principal employer" or under "immediate employers" then they would be working under independent employers. The employees of the independent employers cannot be totalled to make up the requisite number of employees to constitute a "factory". Therefore, the unity or the identity of the factory has to be secured by the presence of three more cementing factors which contribute to the concept of a "factory". Therefore, a "factory" requires secondly the unity of ownership or occupation of the factory. In the present case, part of the factory is occupied by the Peter Sewing Machine Company while the rest of it is occupied by the contractors who have no definite contractual relationship with the Peter Sewing Machine Company as to what they should produce and whether they should sell their products to the Peter Sewing Machine Company. This unity is, therefore, lacking in the present case. Thirdly, the unity of employment is essential in the sense that the employees must be engaged either by the principal employer or by him through the immediate employers. The contractors in the present case are independent employers and not immediate employers for the reasons stated above. There is, therefore, no unity of employment between the Peter Sewing Machine Company and the contractors and the former is not the principal employer and the latter are not the immediate employers within the meaning of Sections 2 (17) and 2 (13) of the Act respectively. Lastly, it is necessary that there should be a unity in the work carried on in the factory premises by the Peter Sewing Machine Company and its contractors. But there is no co-ordination and no contractual relationship between them and this unity also, therefore, is found to be lacking.

11. The upshot of the above discussion is that the Peter Sewing Machine Company and the contractors are carrying on their respective businesses independently of each other. The employees employed by all of them cannot, therefore, be clubbed together to find out if the total of the employees is twenty or more persons. It is necessary that the contractors should be proved to be the "immediate employers" before the Peter Sewing Machine Company can be held to be the "principal employer".

12. The Scheme of the Act is that the liability for payment of contributions is under Section 40 of the Act on the "principal employer". Under Section 41 of the Act, the principal employer has to recover the contributions in respect of an employee of the immediate employer from the immediate employer. It would, therefore, be contrary to

the Scheme of the Act to ask the Peter Sewing Machine Company to pay the arrears of the employees' contributions in respect of the employees engaged by the Peter Sewing Machine Company as well as the contractors inasmuch as the Peter Sewing Machine Company is not the principal employer and the contractors are not the immediate employers. The former has, therefore, no authority and no *locus stand* to recover the contributions from the contractors. The result of asking the Peter Sewing Machine Company to pay the contributions would be that it will have to pay not only the contributions in respect of its own employees but also in respect of the employees of the contractors without the right to be reimbursed from the contractors under Section 41. This was not the intention of the legislature and cannot, therefore, be countenanced.

13. The legal position on the admitted facts, therefore, is that no contributions in respect of the relevant periods were payable by the Peter Sewing Machine Company. The question whether the contributions were so payable or not was a substantial question of law inasmuch as a large number of cases having similar facts and circumstances would arise for decision for which the present case may provide a precedent. The question is, however, decided against the appellant and the appeals are dismissed but without any order as to costs.

Appeals dismissed.