RAJASTHAN HIGH COURT

The Regional Director E.S.I. Corporation Jaipur

Vs.

P.C. Kasliwal

S.B. Civil Misc. Appeal Nos. 27And 28 of 1972
(M.B. Sharma, J.)

02.01.1981

JUDGMENT

M.B. Sharma, J.

1. The above numbered two Civil Miscellaneous Appeals have been filed by the Regional Director, ESI Corporation, Jaipur under Section 82 of the Employees State Insurance Act, 1948 (here in after referred to as the Act) against the two judgments of the Employees State Insurance Court, Jaipur (in short court), but as the point of law involved in both the appeals is common, they are being disposed of by a single judgment.

2. M/s. Vijay Metal Industries, Jaipur is a partnership firm. One P.C. Kasliwal is an active partner of the partnership firm and draws a monthly allowance of ₹ 400/-. The ESI Corporation, Jaipur taking Shri P.C. Kasliwal is an employee within the meaning of Sub-section (9) of Section 2 of the Act required the firm M/s. Vijay Metal Industries to pay employees contribution amounting to ₹ 211.25 P. and employer's special contribution amounting to ₹ 472/- for the period from January 28, 1968 to January 30, 1971, and when the firm did not make the said payment, the Regional Director, ESI, Corporation (in short the Director) obtained a certificate from the Collector, Jaipur under the Public Demands Recovery Act. An application under Section 75 of the Act was filed by Sri P.C. Kasliwal before the court, and the main contention raised therein was that he was only a partner of the firm and was not an employee within the meaning of Sub-section (9) of Section 2 of the Act. The ESI, Corporation (hereinafter referred to as the Corporation) contested the application, and

a preliminary issue was struck as under:

> Whether an employer/partner can be an employee of his own firm?
> The Court holding that a partner, though he draws an allowance, is not an employee within the meaning of Sub-section (9) of Section 2 of the Act, allowed the application and declared that P.C. Kasliwal is not an employee of the firm, Vijay Metal Industries, and consequently the certificate issued by the Collector for the recovery of the aforesaid amounts was set aside.

4, 800/- per annum as partnership allowance besides the profit. M/s. Jaipur Printers is mainly engaged in printing business since 1948, and besides the two above named partners one Sohanlal Jain is also a partner. It is covered under the Act and is paying regular contributions, both employees and employer's contribution, to the Corporation. A certificate for recovery of ₹ 455/- as employees contribution from 28-1-1968 to 28-7-1970 and ₹ 34/- as interest upto 15-12-71 at the rate of ₹ 61- per cent per annum was issued. Another certificate amounting to ₹ 788/- including interest was issued on 18-12-70 for employer's special contribution. The Collector, Jaipur issued demand notice under the PDR, Act for the recovery of the aforesaid amounts. An application under Section 75 of the Act was filed by one Sohan Lal Jain partner of Ms. Jaipur Printers, Jaipur on the ground that the Corporation has wrongly covered the partners of the firm considering them as employees under Section 2(9) of the Act. When as a matter of fact they were the partners and were getting allowance in that capacity, and were not employees within the meaning of Section 2(9) of the Act. Two partners were also not engaged in the manufacturing process of the factory. It was prayed in the application that the demand notice be quashed. The application was contested by the Corporation, and the learned Court framed a preliminary issue to the following effect:

> Whether Sarva Shri Gendilal and Chhitarmal who are partners of the firm M/s. Jaipur Printers are employees of the firm, because they drawn an allowance?

The Court declared that they are not the employees of the firm M/s. Jaipur Printers, and quashed the certificates issued by the Collector under the PDR, Act for the recovery of ₹ 1275/- on account of employees and employers special contribution on account of the two above named partners of the firm.

4. Having set out the facts of the two cases, it may be stated that the point which arises for determination in these appeals is, as to whether a partner of a partnership concern, who draws monthly allowance for being actively engaged in the work of a factory is an employee within the meaning of Section 2(9) of the Act, and as such the principal employer has to pay the employees contribution as well as the employer's special contribution for the purpose ?

5. The contention of the learned Advocate for the appellants is that the employed some cases can also be an employee within the meaning of the meaning of Section 2(9) of the Act. He submits tat any person employed for wages in connection with the work of a factory or establishment to which the Act applies is an employee within the meaning of Section 2(9) of the Article Therefore, even if a partner is engaged in connection with the work of the factory for wages, employees contribution as well as employer's special contribution relation to that partner has to be paid by the firm. The learned Advocate for the respondents, on the other hand, contends that preamble of the Act will Show that it has been framed to provide certain benefits to the employees in case of sickness, maternity and employment injury, and to make provisions for certain other matters in relating there to. According to him, a partner is a principal employer within the meaning of Section 2(17) of the Act, and, therefore a partner cannot be an employee within the meaning of Section 2(9) of the Act It is also contended that P.C. Kasliwal is the principal employer and he was called upon to pay employees contribution, as well as employer's special contribution & therefore, he cannot be an employee. According to him if the contributions are not paid, the principal employer is liable to prosecution, and, therefore, a principal employer when he is partner of a firm cannot be an employee within the meaning of Section 2(9) or the Act. It is further contended by him that for the purpose of coverage under the Act, it may be taken that if 20 or more persons including a partner are employed, the premises may be a factory within the meaning of Section 2(12) of the Act. According to him the use of the word 'person' in Section 2(12) of the Act is not without significance and the Legislature has not used the word `employee'. In support of his contention the learned Advocate has referred to an unreported decision of this court in *Bharat Industries, Jodhpurvs v. The Regional Director, Employees' State Insurance Corporation, Jaipur and Anr.* [1] under Section 81 of the Employees State Insurance Act, 1948, decided on August 29, 1969. It was a case where the question arose as to whether the partners of the firm, who supervise the work in a factory or do other jobs, come within the purview of persons working or were working' in the definition of 'factory' given in Section 2(12) of the Art

Placing reliance on a few reported decisions, the view taken wherein that the sole test which must be applied for determining whether an establishment is a factory or not is, whether twenty or more "persons are working in the factory, and whether a manufacturing process is being carried on with the aid of power in any part of the establishment, and if these two tests are satisfied, the establishment must answer the description of a factory under the Act and it is immaterial that some of the persons who work in the factory are either proprietors of the establishment or are partners in the firm witch owns the establishment, was approved. It is contended by Mr. Kala, the learned Advocate for the respondents, that in that case heir lordships were considering Section 2(12) of the Act as to whether for the purpose of coverage under the Act an establishment having 20 or more persons including partners, who were actively engaged in the business of the factory, is a factory. They were not called upon to consider as to whether for the purpose of contribution also such a partner was an employee within the meaning of Section 2(9) of the Act. It is further contended by him that in the aforesaid case their Lordships were considering the definition of "factory" as given in Section 2(12) of the Act, as it stood prior to the amendment, which, was brought into force with effect from 28-1-68, by which for the words "are working or were working" the words "are employed or were employed for wages" were substituted. Because there is no dispute in both the cases that the establishments are factories within the meaning of Section 2(12) of the Act and are covered under the ESI Act, it is not necessary for the present to deal as to whether the decision of this Court in Bharat Industries Jodhpur (supra) in view of change in the definition of Section 2(12) of the Act needs any reconsideration. In support of his contention that a partner, even though he draws some allowance or emoluments and is actively engaged in the work of the factory (as in the case of P.C. Kasliwal), he cannot be an employee within the meaning of Section 2(9) of the Act, for the purpose of contribution, Mr. Kala has placed reliance on *Ellis v. Joseph Elis and Co.* [2] It was a case under the Workmen's Compensation Act, 1897. A member of a partnership firm for the purpose of working a mine by arrangement with his copartners worked in the mine as a Foreman and received weekly wages out of the profits of the business. While working in the mine, he met with an accident which caused his death, and his widow thereupon claimed compensation under the workmen's Compensation Act, 1897 from the surviving partners. It was held that a case contemplated by the Workmen's Compensation Act was that of a Workman employed by some other person or persons. The deceased having been himself one of the partners in the firm for which he was working, he could not be said to have been an employee of them; and, therefore, the case was not

within the Act and the widow was not entitled to compensation. It was observed, "It seems to me, that when one comes to analyze an arrangement of this kind, namely, one by which a partner himself works, and receives sums which are called wages, it really does not create the relation of employers and employees, but in truth is mode of adjusting the amount that must be taken to have been contributed to the partnership's assets by a partner, who has made what is really a contribution in kind, it does not affect his relations to the other partners, who is that of co-adventurer and not an employee. Such a partner cannot be himself in a position of not being a partner when he is one, or of being a workman employed when that position would involve that he would be both employer and employee." This ruling was followed in *Sehgal Industrial Works, Delhi v. ESI, Corporation, New Delhi* [3] It was a case where the question arose as to whether a particular establishment was a 'factory' within the meaning of Section 2(12) of the Act, as it stood after the amendment of 1968. I have already said above that whether the view of this Court in Bharat Industries, Jodhpur, case (supra) needs reconsideration in view of the definition of 'factory' in Section 2(12) of the Act is not for consideration for the present, because in both the cases in hand, it is not disputed that the establishment was a 'factory' within the meaning of Section 2(12) of the Act.

6. In Fills case (supra), the provisions of the Workmen's Compensation Act, 1897 were under consideration, and a view was taken that the, same person cannot be both employer and employee. In *ESI Corporation, Jaipur v. Good luck Engineering Company, Ajmer and Ors.*[4] placing reliance on Bharat Industries case (supra) and other cases it was held that a partner employed for wages was to be included in the figure twenty to make an establishment a 'factory' within the meaning of Section 2(12) of the Act for the coverage under the Act.

7. A look at the definition of 'principal employer' in Section 2(17) of the Act is necessary. It reads as follows:

> 2 (17) "Principal Employer" means'
> (i) In a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named, as the manager of the factory under the factories Act, 1948 (63 of 1948), the person so named;
> (ii) In any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf

or where no authority is so appointed the Head of the Department.
(iii) In any other establishment, any person responsible for the supervision and control of the establishment.

Even a person named as the Manager of the factory under the Factories Act, 1948 is included in the definition of the "principal employer". But, still such a person is employee within the meaning of Section 2(9) of the Act, if his employment is within the prescribed limit of wages which has been raised from time to time, and now includes an employee drawing a salary of ₹ 1, 000/-. So, the same person can be 'principal employer' within the meaning of Section 2(17) of the Act as well as an employee within the meaning of Section 2(9) of the Act. The two positions cannot be said to be contrary to each other. If he fails to pay the contribution payable under the Act, then he is liable to be prosecuted as a "principal employer", but if he meets some accident or is sick during the course of employment, he is entitled to some benefits under the Act for which employees contribution as well as employer's contribution is payable. According to Mr. Kala, a look at the definition of "wages", as given in Section 2(20) of the Act will show that there must be contract of employment express or implied, which if fulfilled, remuneration would be payable, he, therefore, submits that there are to be two parties for the contract of employment, i.e. "employer" and 'employee', and the partner cannot employ himself, and, therefore, any remuneration paid in the case of P.C. Kasliwal being ₹ 375/-, according to Mr. Kala will not fall within the definition of 'wages', as given in Section 2(21) of the Act. I have already referred to the definition of "principal employer" as contained in Section 2(17) of the Act, and it has been said that in some cases the 'principal employer' can also be the employee. It can, therefore, be said that the same person can be 'employer" as well as 'employee' for the purpose of the Act and the two capacities cannot be said to be contrary to each other. In *Non-Ferrous Rolling Mills (P) Ltd. v. The Regional Director ESI Corporation, Madras* [5] It was held that the 'Principal employer' can also be an employee, and under the Act it cannot be said that a "Principal employer" cannot also be an employee. It was held as follows:

> I must accept the position taken by the Corporation as correct, both on the authorities above cited and on the terms of the definition of 'employee' occurring in Section 2(9) of the Employees State Insurance Act. The fact that he is a principal employer within the meaning of Section 2(17) for certain purposes

> under this Act does not altogether exclude his being also an employee under the Act. In my opinion the definition of an 'employee' under Section 2(9) is sufficiently clear and is also apt to apply to this person. The section in terms, refers to 'any person employed for wages on any work connected with the administration of the factory' It cannot be denied that as manager of the factory, Vimal Chand Galada is employed in a work connected with the administration of this factory nor could it be controverted that he was paid remuneration, in consideration of such work. This remuneration, in my view, also fits in with the definition of 'wages' under Section 2(22) of the Act which refers to "all remuneration to an employee if the terms of the contract of employment express or implied were fulfilled.

8. In the aforesaid case, reliance was placed on *Bolting and Anr. v. Association of Cinematograph Television and Allied Technicians* [6] In that case, the facts were that the two plaintiff's brothers, were Managing Directors of a Film Production Company called Charter Film Production Ltd. Each was bound by his agreement with the company to give the whole of his time and attention to the business of the company and at all times to diligently serve the company. They represented their company on the Federation of British Film Makers, which was a trade union of employers. There was another registered trade union, the Association of Cinematograph Television and Allied Technicians, which consisted of all employees engaged on the technical side of film production. Both the plaintiffs applied to be elected a member of the aforesaid employees Union, and their applications were accepted. They attended meetings of the committees and one of them namely, Roy Bolting actually served on the Executive Council for one year. But, after the second world war, both the plaintiffs found themselves in difficulty in being members of the trade union of the employees and also directors of the Company. The dispute arose as to whether while being Directors of the Company they could be members of the union of employees. Lord Denning M.R. in a majority judgment held that they could not be compelled to be the members of the union of the employees, but it was observed by Lord Denning that if the plaintiffs were partners, they would contract with one another to give their services for the stated remuneration. The majority view was that the contract of membership of the employees union was not void. They could be Directors of the company as well as members of the employees trade union.

9. I am, therefore, of the opinion that a person can also be an employer as well as

employee under the provisions and the scheme of the Act and the two capacities do no conflict with each other. It is by virtue of contract of employment in between the other partners and one of the partners who is engaged in connection with the work of a factory that he draws monthly remuneration. Remuneration so paid to a partner is 'wages' within the meaning of Section 2(22) of the Act. Therefore, a partner who draws monthly allowance within the prescribed limits under the Act and is engaged in the work of the factory on an establishment is an "employee" within the meaning of Section 2(9) of the Act. A partner so employed by the other partners is only entitled to the remuneration if the terms of his employment are complied with. The remuneration so paid to the partner, to my mind, fits in with the definition of 'wages as. under Sub-Section (22) of Section 2 of the Act, which refers to all remunerations of an employee if the terms of the contract of employment express or implied were fulfilled. Mr. Corp. Mr. Kala has placed reliance on *ESI Corporation, Trichur v. The Ayurvedic Industrial Cooperative Pharmacy, Puthur,*[7] *Braithwaite & Co. (India) Ltd. v. Employees' State Insurance Corporation* [8] and *A.P. State Electricity Board v. ESIC Hyderabad* [9] In ESI Corporation, Trichur's case (supra), which was a case of casual labour, dealing with the question of coverage it was held that there may be engagements which may not amount to service and so long as it is not service by one under another, there is no question of relationship with coverage under the Act. I have already said above that a partner can be employed by other partners, and if he draws emoluments within the prescribed limits for the work of the factory; then he is an employee within the meaning of Section 2(9) of the Act. The same person can be a 'principal employer' as well as an 'employee' for the purpose of the Act. Braithwaite & Co's case (supra) was a case of payment under the scheme does not become a term of the contract for employment of the employees. The case of A.P. State Electricity Board (supra) was also a case of coverage of an establishment under Section 2(12) of the Act. It was held, "The expression 'wages' under Section 2(9) must be understood in a wider sense as meaning any remuneration paid to any person who is EMPLOYED IN A FACTORY AND CANNOT BE Restricted only to the remuneration paid to the employees who come within the definition of Section 2(9) of the Act."

10. It was thus held that the person employed for wages" "occurring in Section 2(12) of the Act has not the same meaning as 'employee' in Section 2(9) of the Act. This ruling has no bearing on the instant case.

11. Mr. Kala has also placed reliance on *Ambassador and Ors. v. The Employees"*

State Insurance Corporation, Bangalore [10] wherein placing reliance on *Bank Silver Co., Bombay v. The Employees' State Insurance Corporation, Bombay* [11] it was held that the proprietors or partners of a factory who actually work therein cannot be regarded as employees for the purpose of ascertaining benefits provided under the Act. It is not clear from that authority as to whether the proprietor or partners in that case were drawing any emoluments or not. In M/s. Bank Silver Co. Bombay (supra), which has been relied upon in Karnataka ease while dealing as to whether a partner working in a factory has to be included in the figure twenty to make an establishment as a factory under Section 2(12) of the Act, some observations have no doubt been made, which support the contention of Mr. Kala, but after having gone through the various provisions of the Act, more particularly the definition of 'employee' in Section 2(9) of the Act, 'principal employer' in Section 2(17) of the Act, and 'wages' in Section 2(17) of the Act, and looking to the objects of the Act, I am of the opinion that a partner who draws emoluments and actively works in the factory is an 'employee' within the meaning of Section 2(9) of the Act, and he can have different capacities as 'principal employer' and 'employee' and both capacities are not contradictory to each other. Employees' contribution as well as 'employer', special contribution' is payable in respect of such partner. In P.C. Kasliwal's case, it is not disputed that he was actively working in the factory and was drawing an allowance of ₹ 375/- p.m. As such, for the purpose of 'employees' 'contribution as well as employees 'special contribution', he is an employee within the meaning of Section 2(9) of the Act. But so far as the other case is concerned, namely, Sohanlal's case, the tribunal has held that the two partners, namely, Gendilal and Chhitarmal are merely sleeping partners of the firm. They do not do any work whatsoever and simply draw allowance because they are partners. Therefore, in respect of them, no employer's special contribution is payable.

12. In the result, *(ESI Corporation, Jaipur v. P.C. Kasliwal)*[12] is allowed. The order of the ESI Court is set aside, and the
application of Mr. P.C. Kasliwal under Section 75 of the Act is dismissed.

13. *(ESI Corporation, Jaipur v. Sohanlal's Jain and Anr.)*[13] is dismissed.

14. Both the parties shall bear their respective costs of both the appeals.

Appeal Allowed.

Cases Referred.

1. (D.B. Civil Reference) No 3/67
2. (1965) (1) KB 324
3. 1975 (30) FIR 217
4. S.B. Civil Misc. Appeal No. 188/71 decided by me on December 21, 1979
5. 1977 Lab IC 1706
6. 1963 (1) All ER 716
7. 1980 Lab IC 557
8. 1968 (I) LLJ 550
9. 1978 (I) LLJ 44
10. 1975 Lab IC 627
11. AIR 1965 Bom 111
12. S.B. Civil Misc. Appeal No.27/72
13. S.B. Civil Misc. Appeal No. 28/72