Employees State Insurance Corporation vs Hotel Kalpaka International on 15 January, 1993

Equivalent citations: 1993 AIR 1530, 1993 SCR (1) 219, AIR 1993 SUPREME COURT 1530, 1993 (2) SCC 9, 1993 AIR SCW 544, 1993 LAB. I. C. 416, (1993) 1 JT 139 (SC), 1993 ( ) LAB LR 177, 1993 BRLJ 166, 1993 BB CJ 73, (1993) 1 SCR 219 (SC), 1993 (1) SCR 219, (1993) 1 COMLJ 234, 1993 (1) JT 139, 1993 SCC (L&S) 305, (1993) 1 KER LT 281, (1993) 1 LABLJ 939, (1993) 1 LAB LN 230, (1993) 1 CURLR 332, (1993) 1 MAD LW 608, (1993) 1 SERVLR 560, (1993) 82 FJR 204, (1993) 66 FACLR 375, (1993) 2 SCT 83, (1993) 49 DLT 525

Author: S. Mohan

Bench: S. Mohan, P.B. Sawant

PETITIONER:
EMPLOYEES STATE INSURANCE CORPORATION

Vs.

RESPONDENT:
HOTEL KALPAKA INTERNATIONAL

DATE OF JUDGMENT15/01/1993

BENCH:
MOHAN, S. (J)
BENCH:
MOHAN, S. (J)
SAWANT, P.B.

CITATION:
1993 AIR 1530 1993 SCR (1) 219
1993 SCC (2) 9 JT 1993 (1) 139
1993 SCALE (1)130

ACT:
Employees State Insurance Act, 1948:
Sections 1(4), 26, 28, 38, 40 and 45-A-Contribution under the Act-Liability of Employer-Closure of establishment-Liability prior to closure-Commencement of recovery proceedings after closure-Validity of.

HEADNOTE:

The Respondent-Hotel which was also running a Bar for sometime, closed down its business after several years. Th Inspectors of the appellant-Corporation verified the records of the establishment and reported that at certain point of time the employment strength of the establishment including the bar was more than 19. Therefore, the establishment was treated as covered provisionally under the Employees State Insurance (ESI) Act, 1948. Since the final date of coverage could be decided only after verifying all the records, the Respondent was asked to produce them. The Respondent did not avail the opportunity afforded to it Though the Respondent sent Its explanation, It was not acceptable to the appellant Corporation and so it passed a detailed order under S.45-A calling upon the Respondent to pay the contribution with interest at 6% failing which It would be recovered as arrears of land revenue. Since this order and the reminder thereto, did not evoke any response from the Respondent, the appellant sent a claim in Form-19 to the District Collector requesting him to recover the said amount

The Respondent challenged the proceedings by filling an application under S.75 of the Act before the ESI Court, which upheld the assessment made by the appellant-Corporation, but stated that recovery steps were not justified after the closure of the establishment, and only prosecution as contemplated u/s. 85of the Act was attracted.

The appellant-Corporation preferred an appeal against the said decision of ESI Court The High Court dismissed the appeal and held that since the scheme was made after the closure of the establishment, the 219
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appellant was not justified in proceeding against the Respondent

Being aggrieved by the judgment of the High Court, the appellant Corporation preferred the present appeal contending that so long as the establishment was covered by the provisions of the Act, the Respondent could not circumvent its liability by claiming that before actual recovery proceedings, it had closed down the establishment.

Allowing the appeal, this Court,

HELD: 1.1. Admittedly the hotel industry like that of the respondent has been notified by the Government thus extending the provisions of the Employees State Insurance Act to hotel industry. Therefore, on the date of commencement of its business, namely, 11.7.85, there was a liability on the Respondent to contribute to the ESI fund. Under section 40 the primary liability is on the employer to pay, not only his contribution but also the employees contribution. As such the employer can not plead that since he had not deducted the employees' contribution from their wages, he could not be made liable for the same. After all when he makes employees' contribution he is entitled to deduct from the wages. Thus by force of the application of

the statutory provisions, the liability to contribute during the relevant period, namely, 11.7.85 to 31.3.88, arose. [226E-G]

1.2. The Insurance Court as well as the High Court have correctly upheld the demand for contribution. But it is rather strange to conclude that the demand could not be enforced against a closed business. If this finding were to be accepted it would not promote the scheme and avoid the mischief. On the contrary, it would perpetrate the mischief. Any employer can easily avoid his statutory liability and deny the beneficial piece of social security legislation to the employees, by closing down the business before recovery. That certainly is not the indentment of the Act. It is equally fallacious to conclude that because the employees had gone away there is no liability to contribute. It has to be carefully remembered that the liability to contribute arose from the date of commencement of the establishment and is a continuing liability till the closure. The very object of establishing a common fund under section 26 for the benefit of all the employees will again be thwarted if such a construction is put. [227D-F]

R.M. Lakshmanamurthy v. The Employees' State Insurance Corporation, Bangalore, [1974] 4 SCC 365, relied on.

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2. The proceeding for the recovery is in respect of the dues of contribution which arose prior to the closure on 31.3.88. Therefore, it matters little when notice was issued calling upon the establishment to pay the contribution. Such a notice is only a reminder to the employer to discharge his statutory obligation. The appellant-corporation is thus entitled to proceed with the recovery proceedings in accordance with law. [227H, 228A]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1854 of 1992. From the Judgment and Order dated 18.12.1990 of the Kerala High Court in M.F.A. No. 800 of 1990. M.L. Verma, V.J. Francis, V. Subramanian and Padmakumar for the Appellant.

P.S. Poti and R. Sasiprabhu for the Respondent. The Judgment of the Court was delivered by MOHAN, J. This appeal by special leave is directed against i.e. judgment of the High Court of Kerala in M.F.A. No. 800/90 dated 18.12.90. The short facts leading to this appeal are as under:

> The respondent-Hotel is situated in Kaloor, Cochin 17. It is a commercial establishment. In July, 1985 this establishment obtained a Bar licence whereupon a Bar was started. After running the business for some time it was closed down with effect from 31.3.88. The Insurance Inspectors of the appellant verified the records of the respondent-establishment on 29.9.87, 9.10.87 and 19.10 87. It was reported that

> the employment strength of the respondent-establishment including Chembaka Restaurant and Mayuri Bar was more than 19 as on 17.7.85. Therefore, it was treated as covered under the Employees' State Insurance Act, 1948 (hereinafter referred to as the Act) with effect from 11.7.85 provisionally. The fact of coverage was intimated to the respondent by notice dated 21.3.88. Since the final date of coverage could be decided only after verifying all the records pertaining to the date of functioning of the establishment, the respondent was requested to produce all the records such as attendance register, wage register, ledgers etc. from the date of starting of the establishment. The respondent was also called upon to start compliance under the Act with effect from 11.7.85. But there was no compliance. Hence, a notice was issued in Form C-18 dated 26.3.88 along with a draft order for contribution amount of Rs. 49,399.75 which was assessed under section 45-

A of the Act for the period 11.7.85 to 313.88. Though the respondent was afforded an opportunity to appear before the officer, it was not availed of However, a letter dated 13.7.88 was received but the explanations were not acceptable to the appellant. Subsequently, a detailed order dated 3.8.88 under section 45-A of the Act was passed calling upon the respondent to pay a contribution of Rs. 49,399.75 together with interest at 6 per cent, failing which it would be covered as an arrears of land revenue. Again, reminder was sent on 22.9.88. No reply was received. Hence, in order to recover the contribution under section 45-A of the Act, a claim in Form-19 was sent to the District Collector, Ernakulam on 31.10.88 requesting to recover the contribution for the period from 11.7.85 to 31.3.88. Challenging these proceedings the respondent filed an application under section 75 of the Act before the Employees' Insurance Court, Alleppey. Inter alia it was contended that the applicant (respondent in this appeal) at no time employed 20 or more persons during the relevant time. The order was illegal because under section 45-A of the Act the respondent was entitled to a reasonable opportunity of being heard. That was not afforded.

These contentions were refuted by the appellant. It was incorrect to state that on no occasion the respondent employed 20 or more workmen since the inspection report dated 8.12.86 clearly established to the contrary. The contention that no opportunity had been afforded before initiating the revenue recovery proceedings, was also denied in view of Form C-18 dated 23.6.88, show cause notice dated 3.8.88 and reminder dated 22.9.88.

By its order dated 6th June, 1990 the Employees' Insurance Court, Alleppey came to the following conclusion:

> "In the result, I can only uphold the assessment made by the ESI Corporation. But when the question of recovery is considered, certain other aspects cannot be ignored. The adhoc assessment itself was made by the opposite party after the closure of the entire establishment. All the employees working in the establishment had left by that time after accepting the termination of their services. In respect of those employees who had already left, the ESI Corporation is now trying to recover contribution. Now the position emerges is that despite the collection of contribution it will be impossible to bring under coverage those employees, because, they are not at all available for

coverage and for enjoying the benefits under the scheme. Therefore, even if the proceedings initiated earlier were sus- tainable, so long as the employees are not available for the purpose of coverage, there is no meaning in collecting contribution alone. In these circumstances, I can only hold that the applicant had failed to comply with provisions of the ESI Act at the appropriate time. Therefore, according to me, after the closing of the establishment such recovery steps are not justified but only the prosecution as contemplated under sec. 85 of the ESI Act is attracted. Therefore, it is upto the ESI Corporation to decide whether any prosecution should be launched against the applicant for the contravention or noncompliance of the requirements of the ESI Act and Rules.' Aggrieved by the same the appellant-Corporation preferred an appeal in M.F.A. No. 800 of 1990. A Division Bench of the Kerala High Court by its order dated 18th December, 1990 posed the question for determination as to whether the appellant could proceed against respondent for realisation of contribution under the ESI scheme, after the closure of establishment.

The High Court upheld the finding of Insurance Court that the respondent had failed to comply with the provisions of the Act at the appropriate time. However, it proceeded to hold that the respondent-establishment was closed on 31.3.88. Ext. P3 notice calling upon the respondent to pay the contribution was only on 23.6.88. Since the scheme was made after the closure of the establishment, the appellant was not justified in proceeding against the respondent. In this view, it dismissed the appeal. It is under these circumstances, the ESI Corporation has come up by way of special leave to appeal.

Mr; M.L. Verma, learned senior counsel for the appellant urges the following:

1. The closure of the respondent-establishment was on 31.3.88 but the liability with reference to contribution arose earlier. The demand is for the period 11.7.85 to 31.3.88. So long as the establishment is covered by the provisions of the Act it is not open to the respondent to circumvent its liability by contending that before actual recovery proceedings it had closed down. If the finding of the High Court is accepted it would be the easiest way to evade the provisions of the Act.

In R.M. Lakshmanamurthy v. The Employees' State Insurance Corporation, Bangalore, [1974] 4 SCC 365. This Court has held that it is a beneficial piece of social security legislation in the interest of labour. Further, the provisions of the Act will have to be construed with that end in view in order to promote the scheme and avoid the mischief.

Under section 26 of the Act all contributions are paid into a common fund. Such a fund will have to be administered for the purposes of the Act as indicated under section 28. Therefore, the employer cannot contend that he did not collect the employees' contribution and hence, he cannot be called upon to pay. Thus the impugned judgment is wrong and is liable to be set aside.

Per contra, Mr. P. Surbramanian Poti, learned senior counsel for the respondent would argue that the contention of the respondent throughout was that at no time it engaged 20 or more employees. Therefore, it was under the belief that the Act would not be applicable. In that belief the employer did not recover from the employees any contribution. Nor was the employer called upon during that relevant time to comply with the provisions of the Act. It was entirely due to the fault of the Officers of the appellant, the respondent did not make the contribution. In any event, the establishment had been closed down on 31.3.88. It will be unjust to enforce the provisions of the Act and to seek to recover contribution after the closure, more so, when the employees have settled their claims and have gone away. Certainly, such a situation is not con- templated under the Act. From this point of view the judgment of the High Court is right and does not call for any interference.

In order to appreciate the rival contentions, it would be useful to set out the necessary legal background.

The Employees State Insurance Act is an act for certain benefits to employees in cases of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto. Section 1(4) makes it applicable to all factories, in the first instance' Under sub-section (5) of the said section, the Government may, by a Notification, extend the provisions of the Act to any other establishment or class of establishment; industrial, commercial, agricultural or otherwise. Admittedly, in this case, the hotel industry like that of the respondent has been notified under the Act. Under section 26, a fund called Employees' State Insurance Fund is created by all the contributions paid under this Act, the purposes, for which it may be expended, are cataloged under section 28. Section 38 requires all employees in factories or establishments shall be insured. Section 39 talks of contribution. In respect of an employee it shall comprise of contribution payable by the employer (employer's con- tribution) and contribution payable by the employee. It is this contribution which has to be paid to the Corporation. Section 40 imposes the liability to pay contributions, in the first instance, on the principal employer. After such contribution the employee's contribution could be deducted from his wages. Sub-section (4) of section 40 is important. That says as follows:

> "(4) Any sum deducted by the principal employer from wages under this Act shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was deducted." (Emphasis supplied) Therefore, this sub-section puts the matter beyond doubt that there is an entrustment. In other words, the employer is a trustee.

Under section 44 there is an obligation on the employer to furnish returns and maintain registers.

The benefits available to the insured persons are stated in section 46:

1. Sickness

2. Maternity

3. Disablement

4. Injury

5. Medical treatment for and attendance on insured persons.

Lastly, there is power to prosecute under section 85 which includes punishment for failure to pay contributions as well as for contravention of or non-compliance with any of the requirements of the Act. In the above legal background we may analyse the factual situation.

Two facts stare at us.

1. The liability to contribution of the respondent- employer relates to a period between 11.7.85 to 31.3.88.

2. The respondent-establishment was closed on 31.3.88.

The contention of the respondent that at no time there were 20 or more employees in his establishment has to be rejected because at no point of time the respondent sought an adjudication on this aspect. On the contrary, the inspections made by the officials of the appellant on 8.12.86, September 87 and October 87 state to the contrary. Therefore, we have to proceed on the basis that the provisions of the Act are applicable to the respondent- establishment, since (i) it is a notified industry, (ii) in the establishment more than 20 employees were working at the relevant time.

From the above provisions it is clear that from the date of his commencement of business, namely, 11.7.85, there was a liability to contribute. It has already been seen under section 40 the primary liability is his, to pay, not only the employer's contribution but also the employee's contribution. Therefore, he cannot be heard to contend that since he had not deducted the employee's contribution on the wages of the employees, he could not be made liable for the same. The object of making a deeming entrustment sub- section (4) of section 40 will be altogether rendered nugatory if such a contention were to be accepted. After all, when he makes employee's contribution he is entitled to deduct from the wages. Therefore, by force of the application of the statutory provisions, the liability to contribute, during this relevant period, namely, 11.7.85 to 31.3.88, arose. There is no gain saying in that. Hence, we reject the arguments of Mr. Subramanian Poti, learned senior counsel for the respondent.

From the above statutory provisions, it would be clear that from out of the common fund maintained under section 26, the employees derive various benefits like sickness, maternity, disablement, injury, medical treatment for and attendance on insured persons. Therefore, it is a beneficial piece of social security legislation. As a matter of fact, this Court had occasion to consider the same in B.M. Lakshmanamurthy's case (supra). At page 370, paragraph 16 it was held :

> "The Act is thus a beneficial piece of social security legislation in the interest of labour in factories at the first instance and with power to extend to other

> establishments. Provisions of the Act will have to be construed with that end in view to promote the scheme and avoid the mischief."

Mr. M.L. Verma, learned senior counsel for the appellant is right in his submissions in this regard. The Insurance Court as well as the High Court have correctly upheld the demand for contribution. But it is rather strange to conclude that the demand could not be enforced against a closed business. If this finding were to be accepted it would not promote the scheme and avoid the mischief. On the contrary, it would perpetrate the mischief. Any employer can easily avoid his statutory liability and deny the beneficial piece of social security legislation to the employees, by closing down the business before recovery. That certainly is not the indentment of the Act. To hold, as the High Court has done, would set at naught all these beneficial provisions.

It is equally fallacious to conclude that because the employees had gone away there is no liability to contribute. It has to be carefully remembered that the liability to contribute arose from the date of commencement of the establishment and is a continuing liability till the closure. The very object of establishing a common fund under section 26 for the benefit of all the employees will again be thwarted if such a construction is put. We cannot also accept the finding of the High Court that because Ext. P3 notice was issued on 23.6.88 after the closure of the respondent establishment on 31.3.88, the appellant was not justified in proceeding against the respondent. The proceeding for the recovery is of the dues of contribution which arose prior to the closure on 31.3-88. Therefore, it matters little when notice was issued, calling upon to pay the contribution.

In our considered view, such a notice is only a reminder to the employer to discharge his statutory obligation. For all these reasons, we have little hesitation in setting aside the impugned judgment of the High Court which in turn upholds the order of Employees' State Insurance Court. The appellant will be entitled to proceed with the recovery proceedings in accordance with law.

Accordingly, the appeal will stand allowed with costs.

G.N. Appeal allowed.