

Kerala High Court

The Regional Director vs M/S.Tata Tea Limited on 13 December, 2010

IN THE HIGH COURT OF KERALA AT ERNAKULAM

Ins.APP.No. 12 of 2009()

1. THE REGIONAL DIRECTOR,
... Petitioner
2. THE RECOVERY OFFICER, E.S.I.CORPORATION,

Vs

1. M/S.TATA TEA LIMITED,
... Respondent

For Petitioner :SRI.T.P.M.IBRAHIM KHAN, SC, ESI CORPN.

For Respondent :SRI.E.K.NANDAKUMAR

The Hon'ble MR. Justice M.N.KRISHNAN

Dated :13/12/2010

O R D E R

M.N. KRISHNAN, J.

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INS.APPEAL NO. 12 OF 2009

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Dated this the 13th day of December, 2010.

J U D G M E N T

This appeal is preferred against the order of the Employees Insurance Court, Alappuzha in I.C.79/04. The applicant's establishment moved an application u/s 75 of the E.S.I.Act for setting aside the direction to pay E.S.I. contribution on the amount reimbursed to M/s P.G. Parameswara Iyer and sons, their stockists in connection with their sale promotion activities. The applicant's establishment is engaged in the manufacturing and marketing of tea. They are having dealers and stockists at different centres and they purchase packets of tea from the establishment and they are being sold. The applicant also introduced a promotion scheme whereby the dealers/stockists are free to INS.APPEAL NO. 12 OF 2009 accept any mode prescribed in the sale promotion scheme. Those persons receive remuneration from the stockists which was reimbursed by the applicant by

way of sale promotion expenses. It has nothing to do with the persons so involved and therefore the prayer is to set aside the order of the E.S.I. Corporation.

2. On the other hand the E.S.I.

Corporation would contend that the records of the establishment reveal reimbursement of those charges to the stockists and therefore it can be considered as the principal employer liable to pay contribution. This was based on the report of an insurance inspector.

3. In the trial court PW1 and DW1 were examined. Exts.P1 to P3 and D1 were marked. On an analysis of the materials the trial court INS.APPEAL NO. 12 OF 2009 found in favour of the establishment and held that interim salesmen are not employees under the E.S.I.Act therefore set aside the order. It is against that decision the E.S.I. Corporation has come up in appeal. The points of law formulated are, (1) Whether the interim salesmen are employees within the meaning of Section 2 (9) of the E.S.I.Act and the salary paid to them will be wages to attract the E.S.I. Contribution.

(2) Whether the interim salesmen are coming under provisions of Section 2 (9) of the Act and the contributions are payable in the facts and circumstances of this case.

INS.APPEAL NO. 12 OF 2009 Points 1 and 2:

4. Heard the learned counsel for the appellant as well as the respondent. It is desirable to understand the work done by these persons in order to decide the question. Tata Tea Ltd. is a manufacturer and seller of tea products. M/s P.G. Parameswara Iyer and sons is the stockists/dealer under them. They are non-exclusive in the sense that they are entitled to store and sale the products of other companies as well. The persons who are attempted to be roped in for the purposes are persons who had purchased packets of tea from the stockists and had sold it during different festivals or exhibitions. It is contended that since Tata Tea Ltd. has reimbursed the amount incurred for the sale promotion which amounts to INS.APPEAL NO. 12 OF 2009 wages and therefore the company is bound to pay contribution for these persons. So the question to be decided is whether a person who sells tea for promotion activities independently whose expenses are reimbursed by the Tata Tea Ltd. to its stockists can be considered as wages for an employee that is either under the principal employer or the immediate employer. This fact has been considered by the learned Insurance Court Judge in paragraph 9 of the award. He had considered the evidence of DW1 and found that payments were reimbursed by the Tata Tea Ltd. to M/s P.G. Parameswara Iyer and Company. In cross- examination DW1 deposed that he did not see any agreement executed between Tata Tea Company and M/s P.G. Parameswara Iyer and sons and his report was based only on the ledger payments. INS.APPEAL NO. 12 OF 2009 He had not enquired about the nature of works of interim salesmen and nothing is stated in the report. It is also not stated that those interim salesman were attached to the stockist's office. He does not know whether E.S.I. Corporation has claimed contribution from M/s P.G. Parameswara Iyer and sons. He would submit further it had not entered into any agreement with M/s P.G. Parameswara Iyer and sons as stockists. It is further interesting to note that the so called activities of salesmen are not carried out in the establishment of

M/s P.G. Parameswara Iyer and sons and again it is deposed that the said Company did not maintain any records relating to interim salesmen. So the basis on which the E.S.I. Corporation wanted to rope in the establishment is that since the INS.APPEAL NO. 12 OF 2009 amounts spent by the stockists for promotion of sale had been reimbursed to the stockists, the principal company will become liable for contribution. I am afraid such an interpretation may lead to dare consequences. As extracted by the trial court neither the stockists nor the so called principal employer has any control or right over these salesmen. In fact what they do is they purchase these stocks but sell it for the purpose of the improvement of the business for which the stockists paid some remuneration and as a part of the sale improvement scheme the Company reimburses that amount to the stockists. In order to be an employee it is fundamental that he is to be employed by the person. Though employment need not be direct S.2(a)(i) gives a picture about the same. So far as this case is INS.APPEAL NO. 12 OF 2009 concerned 2(a)(i) of the E.S.I.Act cannot have any application at all and if at all we have to see whether S.2 (9)(ii) will have any application. In S.2(9)(ii) also employee means, ".....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 is an agent of 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." Just because the stockists or somebody else makes genuine attempts to improve their business and in the process since the products of the manufacture is being sold out if one comes to the conclusion that these people INS.APPEAL NO. 12 OF 2009 have to be tacked with the principal employer, as stated by me earlier will lead to dangerous consequences. Sale promotion activity is a factor which is concerning all, right from the manufacturer to the wholesaler or the retailer as the case may be and in all those cases just because the reimbursement is made by the manufacturer as an incentive for the sale promotion activity one cannot classify it as wages so as to attract the provisions of the E.S.I.Act or broadly speaking neither they can be treated as an employee of the principal employer nor the amount received as taken as wages for the purpose of the E.S.I. Contribution. The learned judge had considered the matter elaborately on factual basis and the finding on the said fact does not appear to be INS.APPEAL NO. 12 OF 2009 perverse or mis guided by law. So the facts emanating make it very clear that they are not attracted and therefore considering the nature of the work done in this case I hold that they will not be covered under the provisions of the Act and so the respondent Tata Tea Ltd. cannot be directed to pay any contribution. Both the questions of law are answered against the Corporation and the appeal fails and the same is dismissed but without costs.

Sd/-

M.N. KRISHNAN, JUDGE.

ul/-

[true copy] P.A. To Judge.