Supreme Court of India
Employees' State Insurance ... vs Harrisons Malayalam Ltd. on 4 November, 1997
Equivalent citations: 1998 (80) FLR 835, JT 1998 (7) SC 278, 1999 (1) KLT 145 SC, (1999) ILLJ 284 SC, (1998) 9 SCC 74
Bench: S Majmudar, M J Rao
ORDER

1. The Employees' State Insurance Corporation has brought in challenge the order passed by the Employees' Insurance Court, Alleppey and as confirmed by the High Court in appeal under the Employees' Insurance Act, 1948.

2. The respondent is a public limited construction company engaged in the business and the work of undertaking construction work at various places in the State of Kerala. During the period 1971 to 1982 it had undertaken construction work for building factory premises of M/s. McDowell Company at Ghertallei. During the relevant time the Employees' State Insurance Act, 1948 (hereinafter referred to as "the Act") was applicable in the State of Kerala. The appellant-Corporation raised the demand against the respondent-Company in connection with the contribution which should have been remitted to the Corporation both consisting of employees' contribution as well as employer's contribution amounting to Rs. 2 lakhs and odd for the period from 1971 to 1982. This demand by the Corporation resulted in an application by the respondent-Company before the Employees' Insurance Court, Alleppey being IA No. 62 of 1988. The Insurance Court after hearing the parties took the view that as the claim pertains to an earlier period i.e. from 1971 to 1982 and there was no clear evidence to show whether the workmen concerned, who were said to be employed by the respondent-Company during the relevant time, were available on the payroll of the Company and as the appellant Corporation had not taken steps in time to activise the respondent in this connection, the claim put forward by the Corporation against the respondent for that period could not be effectively entertained. However, the Insurance Court noted that there was some evidence regarding continuity of employees at least from 1983 onwards till the coverage was effected in 1986. The appellant-Corporation was held entitled to collect contribution in respect of those employees who are employed by the respondent during 1983 and who continued under employment thereafter till they were brought under coverage w.e.f. 1-12-1986. In the result the respondent's application was allowed to the aforesaid extent. The appellant-Corporation being aggrieved by the said decision of the Employees' State Insurance Court carried the matter in appeal before the High Court of Kerala under Section 82 of the Act. The High Court by the impugned judgment agreed with the decision rendered by the Insurance Court and dismissed the appeal. The High Court observed that the Insurance Court was justified in arriving at the finding that the Corporation could not insist for payment of contribution from the respondent in respect of employees whose particulars were not available. Moreover, the request for contribution was made after several years and there was nothing on record to show that inspection had been conducted at any time prior to 1982. In the result, the High Court dismissed the appeal of the Corporation.

3. In support of the present appeal learned counsel for the Corporation submitted that the view of the High Court that only because details were not furnished by the respondent about the exact number of employees employed by it during the relevant time even though it was under a statutory

obligation to furnish such data as per Regulations 12 to 14 of the Employees' State Insurance Regulations, 1990 (sic) framed under the Act, the Corporation could not claim contribution for the said period was clearly unsustainable. It was contended that the Corporation could not be found fault with for the said absence of data especially when the aforesaid data was within the personal knowledge of the respondent-Company which engaged those employees during the relevant time. Consequently, the absence of data about the availability of the employees concerned or their whereabouts could not furnish a relevant ground for the respondent to oppose the claim of the appellant-Corporation. In support of this contention two decisions of this Court were pressed into service by learned counsel for the appellant. In the case of ESI Corpn. v. Harrison Malayalam (P) Ltd., wherein incidentally the respondent before this Court was the very same respondent who is before us in the present appeal, an identical contention canvassed by the respondent before the High Court and which had appealed to the High Court was repelled by this Court. In the light of the scheme of the Act considered in that judgment it was observed in para 3, p. 362 of the report that:

"On the admitted fact that the respondent-Company had engaged the contractor to execute the work, it was also the duty of the respondent-Company to get the temporary identity certificates issued to the workmen as per the provisions of Regulations 12, 14 and 15 of the Employees' State Insurance (General) Regulations, 1950 and to pay the contribution as required by Section 40 of the Act. Since the respondent-Company failed in its obligation, it cannot be heard to say that the workers are unidentifiable. It was within the exclusive knowledge of the respondent-Company as to how many workers were employed by its contractor. If the respondent-Company failed to get the details of the workmen employed by the contractor, it has only itself to thank for its default. Since the workmen in fact were engaged by the contractor to execute the work in question and the respondent-Company had failed to pay the contribution, the appellant-Corporation was entitled to demand the contribution although both the contribution period and the corresponding benefit period had expired."

4. The aforesaid decision of this Court in case of the respondent-Company itself obviously pertaining to another contract work which might have been undertaken by it really clinches the issue against the respondent. There is another decision of this Court to which our attention was invited by learned counsel for the Corporation in the case of ESI Corpn. v. Hotel Kalpaka International, . It has been held by this Court, speaking through Mohan, J., that under Section 40 of the Act primary liability is of the employer to pay, not only the employer's contribution but also the employees' 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. It cannot be said that the demand could not be enforced against a closed business as such a finding would, instead of promoting the scheme and avoiding the mischief, perpetrate the mischief. It was further observed that it cannot also be said that because the employees had gone away there is no liability to contribute. 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.

5. In view of the aforesaid decisions of this Court, especially the first decision which is rendered in the case of the respondent-Company itself, there is no escape from the conclusion that the claim of

the appellant-Corporation could not have been successfully challenged by the respondent only on the specious plea that during the relevant period from 1971 to 1982 no data was available with the respondent about the exact number of employees employed by it and the payment made to them during the relevant period. Therefore, on that short ground the appeal will have to be allowed. However, before we do so, we must note two further contentions canvassed by the learned counsel for the respondent seeking a remand of these proceedings to the Insurance Court, Firstly, it was submitted that the workmen engaged by the respondent were of casual nature and the respondent's own work was that of a casual contract and, therefore, no liability to contribute under the Act would arise in such a case. Secondly, it was submitted that the total claim of Rs. 2 lakhs and odd was on the basis that the sub-contractors were paid Rs. 33 lakhs and odd during the relevant time by the respondent but that included not only the payment of wages to the employees of the sub-contractors, but also it included transport charges and other miscellaneous items and such a contention was put forward in the application before the Insurance Court. It was, therefore, submitted that even if on the main contention the respondent fails on the aforesaid two grounds, for considering these two contentions the matter may be remanded for a fresh decision of the Insurance Court.

6. So far as the first ground seeking for remand is concerned, reliance was placed on para 4 of the judgment of this Court in the respondent's own case in Harrison. It has been observed therein that:

"Shri Pai while not disputing the fact that the Act applies to casual workmen, contended that it cannot be made applicable to the workmen of casual contractors such as the plumbers, electricity repairers, air-conditioner repairers, computer repairers, T.V. repairers etc. whom contractors engage for temporary repair works. There is indeed great force in this contention. However, in the present case there is nothing on record to show that the contractor engaged was such casual contractor and the work executed by him was of a casual nature."

7. We fail to appreciate how these observations made in the case of the respondent itself in that earlier case can be of any avail to the respondent in the present case. It is not the case of the respondent nor was it proved on record even in the alternative that the work which the sub-contractors' employees did was of such a nature that the main contract itself undertaken by the respondent could be treated to have resulted in the contract work being of casual nature. On the contrary, the evidence is that for 11 years from 1971 to 1982 the respondent did the construction work for McDowell Company. Thus it was almost of a perennial nature spread over 11 years and during that time the workmen were engaged, though according to the respondent through sub-contractOrs. Consequently, there would remain no occasion for remanding the proceedings for considering the first objection.

8. Regarding the second objection it is necessary to note that though it was the contention of the respondent in application before the Insurance Court that it had engaged sub-contractors who brought their own workmen during the relevant period for carrying out the work of the respondent, there was documentary evidence on record by way of letters dated 5-12-1986, 27-1-1986 and 18-11-1986 received from the so-called sub-contractors to show that they were in fact employees of the respondent and were not subcontractOrs. When such evidence was led before the Insurance

Court by the Corporation it was incumbent upon the respondent to join the issue and to seek a decision of the Insurance Court on this alternative aspect. That was not done presumably because it was not worthwhile doing so. Therefore it is now too late in the day for the respondent to claim a remand even on this ground especially when we are told that the respondent is one of the well-known companies in Kerala and was carrying construction activities on a large scale for different clients at the relevant time and the claim involved is only Rs. 2 lakhs and odd. For all these reasons, therefore, we are not inclined to accept even the second objection of the respondent for seeking a remand of these proceedings.

9. In the result, the appeal is allowed, the order of the Insurance Court as well as the decision of the High Court are set aside and the application filed by the respondent before the Insurance Court will stand dismissed. It will be open to the appellant-Corporation to proceed to recover the amount in question in accordance with law. No costs.