BOMBAY HIGH COURT

Hon'ble Mrs. R.P. Sondurbaldota, J,

Appeal under ESI No. 2/2007, D/-2-5-2013

Regional Director, E.S.I. Corporation, Goa

vs.

Farmacia Ananta, Goa

EMPLOYEES' STATE INSURANCE ACT, 1948 - Sections 2(9), 45A, 75 and 82 - Coolies/hamalies engaged for loading and unloading - When would be liable to be covered as employees under the Act - Appellant raised demand of contributions towards coolie/freight charges and repair/maintenance charges - Respondent challenged the order of appellant before Employees' Insurance Court - The EI Court allowed the application of the respondent-firm - Appellant challenged the order passed by EI Court by filing appeal - Held, activity of loading and unloading is a regular activity in regular course of business - Activity is conducted under the supervision and control of the respondent - Hence, coolies will be employees under the Act - Employer is liable to pay ESI contributions in respect of such coolies/hamalies - Where the employer is unable to give details of labour charges and cost of material, the ESI Authority could fairly determine contribution at the rate of 25 per cent of the total amount as per its memorandum dated 16.11.1981 - The appellant may pass a fresh order under section 45A of the Act taking into account circular dated 16.11.1981 - Accordingly, the appeal is partly allowed - Order passed by EI Court towards coolies/freight charges is set aside. Paras 7 to 9

***For Appellant*:** Ms. A. Agni, Advocate.
***For Respondent*:** Mr. R.G. Ramani, Advocate.

IMPORTANT POINTS

- **When the activity of loading and unloading is a regular activity in regular course of business, under the supervision and control of the employer, the employees like coolies/hamalies employed through contractors or direct for carrying out the job, will be employees under section 2(9) of the Employees' State Insurance Act, 1948.**
- **The employer is liable to pay ESI contributions in respect of coolies/hamalies irrespective of their engagement on contract basis or otherwise if they have to perform work of regular nature under the supervision and control of the employer.**
- **When the employer is unable to give details of labour charges and cost of material, the ESI Authority could fairly determine contribution at the rate of 25 per cent of the total amount as notified *vide* memorandum dated 16.11.1981 by the ESI Corporation.**

ORDER

PER R.P. SONDURBALDOTA, J.-

1. This appeal preferred by the Regional Director; E.S.I. Corporation was admitted on the following substantial questions of law:

(A) Whether the coolies/hamalies engaged for loading and unloading goods of the respondent in connection with their business are covered within the scope of the term employee as defined under section 2(9) of the Employees' State Insurance Act and whether the ratio as laid down by the Bombay High Court in the Parle *Bottling* case would not be binding ratio in view of the Judgment of the Apex Court in the case of *Rajkumar Transport and South India Flour Mills* case. Whether the ratio laid down by the A.P. Court in E.I.D. *Parry* case is *per incurium* considering the ratio laid down by the Hon'ble Supreme court in *Rajkamal* case?

(B) Whether the E.I. Court has ignored and by-passed the basic norm governing coverage of the establishment and the definition of employee as contained in Section 2(9) of the E.I. Act and the relevant test that if the hamalies/coolies casual employees worked in connection with the work of the establishment they would have to be treated as employees within the meaning of the expression employee as contained in Section 2(9) of the E.I. Act.

2. The factual matrix of the appeal is that the respondent is a partnership firm dealing in the business of selling medicines and drugs. It has branches at Margao and Mapusa in the name and style of Drogaria Ananta Panaji and Drogaria Ananta Mapusa. The total number of employees reflected in the returns filed by the respondents were more than 31 during the period 1990-92. The establishment of the respondent was inspected by ESI inspector on 6th November, 1992. Thereafter, notice dated 6th April, 1994 came to be served upon it under Section 45A of Employees' State Insurance Act (hereinafter referred to as 'ESI Act') calling upon it to show cause as to why the contribution as per the statements enclosed therein should not be recovered from it. The respondent failed to respond in any way to the show cause notice. It neither paid the contribution as demanded under the notice nor sent any reply thereto. It also did not appear before the Regional Director of the Corporation when personal hearing was afforded to it. The appellant then passed orders dated 29th December, 1995 calling upon the respondent to pay contribution of Rs. 5,608 for the period April, 1990 to March 1992 and Rs. 2,118 for the period 1990-1991 alongwith interest thereon. The demand of contribution had been made in respect of: (i) the coolie charges or freight charges and (ii) towards repair and maintenance charges. The respondent challenged the demand by filing application under Section 75 of ESI Act contending that it was not liable to pay any contribution in respect of coolie and freight charges as also the repair and maintenance charges. The ESI Court, relying upon decision of this Court in the case of *Parle Bottling Company Pvt. Ltd.* v. *The Regional Director, ESIC, Bombay* reported in 1989 II CLR 229 held that no contribution was payable by the respondent in respect of the freight charges. As regards the amount claimed on repairs and maintenance the ESI Court was of the opinion that the order passed by the Corporation being a non-speaking order could not be sustained. For these reasons it allowed the application of the respondent under sections 75 and 77 of the ESI Act. Being aggrieved by the order the Regional Director, ESI Corporation has filed the present appeal.

3. Ms. Agni, the learned counsel for the appellant submits that in the impugned order the ESI Court refers to decisions of the Apex Court in *M/s. Rajkamal Transport and another* v. *The Employees' State Insurance Corporation, Hyderabad* reported in (1996) 9 SCC 644, Andhra Pradesh High Court in E.I.D. *Parry (India) Ltd., Vijayawada* v. *Employees' State Insurance Corporation and Anr.* reported in (2002) II CLR 349 and of this Court in *Parle Bottling Co. Pvt.* v. *The Regional Director, E.S.I.C., Bombay* reported in (1989) II CLR 229, but the appreciation of these three decisions by it in the impugned order is not correct. According to her the decisions have not been read in the correct prospective. On proper reading of the decisions the respondent will have to be held liable to pay the contribution. She also submits that the ESI Act being a beneficial legislation will have to be read and interpreted in favour of the employee in the event of possibility of different interpretations.

4. Perusal of the impugned order shows that the same is passed essentially on appreciation of the decisions cited therein. It would therefore be convenient to first look at the three decisions and then refer to the factual matrix of the appeal. The first decision is of the Apex Court in *M/s. Rajkamal Transport* (supra). The facts in that case were that M/s. Rajkamal Transport had engaged hamalies for loading and unloading of the goods undertaken by them for carriage as carriers. The Corporation had called upon it to pay it's contribution towards the insurance benefit of the hamalies. M/s. Rajkamal Transport disputed the liability and made an application for determination under Section 76 of the Act. The ESI Court held that the hamalies were employees within the meaning of Section 2(9) of the ESI Act. It rejected the claim of the M/s. Rajkmal Transport that it did not pay any wages or salary regularly to the hamalies and that it collected the charges from it's customers and paid the amount to the hamalies at the piece rate for the work done by them. M/s. Rajkamal Transport had only supervised the loading and unloading operation by the hamalies. The Insurance Court held that though M/s. Rajkamal Transport collected charges from the customers and paid the amount to the hamalies it supervised the work of loading and unloading of the hamalies and also that the hamalies were not appointed or controlled by any other agency. The appeal preferred by M/s. Rajkamal Transport against the order, of ESI Court was dismissed by the High Court. The matter was then carried to the Apex Court. While considering the argument that hamalies cannot be considered to be employees of M/s. Rajkamal Transport the Apex Court looked into the definition of Section 2(9) of the ESI Act, it's clause (ii) in particular. It noted that clause (ii) envisages that the employees need not necessarily be directly employed by the employer. Those who are employed by or through an immediate employer on the premises of the factory or establishment under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or the establishment or which is preliminary to the work carried on in or incidental to the parts of the factory or establishment is an employee within the meaning of Section 2(9) of the ESI Act. This view had already been taken by the Apex court in its decision in *Royal Talkies* v. *ESI Corporation,* reported in (1978) 4 SCC 204. In the facts of M/s. Rajkamal Transport the Apex Court found that M/s. Rajkamal Transport had control over loading and unloading of the goods entrusted to it. Its

regular business was of transport of goods entrusted to it as carriers. When the goods were brought to its warehouse, M/s. Rajkamal Transport necessarily had to get the goods loaded or unloaded through the hamalies and it controlled the activities of loading and unloading. The test of payment of salary or wages in such facts is not relevant consideration. What is important is that the hamalies worked in connection with the work of the establishment. That loading and unloading of the work was done at the direction of the establishment and in its control. Therefore the hamalies engaged in the work of loading and unloading by M/s. Rajkamal Transport were held to be its employees.

5. In *E.I.D. Parry (India) Ltd.* (supra) Andhra Pradesh High Court held that the company which was the manufacturer, stockist and distributor of goods engaging hamalies for loading and unloading and storing of goods in godown was not liable to contribute for the coolies and freight charges since the facts of the case showed that hamalies had been employed either by its dealer or its warehousing corporation. The company only reimbursed the dealer or the warehouse corporation of the charges paid to the hamalies. The relationship of the company and the warehousing corporation was that of a bailor and bailee under the non-gratuitous bailment. The Andhra Pradesh High Court also found that there was nothing on record to show that the hamalies engaged by the company exclusively worked for it and to nobody else since the warehousing corporation godown was used by several persons. Thus, the Andhra Pradesh High Court distinguished the decision of the Apex Court in *M/s. Rajkamal Transport* (supra) on the fact situation of the case before it. Therefore there is no need to consider whether the ratio therein is *per incurium* the ratio in *M/s. Rajkamal Transport* case.

6. The decision of this Court in *Parle Bottling Co. Pvt. Ltd.* case (supra) is prior in point of time to the decision of the Apex Court in M/s. Rajkamal Transport. This Court held therein that the coolies hired by the salesmen of the bottling factory to assist the permanent loaders who were paid on vouchers could not be regarded as employees within the meaning of the Act. Further, the coolies hired were not any particular individuals but those who were available on the spot at the relevant time. Consequently, there was no relationship of master and servant created between them and the salesmen and much less between them and the company. This decision can be distinguished on facts from the ratio in *M/s. Rajkamal Transport* case (supra). The facts show that there were permanent loaders employed by the company and the coolies were hired only to assist the permanent loaders. The coolies were not regular persons but anybody available at the relevant time.

7. Coming to the fact situation of the present case, the evidence led by the respondent was limited to the statements in deposition of its witness that the respondent is not liable to pay any contribution on freight charges as the same were paid in transportation of goods and did not involve element of wages. He also stated that the coolie charges were paid to the outsiders who are not employers of the respondent. This evidence by itself cannot take the respondent out of the purview of application of the law laid down in *M/s. Rajkamal Transport* case (supra). There is no dispute that the activity of loading and unloading of medicines is a regular activity undertaken in the regular course of business of the respondent. Whenever the stock of medicines is brought to the shop for sale which would be at periodical interval the respondent engages hamalies for loading and unloading. There is no dispute that this activity is conducted under the control and supervision of the respondent. It is not the evidence of the witness of the respondent that the hamalies are engaged by any third person or that the hamalies hired are not any particular individuals but whosoever available on the spot at the particular time. In the circumstances, the ratio of the Apex Court in *M/s. Rajkamal Transport* would get attracted to the facts of the present case. Further, since ESI Court (ESI Act) is a beneficial piece of legislation for the benefits of the employees in such facts the hamalies will have to be treated as employees within the meaning of Section 2(9) of the ESI Act. Therefore, the demand by the appellant for the payment of freight charges cannot be disputed or denied. The questions of law framed are answered accordingly.

8. As regards the demand made by the appellant of contribution on repairs and maintenance charges, I find no infirmity in the view taken by the ESI Court. It refers to the memorandum No. P-11/14/41/79-Ins. IV, Instruction No. 17 of 1981 dated 16th November, 1981 from the Employees' State Insurance Corporation directing that in cases where the employer is unable to give details for payment made towards labour charges, cost of material relating to repairs or maintenance the Regional Director could fairly determine the contribution of 25% of the total amount of bills. The ESI Court found that the Regional Director had, contrary to the memorandum, assumed the total amount of bills for recovery of contribution. This part of the order being non-speaking order the ESI Court did not support it and set it aside with liberty to the appellant to pass a fresh order of determination of claim under section 45A of the ESI Act by taking into account the circular dated 16th November, 1981.

9. For the reasons stated above, the appeal is partly allowed. The order dated 23rd April, 2007 passed by the ESI Court is set aside to the extent of the contribution towards coolies/freight charges and the order of the Regional Director, ESI Corporation thereon is confirmed.

Ref: LLR

If you have any questions, feel free to reach out to us on WhatsApp at Jay Shah - +91 9167121333