

**(2004) 09 AP CK 0086**  
**In the Andhra Pradesh High Court**  
**Case No : CMA No. 354 of 1999**

BOC India Ltd.

APPELLANT

Vs

Assistant Regional Director, Employees' State Insurance  
Corporation and Another

RESPONDENT

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**Date of Decision :** 14-09-2004

**Acts Referred:**

Employees State Insurance Act, 1948 — Section 2(13), 2(9)

**Citation :** (2004) 5 ALD 713 : (2005) 1 ALT 397 : (2004) 3 APLJ 241 : (2005) 1 LLJ 224

**Hon'ble Judges :** L. Narasimha Reddy, J

**Bench :** Single Bench

**Advocate :** C.R. Sridharan, for the Appellant; B.G. Ravinder Reddy, SC, for the Respondent

**Final Decision :** Allowed

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## Judgement

L. Narasimha Reddy, J.—This appeal is filed u/s 82 of the Employees State Insurance Act, 1948, hereinafter referred to as "the Act", by the appellant herein, aggrieved by the order, dated 20.10.1998, passed by the E.S.I. Court, in E.I. Case No. 66 of 1997.

2. The appellant is a Limited Company, engaged in the activity of manufacturing, and supply of industrial gases. The present dispute relates to the transport of Oxygen gas manufactured, and bottled by the appellant. After the gas is manufactured, and filled in cylinders, the appellant supplies the same to its customers. While in some cases, the customers directly take the cylinders, in other cases, the appellant delivers the cylinders to its bulk customers, by engaging transport contractors.

3. On 17.2.1995, the officials of the E.S.I. Corporation visited the factory of the appellant. They opined that the appellant ought to have paid contribution for the employees, engaged in transport of cylinders also. Accordingly, a notice was issued by the respondents, to the appellant. Through reply, dated 14.6.1995, the

appellant disputed its liability. This was followed by another reply, dated 18.9.1995. Taking the same into account, the respondents issued a show-cause notice, dated 25.9.1995, calling upon the appellant to show-cause, as to why the assessment should not be made against it, in the manner proposed. Since there was no response to the same, the respondents passed an order, dated 18.8.1997, u/s 45-A of the Act, demanding contribution of Rs. 63,573/- for the period from July, 1992 to October, 1995. Disputing the correctness of the same, the appellant filed E.I. Case No. 66 of 1997 before the E.S.I Court, u/s 75(1)(g) of the Act.

4. The appellant contended that, it is not liable to make any E.S.I contribution for the employees engaged in transport of cylinders, for the reason, that they are neither employed by them, nor are under their supervision. It was alleged that the transport contract was tentative, depending on number of variables, and no particular individuals were kept at their disposal, by the transporter.

5. The respondents on the other hand pleaded that the employees, engaged in transport of cylinders, were under the direct supervision of the appellant. They contended that the contractor entrusted with the transport of cylinders falls within the definition of "immediate employer", as defined under Sub-section 13 of Section 2 of the Act. Through its order under appeal, the Trial Court rejected the contention of the petitioner.

6. Sri C.R. Sridharan, learned Counsel for the appellant, apart from reiterating the contentions advanced by the appellant before the Trial Court, submits that before fastening any liability on the appellant, it was obligatory on the part of the respondents, to establish that the employees in question, were either working in the premises of the appellant, or were under their direct supervision. He submits that except making a casual visit, the respondents did not record any finding on any of these aspects. He contends that transporting cylinders is not at all part of the activity of the appellant. He further submits that the contractor himself was sending driver and hamalies, by engaging them on ad-hoc basis, and on daily wage basis; hence it was impossible to maintain any record thereof, or to comply with the provisions of the Act.

7. Sri B.C. Ravinder Reddy, learned Standing Counsel for the respondents, on the other hand submits that, the supply of filled cylinders, and taking return of the empty cylinders, is very much part of the activity of the appellant. He submits that the employees engaged in transport of the cylinders have invariably to enter the premises of the factory, and thereby, they fall within the definition of Section 2(9) of the Act.

8. Learned Counsel for the appellant as well as the learned Counsel for the respondents have relied upon several decisions rendered by Supreme Court and this Court, in support of their respective contentions.

9. The appellant is engaged in the activity of manufacture of industrial gases. It is not in dispute that it has engaged more than 20 employees, and is thereby,

covered by the provisions of the Act. The appellant has been making contributions for the employees directly appointed by it. The present dispute is about the contribution in respect of the persons said to be engaged in transport of Oxygen cylinders. While the appellant contends that transport of cylinders is not part of its activity, the respondents insist that the workers engaged therefor, come within the definition of the word "employee" u/s 2(9) read with Section 2(13) of the Act.

10. Section 2(9) of the Act defines the term "employee". This definition takes in its fold, not only the employees directly engaged by the employer, but those who are placed at its disposal by an agency known as "immediate employer". The term "immediate employer" is defined under Sub-section (13) of Section 2. It reads as under:

"Immediate employer", in relation to employees employed by or through him, means a person who has undertaken the execution, on the premises of a factory or an establishment to which this Act applies or under the supervision of the principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment, and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily let or let on hire to the principal employer;"

Two important facets of this definition are that, the persons so employed shall work on the premises of a factory, or that they shall be under supervision of the principal employer or his agent.

11. The jural relationship of the workers engaged in activities other than the manufacturing process, in the context of the Act has been the subject-matter of several decisions of the Supreme Court and various High Courts. In *C.E.S.C. Limited and Others Vs. Subhash Chandra Bose and Others*, , the Supreme Court held that irrespective of the nature of interpretation to be placed on the term "employee" u/s 2(9), the difference between "principal employer" on the one hand, and the "immediate employer" on the other, cannot be ignored. It was further suggested that it is only when the employees engaged by the immediate employer, work directly in the establishment, or under direct supervision of the principal employer, that they cannot be brought within the cover of Section 2(9) of the Act. Another important decision that deals with these aspects is the one in *Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation*, . It is apt to refer to the discussion undertaken in the context of the principle of subsidiary activities of an industrial undertaking, in the context of Sub-sections (9) and (13) of Section 2 of the Act. It was observed as under:--

"In such cases, the "principal employer" has no direct employment relationship since the "immediate employer" of the employee concerned is someone else. Even so, such an employee, if he works (a) on the premises of the

establishment, or (b) under the supervision of the principal employer or his agent "on work which is ordinarily part of the work of the establishment or which is preliminary to the work carried on in or incidental to the purpose of the establishment", qualifies u/s 2(9)(ii). The plurality of persons engaged in various activities who are brought into the definitional net is wide and considerable; and all that is necessary is that the employee be on the premises or be under the supervision of the principal employer or his agent".

Therefore, much would depend on as to whether the employees in question, are working within the premises of the principal employer or under his supervision.

12. In the present case, the respondents did not find any persons engaged in the activity of transport of cylinders within the premises of the factory. They only assumed that the activity of transport involves in persons entering the premises. In this regard, it needs to be borne in mind that the term "working on the premises of the establishment", cannot take in its fold the situations of the casual or occasional presence of the persons in the factory. It is true that for the purpose of loading the cylinders and unloading the empty cylinders, the driver of the vehicle and the hamalies have to enter the premises. So is the case with various persons who are required to unload the raw material, or even to transport the workers to the premises of the factory. If mere entry for such purposes alone is to be treated as the yardstick, every person who enters the factory for whatever purpose, deserves to be covered under the definition. It can never be said to be the purport of the expression. The words "person who has undertaken execution on the premises of the factory" employed in the definition, indicate the presence of the persons for execution of the principal activity of the industrial establishment, and not a casual entry.

13. One more contention advanced on behalf of the respondents, both before the Trial Court as well as this Court, is that workers engaged in transport of the cylinders were under the supervision of the appellant. The only material relied upon in arriving at this conclusion is that such persons are issued the trip sheets indicating the places of delivery. Mere issuance of trip sheets cannot be treated as an act of supervision. The trip sheets indicate nothing more than the places, where the goods entrusted to the persons are to be delivered. They are closely comparable to the transport invoices given to any transporter. A person booking goods for transport has, invariably to indicate the destination. Except that there exists a contract spread over for a period, the alleged "immediate employer" in relation to the appellant, is no way different to any other transport organization.

14. Further, in his evidence the Contractor has clearly disclosed that he owns one lorry and engages one driver and two hamalies on ad-hoc basis depending on the availability of persons. His activity cannot be compared even to that of a Labour Contractor.

15. A similar situation came to be dealt with by the Supreme Court in *Raj Kamal Transport and Anr. v. The Employees State Insurance Corporation, Hyderabad*

1996 (3) Sc 806. After observing the relevant facts and the legal provisions, the Supreme Court held as under;

"the admitted facts are that the appellants had engaged hamalies for loading and unloading the goods undertaken by them for the carriage as carriers. Though, the appellants collect the charges from the customers and pay the amount to hamalies at the piece rate for the work they do, they have got supervision of loading and unloading by the hamalies. The hamalies are not appointed or controlled by any other Agency".

16. From this, it is evident that unless the hamalies are either directly appointed or controlled by the industrial undertaking, it cannot be fastened with the liability to pay contribution. This decision was followed by this Court in EID Parry (India) Ltd., Vijayawada v. ESI Corporation, Hyderabad 2002 . (1) ALD 362. The record of this case disclose that neither the employees in question were found to be working in the premises of the appellant, nor were they under the control of the appellant or its agent.

17. Hence the appeal is allowed and the order challenged in E.I. Case No. 66 of 1997 is set aside. There shall be no order as to costs.