

(1992) 08 BOM CK 0053
In the Bombay High Court
Case No : First Appeal No. 807 of 1977

Employees State Insurance Corporation	APPELLANT
Vs	
Abu Marble Mining Private Limited	RESPONDENT

Date of Decision : 14-08-1992

Acts Referred:

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

Citation : (1992) 3 BomCR 616

Hon'ble Judges : A.V. Sawant, J

Bench : Single Bench

Advocate : R.M. Jaykar, instructed by M.V. Jaykar and Co, for the Appellant;
A.A. Saazgiri, for the Respondent

Final Decision : Allowed

Judgement

A.V. Sawant, J.—This appeal raises an important question of law as to the interpretation of the provisions of the Employees' State Insurance Act, 1948 (in short "the said Act"). In particular the question raised is as to the interpretation of the provisions of section 2(9) of the said Act defining the term "employee". By the impugned judgment dated 30th July, 1977, the application filed by the respondent-Company has been allowed and it has been declared that the claim made by the appellant-corporation in its letter dated 26th November 1975 was improper and illegal. A few facts may be stated as under :

2. Admittedly the respondent-Company, viz., Messrs. Abu Marble Mining Private Limited, is a Company registered under the Indian Companies Act, 1956 and is dealing in marble and for that purpose, has established a factory at Motibag, Chembur, Bombay. It is not disputed that the employees at the said factory are covered by the said Employees' State Insurance Act. The respondent-Company receives three kinds of orders from its customers. One kind of order is that customers themselves supply the stone for cutting and polishing. Second kind of order received from the customers is that they go to the shop of the respondent-Company, select the marble from the stock maintained by the Company, the

Company cuts it, polishes and finishes it and then supplies the said material to the customers. The third type of orders, which is relevant for the purpose of this appeal, is called a "complete contract" in the sense that the customers ask the respondent-Company to supply the marble, cut it, finish it and also fix the marble tiles at the site and all this work is done by the respondent-Company.

3. In the course of his inspection, the inspector of the appellant-Corporation observed that in the year 1971-72, a sum of Rs. 34,982/- was paid by the respondent-Company for marble fixing and polishing contract to one Ratanlal Mularam Sharma, who was examined as applicant's witness No. 1 at Ex. 48. The inspector, therefore, submitted a report to the Corporation that a sum of Rs. 34,982/- should be treated as wages and the respondent-Company should be asked to make payment of the contribution on that sum. The demand was made by the Corporation by its letter dated 12th August, 1975. By its letter at Ex. 50 the respondent Company denied its liability to make the contribution on the said amount of wages and contended that what was paid to the said Ratanlal Sharma could not be termed as "wages" under the said Act since the said Ratanlal Sharma and his two workmen, who incidentally in this case, were his sons, were self-employed contractors engaged in the work of the fixing marble in the building under the marble fixing contract and that the said work was done entirely outside the premises of the factory of the respondent-Company. It was contended by the respondent-Company that they had no control or supervision over the labour contractor Ratanlal Sharma though the Company stated that it only looked after the quality of the work done through the labourers.

4. However, the appellant Corporation was not satisfied with the reply of the respondent-Company and served a demand notice on the respondent-Company to pay a sum of Rs. 1399/- towards its contribution on the wages of Rs. 34,982/-. It is this demand which has given rise to the application in the trial Court, being Application No. 122 of 1975 in the Employees' State Insurance Court at Bombay. The said application is in the nature of proceedings u/s 75 of the said Act. At the trial, the appellant-Corporation did not examine any witnesses. However, the respondent-Company examined two witnesses. The first witness is Ratnalal Sharma who was the said contractor whose evidence is at Ex. 48 and the second witness is Sattbodh Narayan Singte who is a director of the respondent-Company and whose evidence is at Ex. 49. Ratnalal Sharma at Ex. 48 has clearly deposed that he was working not on daily wages or monthly wages but on piece rate basis and used to get Rs. 1.25 per sq. ft for fixing the tiles. In the examination-in-chief itself, he says that the respondent-Company used to give certificate in respect of the work completed by him and he is categorical that he never accepted the work of any other Company. In the cross-examination, Ratanlal Sharma says that the directions regarding the work and place are given by the respondent-Company. The respondent-Company has got its polishing machines. He further categorically states that he does not accept the work or contract directly and that he does only labour work. He further says that the marble to be fixed is supplied by the respondent-Company and even the cement is supplied by the said Company.

5. The second witness examined by the respondent-Company in its own director Sattbodh Singte whose evidence is at Ex. 49. He deposes to the three kinds of orders which the respondents-Company receive from its customers. The third type of order, which is relevant for the purpose of the present appeal, is referred to as a "complete contract" in the sense that supplying the marble, cutting, finishing and fixing the tiles etc. is to be done by the respondent Company. Sattbodh says in his examination-in-chief itself that if the customer makes a complaint to the respondent-Company regarding the contract work; the staff of the Company has to go to the site and give directions to the contractor. It is true that Sattbodh deposed to the effect that the contractor did not work exclusively for the respondent-Company but this statement cannot be accepted in the face of the categorical assertion by Ratanlal Sharma that he never accepted work from any other Company. At the end of his deposition, Sattbodh was constrained to admit in the cross-examination that whenever there was a full or complete contract, it was the Company's responsibility to lay the marble. It was the Company which was responsible for the work to the satisfaction of the customer and this was always so in a case of the complete contract.

6. On the basis of this evidence, the learned trial Judge came to the conclusion that the work of fixing and polishing the marble done outside the premises of the respondent-Company was not a part of the work of the respondent Company. Consequently, the learned Judge held that the amount of Rs. 34,982/- debited as marble fixing contract amount was not "wages" as per the definition of that term given in the Employees' State Insurance Act. In the result the application filed by the respondent Company has been allowed and it has been declared that the claim made by the appellant Corporation was improper and illegal.

7. Being aggrieved by the said judgment and order the Corporation has filed this appeal. I have heard Shri Jaykar in support of the appeal and Shri Sanzgiri for the respondent-Company. Shri Jaykar has invited my attention to the scheme of the provisions of the Employees' State Insurance Act, 1948 and has contended that in view of the evidence on record, there is no manner of doubt whatsoever that in the present case the third type of activity referred to as the third kind of order received by the respondent-Company, involved the work done by the employees of the Company. He contended that such an employee may not have been employed on the premises of the factory or establishment of the respondent-Company but there could be no manner of doubt that such an employee was employed under the supervision of the principal employer or, in the facts of the case, was his agent on work which is ordinarily the part of the work of the factory or establishment or which is the preliminary to the work carried on in or incidental to the purpose of the factory or establishments. Shri Sanzgiri, on the other hand, contended that in the facts of the present case, it would not be permissible to hold that the immediate employer was employed under the supervision of the principal employer or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishments. Both the learned Counsel invited my attention to the definitions of the relevant

clauses of section 2 and in particular to Clause (9) of section 2 defining the word "employee", Clause (13) defining the word "immediate employer"; Clause (17) which defines "principal employer" and Clause (22) which defines "wages". However, since the controversy centres around the definition of the term "employee" appearing in section 2 Clause (9) it is necessary to reproduce the same for ready reference.

Section 2(9) :

"employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and -

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or

(ii) 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 his agent on 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; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract or service; (and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment; or any)

(a) any member of (the Indian) naval, military or air forces; or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed such wages.

Provided that an employee whose wages (excluding remuneration for overtime work) exceed at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period."

8. Before advertng to the rival contentions on the interpretation of section 2(9) of the said it is necessary to bear in mind the social background behind the enactment of the Employees" State Insurance Act, 1948. As the preamble reads, it is an Act to provide for certain to employees in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto. In this connection, Shri Jaykar for the appellant has invited my attention to the decision of the Supreme Court in the case of Royal Talkies, Hyderabad and others v. Employees State Insurance Corporation through its Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation, . This was a

case of cinema theatre where there was a canteen and a cycle stand for providing better amenities for the customers and improvement of the business. The question was whether the two operations, namely, keeping a cycle stand and running a canteen were incidental or adjunct to preliminary purpose of the theatre within the meaning of sub-clause (ii) of Clause (9) of section 2 quoted above. The Supreme Court referred to the statutory personality and the social mission of the Act and observed that the benefits really belong to the employees and are intended to embrace as extensive a circle as is feasible. It was, therefore, held that the social orientation, protective purpose and human coverage of the Act were important considerations in the statutory construction, more weighty than mere logomachy or grammatical nicety. It was held that all that the statute required was that the work should not be irrelevant for the purpose of the establishments. It was sufficient, if it was incidental. On the evidence on record, therefore, in the case of Royal Talkies, the Supreme Court came to the conclusion that the two operations a cycle stand and running a canteen were incidental or adjunct to the preliminary purpose of the theatre. In para 9 of the judgment at pages 1480-81, the Supreme Court observed thus:

"A conspectus of the statute, to the extent relevant, is necessary to appreciate the controversy at the Bar. The statutory personality and the social mission of the Act once projected, the resolution of the conflict of interpretation raised in this case is simple. Although, technically the Act is a pre-constitution one it is a post-Independence measure and shares the passion of the Constitution for social justice. Articles 38,39,41,42,43 and 43-A of the Constitution show concern for workers and their welfare. Since Independence, this legislative motivation has found expression in many enactments. We are concerned with one such law designed to confer benefits on this weaker segment in situations of distress as is apparent from the preamble. The machinery for state insurance is set up in the shop of a Corporation and subsidiary agencies. All employees in factories or establishments are sought to be insured against sickness, and allied dis-abilities, but the funding, to implement the policy of insurance, is by contributions from the employer and the employee. In view of the complexities of modern business organisation the principal employer is made primarily liable for payment of contribution "in respect of every employee whether directly employed by him or by or through an immediate employer". Of course, where the employee is not directly employed by him but through another "immediate employer", the principal employer is empowered to recoup the contribution paid by him on behalf of the immediate employer (section 41). There is an Inspectorate to supervise the determination and levy of the contributions. There is a chapter prescribing penalties; there is an adjudicating machinery and there are other policing process for the smooth working of the begin project envisaged by the Act. The benefits belong to the employees and are intended to embrace as extensive A CIRCLE AS is feasible. In short, the social orientation, protective purpose and human coverage of the Act are important consideration in the statutory construction, more weighty than mere logemachy or grammatical

nicety".

In the light of this philosophy the Supreme Court observed thus in para 18 at page 1483 of the report :

"Therefore, we move down to section 2(9)(ii). Here again, the language used is extensive and diffusive imaginatively embracing all possible alternatives of employment by or through an independent employer. 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. Assuming that the last part of section 2(9)(ii) qualifies both these categories, all that is needed to satisfy that requirement is that the work done by the employee, must be (a) such as is ordinarily (not necessarily non-statutorily) part of the work of the establishment, or (b) which is merely preliminary to the work carried on in the establishment, or (c) is just incidental to the purpose of the establishment. No one can seriously says that a canteen or cycle stand or Cinema magazine booth is not even incidental to the purpose of the theatre. The cinema goers ordinarily find such work an advantage, a facility an amenity and sometimes a necessity. All that the statute requires is that the work should not be irrelevant to the purpose of the establishment. It is sufficient if it is incidental to it. A thing is incidental to another if it merely appertains to something else as primary. Surely such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either. Much depends on time and place, habits and aspetites, ordinary expectations and social circumstance. In our view, clearly the two operations in the present case, namely, keeping a cycle stand and running a canteen are incidental or adjuncts to the preliminary purpose of the theatre."

9. Shri Jaykar has then invited my attention to the decision of the Supreme Court in the case of Regional Director, Employees" State Insurance Corpn., Madras Vs. South India Flour Mills (P) Ltd., . This was a case where the work involved was construction of the additional buildings required for the expansion of a flour mills. It was held that such work of construction of the additional buildings required for the expansion of the factory-flour mill-must be held to be ancillary, incidental or having some relevance to or link with the object of the factory. It is not correct to say that such work must always have some direct connection with the manufacturing process that is carried on in the factory. The expression "work of the factory" should also be understood in the sense of any work necessary for the expansion of the factory or establishment or for augmenting or increasing

the work of the factory or establishment. Such work is incidental or preliminary to or connected with the work of the factory or establishment. Hence the Supreme court held that the workers employed for the construction work of the additional buildings for the expansion of the factory were employees within the meaning of Clause (9) of section 2 of the said Act. In para 2 of the said Act. In para 12 the Supreme Court observed thus at page 1690 of the report.

"Therefore, the investigation under the principal question formulated above boils down to this, namely, whether the construction of factory buildings for the expansion of the existing factories is incidental or preliminary to or connected with the work of the factory or not. It has been already noticed that the definition of the term "employee" u/s 2(9) of the Act is very wide. It includes within it any person employed or any work incidental or preliminary to or connected with the work of the factory or establishment. It is difficult to enumerate the different types of work which may be said to be incidental or preliminary to or connected with the work of the factory or establishment. It seems that any work that is conducive to the work of the factory or establishment or that is necessary for the augmentation of the work of the factory or establishment will be incidental or preliminary to or connected with the work of the factory or establishment. In the instant cases, the additional buildings have been constructed for the expansion of the factories in question. It is because, of these additional buildings that the existing factories will be expanded and, consequently, there will be increase in the production, that is to say, increase in the work of the factories concerned. So the work of construction of these additional buildings has a link with the work of the factories. It cannot be said that the construction work has no connection with the work or the purpose of the factories. So it is difficult to hold that the work of construction of these additional factory buildings is not work incidental or preliminary to or connected with the work of the factories."

In para 13 of the judgment at page 1690 the Supreme Court refers to the social philosophy behind the statute in the following words.

"The Act is a piece of social security legislation enacted to provide for certain benefits to employees in case of sickness, maternity and employment injury. To hold that the workers employed for the work of construction of buildings for the expansion of the factory are not employees within the meaning of section 2(9) of the Act on the ground that such construction is not incidental or preliminary to or connected with the work of the factory will be against the object of the Act. In an enactment of this nature, the endeavour of the Court should be to interpret the provisions liberally in favour of the persons for whose benefit the enactment has been made."

The Supreme Court thereafter in para 14 referred with approval to the observations of Krishna Iyer, J., in the case of Royal Talkies Hyderabad (supra) and concluded that the workers employed for the construction work of the additional buildings for the expansion of the factory were the employees within

the meaning of section 2(9) of the said Act.

10. Apart from these above two cases directly under the said Act, Shri Jaykar has also invited my attention to the decision of the Supreme Court in the case of Silver Jubilee Tailoring House and Others Vs. Chief Inspector of Shops and Establishments and Another, . This is a case under the Andhra Pradesh (Telangana Area) Shops and Establishment Act, 1951 and the question was whether stitchers employed by the tailors could be deemed to be persons employed u/s 2(24) of the said Andhra Pradesh Act. Dealing with this question the Supreme Court observed that right to control the manner of the work would not be exclusive test for determining the relationship of employer and employee. It is also to be considered as to who provides equipment. It might be that little weight can now a days be put upon the provisions of tools of minor character as opposed to plant and equipment on a large scale. But so far as tailoring is concerned, the fact that sewing machines on which the workers do the work generally belong to the employer is an important consideration for deciding that the relationship is that of master and servant. The Supreme Court further observed that apart from this when the employer has the right to reject the end product if it does not conform to the instructions of the employer and direct the worker to restitch it, the element of control and supervision is also involved. The Supreme Court further observed that the fact that the stitchers take up the work from other tailoring establishment and do that work in the shops in which they generally attend for work and that they are not obliged to work for the whole day does not militate against their being employees of the proprietor of the shop where they attend for work.

11. Relying upon the above three judgments, it was sought to be contended by Shri Jaykar that the marble fixer in the present case, would be the employee of the respondent-Company. Shri Jaykar has further invited my attention to some of the unreported decisions of this Court, two of which are directly dealing with the case of marble fixers. The first is the decision dated 10th January, 1986 rendered by Vaze, J., in First Appeal No. 103 of 1976 in the case of Employees State Insurance Corporation v. Messrs Hindustan Marble Pvt. Ltd. This was a case, where the respondent-Company had employed one Abdul Rashid as sub-contractor for fixing the marble and the total amount of Rs. 96,000/- was paid to the said Abdul Rasheed out of which Rs. 71,856/- were paid as wages. As the principal employer did not give the break-up of the profit supported by the account book or other documents, the Corporation claimed the contribution on the entire amount of Rs. 96,000/- at 2% as employees' contribution and 3% as employers' special contribution. Accepting the contention of the Corporation, Vaze, J., held that the entire marble tiles and slave together with the cement material was supplied by the respondent-Company and it was common ground that laying of marble tiles in situ was one of the activities of the Company. Consequently, the learned Judge came to the conclusion that the trial Court was wrong in holding that the casual workers employed at the site were not the employees of the Company within the meaning of section 2 Clause (9) of the said

Act. In the result the appeal filed by the Corporation being First Appeal No. 103 of 1973 was allowed.

12. The second decision to which my attention has been invited is the one dated 23rd March, 1988 rendered by Sharad Manohar, J., in First Appeal No. 26 of 1977 in the case of The Employee State Insurance Corporation v. Indiana Tiles and Marble Corporation. This was also a case of a marble fixing contractor and the question precisely was one which arose before me, namely, as to whether the marble fixing contractor was the employee of the principal employer, namely, the respondent-Company. The learned Judge has discussed the relevant definitions appearing in section 2 and has come to the conclusion that once it was held that one of the activities of the Company was to lay and polish the tiles in the buildings outside the factory, the Company was free to send its own employees working in the factory to do the work outside the factory or to entrust the work not to its direct employees but to the employees of its contractors. It was held that the Company would be liable to pay the dues in respect of the employees of the contractor.

13. Shri Jaykar has then invited my attention to the Division Bench decision dated 23rd and 24th January, 1989 in Letters Patent Appeal No. 21 of 1982 in First Appeal No. 393 of 1974 in the case of a tailoring contractor who employed the stitchers holding that stitching was a necessary and integral part of the tailoring business. The Division Bench has observed as under:

"It is now well settled that the mere fact that there is no direct supervision or control over the workers will not mean that there is no master and servant relationship between them and those who engage them. It is not necessary that the employer should control the manner of the work done at every stage. It is enough if there is a general supervision or control over the work put in. In the present case, the customers' orders are taken at the Prarthana time of taking the orders, measurements of the customers are taken and cloth is cut according to the measurements, and the cut-cloth is then sent to the stitchers with instructions for stitching according to the measurements and requirements. After the clothes are stitched according to such instructions, the customers are given trial, may be more than one, and modifications are carried out by the stitchers in terms of the new instructions. In other words, the stitchers have to stitch the clothes as per the orders and instructions of the respondent. This according to us, constitutes sufficient supervision and control over the manner in which the work is done by the stitchers. The supervision and control over a work may vary depending upon the nature of the work and the skill required to execute the same. It need not be uniform in respect of all work. When, however, the minimum necessary control as in the present case is exercised, it is a sufficient indication that the relationship of master and servant exists between the parties. On this criterion, we are more than satisfied that in the present case, there being the required supervision and control on the manner of the work executed by the stitchers there is a relationship of master and servant between the respondent

and the stitchers and the stitchers are employees of the respondent within the meaning of the Act."

14. On the other hand Shri Sanzgiri the learned Counsel appearing on behalf of the respondent-Company relied upon the judgment of the Division Bench of this Court in the case of Employees State Insurance Corporation v. Shalimar Tar Products (1935) Limited, reported in 1976 II LLJ 330. The question which arose in that matter was whether the persons employed by the respondent-Company on their site contract job outside the factory premises were their employees as defined in the E.S.I. Act. The said Company undertook the water proofing contract in which it utilised some of the articles or products produced by its factory. For the water proofing work certain persons were employed outside the factory at the contract site. It was contended that these persons though did not fall under Clauses (i), (ii) and (iii) of section 2(9) of the Act, yet fell within the inclusive definition as they could be said to be engaged in the work of distribution of the products of the factory. In the facts of the case, the Division Bench held that it was only incidental that for carrying out the contract of water proofing work, the Company utilised some of its products manufactured by the factory and in this way a part of the product of the factory is distributed or can be said to be sold in the process of carrying out the water proofing contracts, but that cannot mean that they were persons employed for the work connected with the distribution or sale of the product of the factory. In the facts and circumstances of the case, the Division Bench, therefore, came to the conclusion that the persons employed in the water proofing contract work would not fall even within the inclusive definition of the word "employee" in section 2(9) as they cannot be said to be persons employed on work or connected with the distribution or sale of the product of the factory. Apart from the fact that the Division Bench itself granted leave to appeal to the Supreme Court under Article 133(1)(a) and (b), as is evident from para 9 of the judgment at page 334 of the report, with respect, in my view, the ratio of the said decision in Shalimar's case can have no application to the facts of the present case. Indeed, it must be mentioned that before Vaze, J., who decided First Appeal No. 103 of 1976, on which reliance has been placed by Shri Jaykar, the decision in Shalimar's case was cited in support of the arguments advanced by M/s. Hindustan Marble (P) Ltd. However, the learned Judge has, in para 7 of his judgment, distinguished the ratio in Shalimar's case as being wholly inapplicable to the case of a marble fixing contract.

15. Shri Sanzgiri then relied upon the recent judgment of the Supreme Court in the case of Calcutta Electric Supply Corporation Ltd. and others v. Subhash Chandra Bose and others, reported in 1992 (I) CLR 932. In the majority judgment, the Supreme Court has taken the view, in the facts of the case, that the mere checking of the work of the electrical contractor after the same was completed would by no means amount to supervision within the meaning of section 2(9)(ii) of the said Act. This was a case where the contract related to the laying of the new underground cables, conversion of overhead mains and service

and maintenance to the underground system. The work being highly sophisticated in nature, requiring special skill and expertise, was given by the Calcutta Electric Supply Corporation to the contractor on the condition that the latter will have to provide competent supervision while the work progresses, in accordance with the provisions of the Indian Electricity Rules, 1956, which, in the larger interest of the electrical network and the community and its safe-guards required an electrical contractor obtaining a licence to carry out electrical installation work of the kind mentioned. The said electricity rules of 1956 obligate the said contractor to take in his services a person holding a valid certificate of competency under whose direct supervision the work is required to be carried out and on completion; its final report being first signed by the supervisor supervising the work and then countersigned by the holder of the licence, who will be responsible for the due execution of the work. The licence is capable of being rendered invalid or liable for cancellation due to non-employment of a supervisor given in the terms and conditions. Even if the terms of the contract and the terms and conditions of the licence, the first being at the behest of the CESC and the second being at the behest of the Government of West Bengal, be suggested to be complementing each other, still there cannot be so interplayed to mean that an agency, express or implied, had been created by the CESC in favour of the electrical contractor appointing him to supervise the work as envisaged u/s 2(9) of the Act. The Supreme Court further held that all that was found in the facts of the case, was that the said work, on completion, was checked by CESC and was then accepted. It was held that checking of the work after the same is completed and supervision of the work while in progress was not the same. These have different perceptions. Checking of work on its completion is an activity, the purpose of which is to finally accept or reject the work, on the touch-stone of job specifications. Thereafter, if accepted, it has to be paid for. Indisputably electrical contractors had to be paid on the acceptance of the work. This step by no means is supervision exercised. Neither can it be the terminating point of an agency when the interests of the so called principal and the so called agent become business like. In para 11 of judgment at page 937 of the report, the learned Judge Punchni, J., who delivered the majority judgment, has referred to the earlier decisions of the Supreme Court in *Royal Theatre's* case (*supra*). Para 19 of the judgment, however, clearly brings out the distinction between the facts of the present case and the facts of the case before the Supreme Court. It has been clearly observed in para 19 at page 940 of the report that all that was found was that the said works on completion were checked by CESC and then accepted. It has been held that by necessary implication of the terms and conditions of the contract in the case before the Supreme Court the supervision by CESC or its agent stood excluded. Supervision rested with persons holding valid certificate of competency for which a register of supervision was required under the licence to be maintained. Considering the scope of section 182 of the Indian Contract Act, the Supreme Court has held, in para 19 of its judgment, that there was no such agency, factually or legally, created on behalf of the CESC in favour of the electrical contractors and none could be as that

would violate the statutory scheme of distinction well marked u/s 2(a) of the Act.

16. It is true that Justice K. Ramaswamy, who delivered the dissenting judgment in the CESC's case has held that the employees working under the respondent performed their duties in execution of the works, repairs and maintenance thereof in connection with the generation, transmission and distribution of the electrical energy by the Corporation licensee. The Corporation was held to be the principal employer. The learned Judge has been referred to the decision in *Royal Theatre's case* (supra) as also to the decision in *South India Flour Mills case* (supra). However, suffice for me to say that on the facts found in the present case, with respect, the ratio of the majority decision of the Supreme Court in CESC case will have no application here.

17. I have already summarised above as to what has been the finding of the learned Judges who delivered the majority judgment in the CESC case and the finding is categoric to the effect that there was mere checking by CESC on the work being completed and this was far from the supervision of the work while in progress. On these facts, in my view, Shri Sanzgiri would not be justified in placing reliance on the ratio of the Supreme Court judgment in CESC's case.

18. In this view of the matter, I am of the view that on the evidence on record in the present case, the work done by the marble fixing contractor must be held to be done under the supervision of the principal employer, namely, the respondent-Company. On the evidence of Ratanlal Sharma, Ex. 48, and Sattbodh, Ex. 49, it is clear beyond doubt that Ratanlal Sharma accepted the work from none-else and that he carried all his work of marble fixing under the supervision of the respondent-Company. The respondent-Company has the polishing machines. Ratanlal Sharma does not take the direct contract. He only does labour work and the marble, cement etc. everything is supplied by the respondent-Company. These are the clear admissions of the contractor who does the job of marble fixing. Similarly the evidence of Sattbodh, the director of the respondent-Company, shows that the third type of activity of the Company was to take "complete contract" which includes supply, cutting, finishing and fixing the marble tiles. Everything was done by the Company. If there was any complaint in the execution of the work, or its manner the complaint was made by the customers to the respondent-Company and the Company was to set right the things by giving necessary directions to the contractor. The responsibility of laying the marble in case of such "complete contract" is always of the respondent-Company was responsible for completing the work to the satisfaction of the customers. In my view, this leaves no manner of doubt whatsoever that the marble fixer in the present case was employed under the supervision of the principal employer and, indeed, in the facts of this case he was his agent on the work which was ordinarily the part of the work of the factory or establishment or which is preliminary to the work carried on. Thus the employees of the marble fixer would be squarely covered by the definition of the word "employer" appearing in Clause (9) of section 2 of the E.S.I. Act, 1948.

19. In view of the above, my answer to the question framed in the opening part of this judgment is that the employees employed by the marble fixer, who was the immediate employer, would be the employees of the principle employer, within the meaning of section 2, Clause (9) Sub-Clause (ii) of E.S.I. Act, 1948. In this view of the matter, the impugned order dated 30th July, 1977 is set aside. The application filed by the respondent-Company challenging the claim made by the appellant-Corporation is rejected. It is held that the appellant-Corporation is entitled to demand the contribution from the respondent-Company in respect of the employees employed by the marble fixer.

20. In view of the above, it is held that the demand of Rs. 1399/- towards the employer's special contribution and Rs. 674.55 towards the employees contribution on the wages of Rs. 34,982/- is justified. The respondent-Company is directed to pay to the appellant-Corporation the said amount and the appellant-Corporation is entitled to recover these amounts with interest in accordance with law. In the result the appeal is allowed. There will, however, in the circumstances of the case, of no order as to costs.