

(2018) 03 BOM CK 0062
In the Bombay High Court
Case No : FIRST APPEAL NO. 92 OF 1994

EMPLOYEES STATE INSURANCE CORPORATION
Vs
M/S EASTERN ENGINEERING CO.

APPELLANT
RESPONDENT

Date of Decision : 19-03-2018

Acts Referred:

Employees' State Insurance Act, 1948 — Section 1, 2(9), 2(10), 2(12), 2(22), 3, 75
Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 —
Section (2)(d)

Citation : (2018) 03 BOM CK 0062

Hon'ble Judges : MRIDULA BHATKAR, J

Bench : Single Bench

Advocate : P.M. Palshikar, Ravi Gadagkar

Final Decision : Allowed

Judgement

1.This Appeal is directed against the judgment and order dated 5th April, 1991 passed by the learned Judge, Employees Insurance Court, Bombay in

Application (ESI) No. 146 of 1984 which was filed under section 75 of the Employees' State Insurance Act, 1948 (hereinafter referred to as "The

Act"). The appellant is the opponent in the said Application. The respondent/ Engineering Company and partnership firm has filed the Application

challenging the order dated 7th April, 1984 directing the applicant to pay Rs.27,893.75 by way of contribution towards the employees of the said

establishment. The said order was confirmed by the opponent Corporation by another order dated 30th August, 1984, which were challenged under

section 75 of the Act.

2. It is the case of the respondent that they are only the commission agent, who keep the goods or machinery in the godown and are not concerned

with sale of goods or any other commercial transactions. The respondent had godown at Dadar and Sion to preserve the old record and furniture, so also the respondent is not a shop and number of employees working is also less to call it as a shop or establishment. The appellant/Corporation sent letter on 16th August, 1982 that the respondent company is covered for E.S.I. Contribution, which is denied by the respondent-company. The appellant/Corporation passed the order demanding the amount of contribution of Rs.27893.70 and therefore, the respondent-company filed an application under section 75 of the E.S.I. Act challenging the legality of the said order. The appellant/Corporation filed reply to the Application and asserted that the establishment of the respondent is a shop and relied on the report of the inspector who had visited the establishment on 8th January, 1981 and justified its order of demand of contribution. The learned Judge of Employees Insurance Court, Mumbai framed issues. Both the parties tendered evidence by examining their respective witnesses and presented the documents. The learned Judge, after considering documentary and oral evidence, allowed the Application and set aside the order dated 30th August, 1984 directing the respondent-company to pay the contribution. Hence this Appeal.

3. The points of determination are as follows:

- (i) Whether the respondent is covered under the definition of shop under the notification dated 18th September, 1978 and E.S.I. Act is applicable to the respondent?
- (ii) Whether the judgment and order passed by the learned Judge, Employees Insurance Court, Bombay is legal and correct?

4. The learned counsel for the appellant mainly relied on the evidence of factory Inspector Venkatesh Vithoba Shanbag, who had visited the factory on 8th January, 1981 and prepared the O-1 Form. The learned counsel has submitted that the said form was filled up by the respondent, which shows that in the establishment more than 20 employees were working in the year 1980. He relied on the Notification dated 18th September, 1978 issued by the Government of Maharashtra. He pointed out that as per clause (3) of the Schedule in the establishment wherein twenty or more employees are employed or on the date of inspection or any day of the preceding 12 months, then that establishment is considered as shop and so, E.S.I Act is

applicable to such establishment. He relied on the report and also O-1 Form. He submitted that out of 20 employees, who are drawing wages of less

than Rs.1000/-, if some are employed, it is the liability of the employer to pay their insurance. He argued that it is the case of the respondent that he

was not having 20 employees at the relevant time in the establishment is false. The respondent-company is working as a Commission Agent so they

were very much dealing with the services. The trial Court has erred in putting the burden on the appellant to prove that the persons working in other

branches were doing the ancillary or incidental services in connection with the business of the establishment. He further argued that for the purpose of

definition of shop, the narrow meaning under the Shop and Establishment Act cannot be adopted to the shop under ESI Act but wider meaning is to be

given. In support of his submission, the learned counsel relied on the following judgments of the Hon'ble Supreme Court - Bangalore Turf Club

Limited vs. Regional Director, Employees' State Insurance Corporation in a group of Civil Appeals¹¹ (2014) 9 SCC 657.

He submitted that on all counts, though the respondent could not prove its case by leading sufficient evidence, the learned trial Judge has erred in

assessing the evidence in favour of the respondent and passed the order which is bad in law, hence the said order is to be set aside.

5. Per contra, the learned counsel for the respondent has supported the judgment and order passed by the trial Court. He argued that the total number

of workers at Mumbai are less than 20. He submitted that the report was given at the insistence of the Factory Inspector and, therefore, the number

of workers of the other branches are also mentioned during the period of 11 months preceding the date of the inspection. He further argued that in

order to attract the Act, there must be 20 persons who are drawing salary less than Rs.1000/-. If the employees are drawing lesser salary than

Rs.1000/-, then only the employer is liable to pay contribution in E.S.I funds under the Act. He further submitted that by way of Circular, the State of

Maharashtra has made the act applicable to the shop and other establishments. The godown of the respondent is not the place where either

manufacturing or sale or purchase takes place. Some goods are only stored along with record and old furniture of the respondent-company. As no

sale, transaction, manufacturing of goods take place in the office/godown of the respondent-company at Mumbai, the activity of storage of goods in

the godown will not be an activity which will render the establishment a status of shop. He submitted that therefore the application was made by the

respondent under section 75 of the E.S.I. Act and the trial Court has rightly passed the order in favour of the respondent.

6. In the course of arguments on the point of applicability, the judgment of the Hon'ble Supreme Court in the case of Employees State Insurance

Corporation vs. M/s. M.M. Suri & Associates (P) Ltd.² AIR 1999 SC 803 is pointed out and discussed.

7. The main challenge to the order is on the ground of applicability and coverage of the Act to the respondent-company. In order to ascertain the

applicability, the number of employees in the establishment is to be taken into account and for determining the coverage, nature of the activity or the

business carried out by the establishment or the industry is to be looked into.

8. For the purpose of applicability of the E.S.I. Act, the number of employees working in the establishment should be 20 or more. In view of the

Clause, even if 20 employees are shown as working on any single day preceding 12 months and there may be less employees than 20 on remaining

days of 12 months yet the act is to be made applicable.

9. Section (3) under Chapter II of the E.S.I. Act states about the establishment of Employees State Insurance Corporation for the administration of

the scheme of Employees' State Insurance in accordance with the provisions of the Act. Section 3 does not differentiate employees on the basis of the

wages earned by them. The Corporation guarantees medical expenses for the employees. Under the Act, each employee(whose wages are below

the ceiling, i.e., as the amount notified by the Government) is required to pay contribution in the scheme (In the year 1990-91, in the present case, the

amount notified by the State of Maharashtra was Rs.1000/-). It was argued by the learned Counsel of the ESIC that for the purpose of applicability of

the scheme, the requirement of 20 employees drawing wages below the ceiling is required is not a correct understanding of the Section. The factory is

defined under sub-section (12) of Section 2 wherein the manufacturing process is carried out by employing 10 or more persons. The number of

employees is mentioned in the Act, so that they can fall in a particular category, therefore, if persons are less than 10 and though the manufacturing

process is going on, it cannot be called a factory and in the said workplace, E.S.I.

Act is not attracted. However, if 10 persons are employed where the manufacturing process is carried out, then for the persons who are drawing less than the ceiling limit of the wages, they are covered under E.S.I.

Act and the employer is under legal obligation to pay his share of the E.S.I. Contribution only for those employees. Similarly, the establishment of 20 or more persons where activity or sale/purchase of goods is conducted, fulfills the definition of shop under the Circular issued under the Act and in the said establishment, the employees drawing less than ceiling limit are covered under E.S.I. Scheme and for employees drawing less than ceiling limit of wages, the employer is liable to pay his share of the contribution.

10. Notification No. ESI.1677/3910/P.II-15 dated 18th September, 1978 is reproduced thus:

â??In exercise of powers conferred by sub-section (5) of section 1 of the Employees' State Insurance Act, 1948 (34 of 1948), the Government of Maharashtra, in consultation with the Employees' State Insurance Corporation and with the approval of the Central Government, after having given six months' notice as required by the said sub-section (5) hereby, with effect from the 12th day of November 1978, extends all the provisions of the said Act to the classes of establishments, mentioned in column 1 of the Schedule hereto appended, in the areas specified in column 2 of that

Schedule.â??

SCHEDULE

1. â?|.

2. â?|.

3. The following establishments wherein twenty or more employees are employed, or were employed for wages on any day of the preceding twelve months, namely:

hotels; (ii) restaurants; (iii) shops; (iv) cinemas, including preview theatres; and (v) newspaper establishments as defined in section (2)(d) of the

Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (45 of 1955)â??.

11. It is useful to produce Section 1 of the Employees' State Insurance Act, 1948:

â??1.Short title, extent, commencement and application.- (1) This Act may be called the Employees' State Insurance Act,1948.

(2) It extends to the whole of India [***].

(3).....

(4) It shall apply, in the first instance, to all factories (including factories belonging to the Government) other than seasonal factories.

[Provided that nothing contained in this sub-section shall apply to a factory or establishment belonging to or under the control of the Government

whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.]

(5)

[(6) A factory or an establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons

employed therein at any time falls below the limit specified by or under this Act or the manufacturing process therein ceases to be carried on with the

aid of power.]â??.

12. Section 2(9) reads thus:

2(9) â?? employee â? means any person employed for wages in or in connection with the work of a factory or establishment to which this Act

applies and â?

(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) â?|...

(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 of 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 ;

[â?|....]

but does not include]

(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 5[such wages as may be prescribed by the Central Government] :â??

13. Section 2(10) states as follows:

(10) â?? exempted employee â?? means an employee who is not liable under this Act to pay the employeeâ??s contribution ;

14. Thus, the distinction between Sections 2(9) and 2(10) is mainly wage based and the ceiling is placed on the basis of amount of wages earned by the employee. If that yardstick is applied, then we may get two types of employees in one establishment or factory. There may be different pay scales or increase in wages due to increment because of experience, skill etc. There can be skilled or unskilled workers. There may be freshers or experienced workers. On that basis, the wages may differ. However, some of these employees may be getting wages below the ceiling and some above the ceiling. However, they all are getting wages and not salary. Therefore, they all are to be considered as employees.

15. This is supported by further sub section, i.e., Section 2(10) of the Act wherein the term â??exempted employeeâ? is defined â??an employee who is not liable under this Act to pay the employee's contributionâ?. That means, though he is an employee under the Act, he is that class of employee may be drawing salary or wages but above the ceiling hence is not liable to pay the employee's contribution and, therefore, will not get the medical benefits under the Scheme as they are getting better payment. The legislature has thoughtfully considered the possibility of difference in the wages of the employees working under the same factory or establishment and the employees, who are getting salary less than prescribed wages, are categorized and defined under Section 2(9) of the Act. For those employees, it is obligation on the part of the employer to pay the contribution on their behalf. Section 2(9) does not only define the employees on the basis of wages but it also further defines and covers the class of employees on the basis of relationship with the employer, i.e., contractual workers who are having a temporary service and so also the employees working in other department and branches.

16. In Clause (3) of the Schedule of the Notification, the word â??employeesâ? is used and therefore, it can be restricted to only the employees under

section 2(9) and excludes employees defined under section 2(10). However, the scheme will be applicable to the establishment due to the twenty

number of the employees who are drawing wages.

17. Learned Counsel for the ESIC argued by giving example that the employer has to pay the contribution of the workers who are earning less than

Rs.1,000/- but for the application of the Act, the minimum number of employees should be 20. Thus, out of 20, there may be two employees who are

drawing less than Rs.1,000/- or there may be 18 employees who are drawing less than Rs.1000/-, for those employees only the employer is required to

pay the contribution. For applicability of the Act, if such criterion of 20 employees earning less than Rs.1000/- is applied, then it is very easy for the

employer to give go-bye to the scheme, just by paying wages of Rs.1,001/- to one or more employees. Such situation is not contemplated under the

Act, as it will defeat the object of the Act.

18. In the case of Employees State Insurance Corporation vs. M/s. M.M. Suri & Associates (supra), the Hon'ble Supreme Court held that 20 or more

persons should be those who fall under the definition of 'employee' as given in Section 2(9) of the Act. The Supreme Court observed that though

6 to 7 persons drawing wages less than prescribed ceiling of the wages and other employees drawing above that ceiling and though the number is 20

or more, the scheme cannot be applied, as the definition of number of 20 employees under section 2(9) of the Act is not complete. The Supreme Court

has considered the earlier rulings in the case of Regional Director, Employees State Insurance Corporation, Trichur vs, Ramanuja Match

Industries, AIR 1985 SC 278. In that case, the question before the Court was whether a partner of the firm is an employee and it was answered

'No' because he was not drawing wages. Thus, the Court in the case of M.M. Suri has mainly applied the yardstick of wages which is defined

under section 2(22) of the Act. In the said case, the Hon'ble Supreme Court has also relied on the case of Employees' State Insurance Corporation vs.

Apex Engineering Pvt. Ltd., (1998) 1 SCC 86 wherein the judgment of the Bombay High Court holding that the Managing Director of the respondent-

company was not an employee within the meaning of Section 2(9) of the Act was reversed. The directions given in the case of ESIC vs. Apex

Engineering Pvt. Ltd. were reproduced by the Hon'ble Supreme Court in the case

of M.M. Suri. Considering those directions, what is important is that the persons should be employed on wages on any work connected with the work of the factory or establishment. In the case of M.M. Suri (supra), the Hon'ble Supreme also specifically reproduced the finding given by the Hon'ble Supreme Court in the case of Regional Director, Employees State Insurance Corporation, Trichur vs. Ramanuja Match Industries (supra) wherein it is observed thus:

“We do not doubt that beneficial legislations should have liberal construction with a view to implementing the legislative intent but where such beneficial legislation has a scheme of its own there is no warrant for the Court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the scheme.”

This proposition of law cannot be disputed, as it is a settled principal of law.¹⁹In the said case, there were 5 officers and the number of workers were admittedly less than 20, therefore, the Supreme Court in the last paragraph of the said judgment has observed that

“In the present case, there is no dispute that as per the notification in question, establishment of respondent is a shop and number of employees falling within the definition of Section 2 (9) of the Act are less than 20, We, therefore, uphold the impugned judgment of the High Court that since in the establishment of the respondent, the employees number less than 20 the notification dated September 30, 1988 extending the Act to the establishment of the respondent is not applicable.”

20. In the judgment of M.M. Suri (supra), the Hon'ble Supreme Court has referred and relied on the judgment of Regional Director, Employees State Insurance Corporation, Trichur vs. Ramanuja Match Industries (supra) and ESIC vs. Apex Engineering Pvt. Ltd. (supra). As mentioned earlier, the issue was whether the partner can be covered under the definition of employee and so also whether the Managing Director can be considered as an employee. In the case of Employees State Insurance Corporation, Trichur vs. Ramanuja Match Industries (supra), he, being the partner though drawing the wages lesser than the ceiling, the partners were not the employees and rather they were the proprietors of the firm and if the number of the partners is deducted, then the total number of employees would be less than

twenty. However, in the case ESIC vs. Apex Engineering Pvt. Ltd.

(supra), the Supreme Court allowed the Appeal of ESIC and held that as the Managing Director remained within the permissible limits of wages as

per Section 2 sub-section

(9) of the Act and hence it reaches the figure of twenty. Thus all the requisite conditions for applicability of the term 'employee' as defined by the Act

stood satisfied in the case.

21. In the case of M.M. Suri (supra), the Hon'ble Supreme Court also relied on the judgment of Division Bench of the Andhra Pradesh High Court in

Andhra Pradesh State Electricity Board, Nellore v. Employees State Insurance Corporation, Hyderabad, (1997) Lab.I.C. 1107. In the said judgment,

the Division Bench has expressed that wider meaning is to be given to definition of 'wages' while considering Section 2(9) of the Act and it also

referred Section 2(12), i.e., of the factory and Division Bench held that in the said defining clause, stress was given on the word 'persons' and

thus for the applicability of the Act, only criteria is to see if the establishment has 20 or more persons in its employment. The Supreme Court in M.M.

Suri's case further observed that the definition of 'factory' has changed by Amendment Act 44 of 1966 and it was further substituted by the words

the persons employed for wages"" and the word 'wages' is specifically introduced in the Section and defined under Section 2(22) of the Act. The

Hon'ble Supreme Court in M.M. Suri has concluded that â??In our view, therefore, the Act would apply to an establishment only when number of

employees is 20 or more and all those employees answer the description of employee contained in Section 2(9) of the Act.

22. Thus, though the learned counsel for the appellant has argued that as per the definition under section 1(3) of the Act, it is made applicable to the

establishment wherein 20 employees are employed on wages, irrespective of their wages either below or above ceiling and hence the definition of

Factory or Establishment is fulfilled, cannot be accepted. These submissions are though found very impressive and compelling, in view of the judgment

and ratio laid down in the case of M.M. Suri, no another view can be taken and the submissions of learned counsel cannot be accepted on this point.

23. However, in the present case, the Act is applicable in view of different set of facts which I address hereafter. In the present case, the factory

inspector has visited on 8th January, 1981 and he prepared his report on the same day in which he has incorporated the number of employees as per wage register from January 1978 to December 1980 and muster roll from January 1978 to January 1981. At the end of the enquiry report, he produced a chart of the year 1980, which is 12 months preceding to the date of inspection, the wage register and muster register disclose the number of employees as :

Jan Feb March April May June July Aug. Sep. Oct. Nov. Dec.

1980 WR 26 26 26 26 27 27 27 26 26 26 27 27

MR 22 22 23 23 24 24 24 24 23 22 22 22

24. The counsel for the respondent tried to explain these figures that these figures are given at the instance and insistence of the factory inspector. He

submitted that the respondent company is working as Commission agent at Mumbai having various branches at Jamshedpur, Delhi, Kolkatta and has

got independent factory at Bangalore. He submitted that the number of employees who are working at the office at Mumbai, Delhi, Kolkata and

Jamshedpur are mentioned and therefore, the number of these employees cannot be taken into account.

25. My attention is drawn by the learned counsel for the appellant to Form No. O-1 which is Employer's Registration Form Regulation 10-B. This

form was filled in by the Accountant of the respondent and where the same figures of the attendance of the employees and wage roll of the

employees is shown in the year 1980. Thus, the figures mentioned in the report of the factory inspector cannot be disputed. So far as counting the

number of employees in the branches is concerned, Section 2(9) is very clear.

26. Thus, as per the Act, the employees from all the branches are also to be taken into account for the purpose of definition of the employees.

Moreover, in the evidence of Shekhar Hovaya Shetty, the witness for the applicant, who is the Chartered Accountant of the respondent, has given

evidence and he has specifically mentioned that the company's independent factory situates at Bangalore in which the company manufactures pressed

sheet metal components and celing jobs. Bangalore factory started in the year 1971-72 and the employees of the Bangalore office are not mentioned

in the submission to the factory inspector. Thus, as per his evidence, there may be less employees working at Mumbai office alone which is a HUB

but the employees working in the branches, excluding Bangalore, if taken into account, the figure goes above 20 and therefore, ESI Act is applicable

to this respondent.

27. The appellant has taken defence that some workers in the factory are drawing wages above ceiling, i.e., then ceiling was Rs.1,000/-. The trial

Court has committed error in putting burden to prove this fact on the respondent/ Corporation. The learned Judge of Employees Insurance Court has

stated that the Corporation has failed to discharge the burden on the point that 20 workers in the establishment were drawing salary below the ceiling.

The burden in fact lies not on the Corporation but on the appellant-company itself. The persons are in employment of the appellant and hence the fact

that how much wages are paid to each of them is within the knowledge of the appellant. The Corporation when alleges that the number is 20 and they

are in employment of the appellant and therefore, demands contribution, then the onus lies on the appellant to come forward and adduce evidence and

show that some of the workers are paid wages above the ceiling and hence E.S.I. Act is not applicable to the appellant. The burden should be put on

the person who asserts and the fact is within whose knowledge. A person may claim certain things on the basis of certain physical facts. The burden

is on the Corporation to show that 20 persons were employed in the premises when it was inspected by their officer. When it is shown that the

persons are 20 and it is claimed that they are drawing the wages below the ceiling, it is not possible for the Corporation to prove this fact that they are

below the ceiling, as the Corporation is not the employer of these persons. About the wages and payment, the knowledge is not with the corporation

but being the employer, with the appellant. Therefore, onus shifts on the appellant to prove that some of these 20 employees were drawing wages

below Rs.1000/-. The documentary proof of the payments and receipts of the same is with the appellant and, therefore, those things should have been

produced before the learned Judge at the time of evidence by the appellant. Thus finding given by the learned Judge of Employees Insurance Court is

wrong and deserves to be set aside.

28. So far as coverage is concerned, the applicant admittedly is not involved in the manufacturing activities in Mumbai or other branches except

Bangalore. It is considered as a shop, hence, covered under the Act. The shop is

not included in the Act but by Government Notification No, ESI/1677/3910/P.11-15 dated 18th September, 1978, the Government of Maharashtra has enhanced the coverage of the ESI Act to the establishment wherein hotels, restaurants, shops, cinemas, newspaper establishments are also included. Clause No. 3 of the Schedule of the said Notification is very relevant for the purpose of application and coverage of the Act.

29. In the case of Bangalore Turf Club Limited (supra), the issue before the Court was whether "Race Club" is an "establishment" for the purposes of E.S.I. Act and whether the Turf Clubs fall within the scope of the definition of word "shop" as categorized in the notifications. In the said judgment, the Hon'ble Supreme Court while considering the object of E.S.I. Act has held that E.S.I. Act should receive a liberal and beneficial construction so as to achieve legislative purpose without doing violence to the language of the enactment and the Act was enacted to provide certain benefits to employees in case of sickness, maternity in case of female employees, employment injury and to make provision in certain other matters in relation thereto. It is further held as under:

"The test of finding out whether professional activity falls within the meaning of the expression "establishment" is whether the activity is systematically and habitually undertaken for production or distribution of the goods or services to the community with the help of employees in the manner of a trade or business in such an undertaking. If a systematic economic or commercial activity is carried on in the premises, it would follow that the establishment at which such an activity is carried on is a "shop".

30. Thus, in the present case, the actual manufacturing has taken place in the main office at Mumbai and other branches. It appears that the activity of keeping of those distribution of goods so also goods related services were taken place in Mumbai and in other branches and, therefore, the respondent is an establishment for the purpose of this Act. Hence, the judgment and order 5th April, 1991 passed by the learned Judge, Employees Insurance Court, Bombay and the order 30th August, 1984 are required to be set aside, as the appellant has established its case.

31. Hence, First Appeal is allowed. The impugned judgments and orders dated 5th April, 1991 and 30th August, 1984 are hereby set aside.