
(1986) 08 KAR CK 0011
In the Karnataka High Court
Case No : M.F.A. No. 466 of 1986

Escorts Ltd.

APPELLANT

Vs

Regional Director, ESIC

RESPONDENT

Date of Decision : 28-08-1986

Acts Referred:

Employees State Insurance Act, 1948 — Section 2 (9), 2 (9) (ii), 75, 82 (2)

Citation : (1986) ILR (Kar) 3595

Hon'ble Judges : Venkatachaliah, J;Rajasekhara Murthy, J

Bench : Division Bench

Advocate : G.S. Ullal, for Bhoopalam Associates and Subba Rao, for the Appellant; M. Papanna, for the Respondent

Judgement

Venkatachaliah, J.—In this appeal u/s 82(2) of the Employees' State Insurance Act, 1948, ("Act") Escorts Ltd., the appellant, assails the order dated 23-9-1985 made in E.S.I, Application No. 13 of 1984 on the file of the Employees' Insurance Court, Bangalore, ("ESI Court" for short).

Appellant initiated the proceedings before the ESI Court u/s 75 of the "Act" questioning the determination made u/s 45A of the "Act" demanding E.S.I. contributions from the appellant as "Principal-employer" in respect of certain workmen employed by appellant's contractors engaged for the construction of appellant's factory-buildings.

2. The material facts are these :

Appellant has a factory at Yelahanka engaged in the manufacture of "Pistons". The said project was taken-up pursuant to a project report prepared in or about the year 1974. The execution of the civil works of the factory buildings and of their sanitary and electrical installations was entrusted to three separate Contractors under rate-contracts. The contracts envisaged completion of the factory-buildings in three stages. In or about the year 1977 the buildings envisaged for the first stage were commissioned and the process of manufacture

commenced.

In respect of the execution of the subsequent stages of the buildings a sum of Rs. 41,75,252-98ps was paid to the three-contractors during the period between April 1979 and May 1980. The respondent-Corporation has sought to treat this entire sum as representing wages of the workmen and demanded the E.S.I. Contribution thereon at 7% amounting to Rs. 2,92,267/-. Proceeding this levy, an inspector of the Corporation had, on 9th and 10th of July 1980, inspected the records of the appellant in this behalf. The findings of this inspection were communicated to the appellant in the form of a notice dated 29-8-1980. Two claims for contributions were raised against the appellant. The first was as to the appellant's liability to make good the arrears of contribution in the said sum of Rs. 2,92,267/-; the second was in respect of liability said to arise out of certain employments in the canteen. The present proceedings concern the former. To this notice dated 29-8-1980, the appellant sent a reply dated 18-12-1980 repudiating liability. The substance of reply was that the said sum of Rs. 41,75,252-98 ps was paid under a "contract for service" and not "contract of service," and that at all events, in respect of the employees engaged by the Contractors, appellant would not become the "principal-employer" within the meaning of Section 2(9)(ii) of the "Act". It was contended that the work done pursuant to the contract could not be said to be "preliminary" or "incidental to the purposes" of the work of appellant's factory.

The appellant did not hear any more of it for quite some time there-after. However, on 7-2-1984, the Corporation picked-up the old threads and issued to appellant a show cause notice No. KAR.INS.VI.53/2970/67 to the effect that the Corporation proposed to determine, u/s 45A of the "Act" the liability of appellant to pay Rs. 2,92,267-70 ps as contribution and that if appellant had any cause to show against the proposed determination, it could do so within 15 days thereof. Apparently, no cause was shown within the time stipulated. Then followed the order dated 29-3-1984 determining the liability in this behalf at Rs. 2,92,267-70 ps under the said Section 45A.

Appellant disputed its liability and raised a dispute in that regard u/s 75 before the ESI Court.

3. Two points were raised before the ESI Court. The first was that in respect of employees engaged by the Contractors, appellant could not be held to be the "principal-employer" u/s 2(9)(ii). The second was that, at all events, the entire sum of Rs. 41,75,252-98ps did not represent the salary or wages of the workmen but included cost of material also and that the demand of contribution at 7% on the entire sum was bad. Evidence, both oral and documentry, was adduced before the ESI Court. On a consideration of the material placed before it, the Court rejected the first contention and held that appellant was the "principal-employer". In regard to the second question which involved a break-up of the figure of Rs. 41,75,252-98ps into its component parts of cost of material and wages, the Court set-aside the determination u/s 45A and remitted the

matter to the Corporation for a fresh determination, Appellant, aggrieved by this order of ESI Court, has come-up in appeal.

4. We have heard Sri. G.S. Ullal, Learned, Counsel for the appellant and Sri. M. Papanna, Learned Standing Counsel for the Corporation. We have been taken through the order under appeal and the evidence on record. Two other appeals M.F.A. 572 of 1986 and M.F.A. 590 of 1986 in which similar contentions had been raised were also heard along with the present-appeal. Sri. Subba Rao, Learned Counsel appearing in these appeals also made his submissions.

5. Appellant has sought to raise certain additional grounds and has also sought to adduce additional evidence in the appeal. We permitted Sri. Ullal to raise additional grounds.

The contentions urged by Sri. Ullal admit of being formulated thus :

(a) The power to make a determination u/s 45A is subject to and conditional upon the existence of certain jurisdictional-facts; and that these conditions are not shown to have satisfied and that therefore the purported determination u/s 45A was one without jurisdiction and is a nullity.

(b) In proceedings u/s 75 an employer can seek -- without more -- a mere declaration as to the nullity of such a purported determination u/s 45A and, accordingly, in the present case, appellant is entitled to such a declaration.

(c) That in such proceeding u/s 75 where an employer seeks the limited relief of a declaration that the determination u/s 45A is bad, the matter that requires to be decided is only that question and the Corporation cannot, in its defence, seek and obtain an adjudication of the dispute as to the validity of its claims otherwise and as to the liability of the employer for, and the extent of, the contributions. The Corporation must be left-to-workout its claims and remedies in such separate proceedings as may be open to it in law.

(d) At all events, the finding of the ESI Court that appellant was the "principal-employer" in respect of the workmen engaged in the building work entrusted to the contractors, is erroneous. That the Corporation in the "Employers" Guide" published by it, had declared that such workmen engaged in the first-construction of the buildings of the factory were exempt.

(e) That, as no services were capable of being rendered under the ESI scheme to the unidentifiable and shifting-mass of workmen engaged by the Contractors, there is, obviously, no quid-pro-quo for the levy and the demand is insupportable on that ground.

6. Re : Contention(a) :

Sri Ullal's contention is that the power u/s 45A(2) is invokable only on the satisfaction of certain conditions-precedent and if the objective existence of these conditions is not established, the Corporation cannot draw upon that power. He relied upon the following observations in Regional Director, Employees

State Insurance Corporation Vs. Fibre Bangalore (P) Ltd., .

"....What emerges.... is that in cases where the requirements of Section 45A, are attracted and satisfied and where the Corporation is enabled to and does make an order under and in accordance with that section determining the amount of contributions payable in respect of the employees of the factory or establishment, the Corporation can proceed to recover the amount so determined as an arrear of land revenue...."

Sri Ullal submitted that the Corporation must either show that appellant had not submitted returns, particulars, etc., or that any Inspector etc., of the Corporation had been obstructed by the Principal or immediate employer in discharging his duties. Sri. Ullal says that, neither of these conditions having been shown to have been satisfied in the present case, the Corporation derived no power to embark upon the determination u/s 45A and that therefore the purported determination was a nullity. This contention was not, in terms, raised before the ESI Court. Sri Ullal submits that this question goes to the root of the matter and that appellant be permitted to urge it. Sri Ullal relied upon certain observations of the Judicial Committee in the AIR 1949 136 (Privy Council)

7. The expression "jurisdiction", it is said, is a "verbal cast of many colours". As applied to the statutory authorities and Tribunals, the concept of "jurisdiction" is equated with the power to determine. Rubinstein, Jurisdiction and Illegality by Amnon Rubinstein, Page 212, says :

".... There is some logic in maintaining that authority to decide embodies a privilege to bind despite error, a privilege which is inherent in every judicial function....

... ..

The privilege to err, inseparable as it is from the exercise of judicial functions, cannot comprise all the questions upon which a Court has to decide...."

This power to bind despite a possible error in the decision is referred to as a "legal-shelter".

The existence of jurisdiction does not depend on the correctness of the conclusions, for the very concept of correctness is often a matter of opinion. Jurisdiction of one authority is not dependent upon the opinion as to correctness of its conclusion of another. The words of a learned author are worth recalling: D. M. Gordon on "The Relation of Facts to Jurisdiction" 45 L.Q.R. 459, at 460-461.

"....A wrong decision must be just as binding as a correct one, for, apart from infallibility being an unrealizable ideal, "correctness" is often a matter of opinion. It would be unworkable to have the binding effect of a judgment depend on its agreement with facts in the absolute, for the test would have to be resort to a second tribunal, and fallibility is inherent in the fact-finding machinery of all tribunals. No self-respecting tribunal would wish to act if it did so at the peril of

being held a usurper whenever it failed to anticipate accurately the conclusions of other Courts, conclusions perhaps based on different evidence. Even infallibility would not protect it ; it would need also the gift of prophecy to be safe from other Courts" fallibility."

This is what is meant by saying that a Tribunal which is authorised to inquire into and decide any matter does not lose its jurisdiction by reaching a wrong decision. However, if a statute conferring the power itself stipulates a condition limiting the power, then the conditions that limit the power constitute jurisdictional-questions or questions "collateral" to the merits as distinct from "adjudicator" questions or "merits of the case"". The former are preliminary questions that are to be answered affirmatively before the essential adjudicator matters could be reached, forming as it were, the "gate-way" to reach the "shelter".

In the oft-quoted passage in *The Queen v. The Commissioner for Special Purposes of The Income Tax* 1888 Q.B.D. 313 Lord Esher M. R. referred to the conditional conferment of power on an inferior tribunal to the effect that only if a certain state of facts exists and is shown to such tribunal before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. In such a case it is not for that Tribunal conclusively to decide whether that State of facts exists, and, if they exercise the jurisdiction without its existence, it will be held that the tribunal had acted without jurisdiction.

The inherent difficulties of a jurisdiction that is to rest upon the very facts a Tribunal has to decide, are not easily solved by a mere distinction between different questions of fact and giving them labels as ""collateral" or "adjudicator".

The proposition that a Tribunal authorised to decide a question does not lose jurisdiction merely because it decides that question erroneously has its own limitations. The errors may be either errors of law or errors of fact. Do both type of errors leave the decision immune from judicial review as merely "errors in jurisdiction" and not "errors of jurisdiction" ? Or do errors of law stand on a different footing and become errors of jurisdiction ? The majority opinion in *Anisminic Ltd. v. Foreign Compensation Commission* 1969(2) A.C. 147 tends to the view that in such a case "lack" and "excess" of jurisdiction get assimilated and that errors of law become errors of jurisdiction.

Referring to the impact of this decision, Supreme Court, in *Shri M.L. Sethi Vs. Shri R.P. Kapur*, observed :

"-- The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. The particular effect of the decision is that any error of law can be reckoned as jurisdictional".

8. In this particular case, however, an elaborate enquiry whether Section 45A(2) prescribes conditions which limit the jurisdiction or constitute merely statutory procedure for the exercise of the power appears unnecessary.

In regard to what are procedural questions, the learned Author says : D.M. Gordon on "The Relation of Facts to Jurisdiction" 45 L Q. R. 459 (483)

"To regard procedural questions as touching jurisdiction at " all seems to be a mistake. When any statute says that if a tribunal find certain facts it shall have power to do certain things, this does not imply that only if it finds these facts by a certain procedure it shall have power to do these things. Even if the statute prescribes the procedure, this does not make observance a condition of the power, but merely of regularity of exercise. Although procedural provisions are imperative, disregard of them creates error, not want of jurisdiction".

Even holding that they are conditions limiting the power, it must be held in this case that one of the alternative conditions has been fulfilled.

Chapter IV of the "Act", enjoins upon employees certain statutory obligations. Section 38 provides that all employees (to whom the "Act" applies) shall be insured. Section 39 envisages the kinds of contributions. Section 40(1) says that the principal-employer shall ray in respect of every employee, whether directly employed by him or by or through an immediate-employer, both the employer's contribution and the employee's contribution. Section 44(1) enjoins upon every "principal employer" the obligation to submit returns in the prescribed form containing the prescribed particulars. The omissions on the part of the appellant in this behalf is the subject matter of the notice dated 29-8-1980 and the proposal dated 7-2-1984. It must be held, therefore, that the invoking of the power u/s 45A is not rendered bad for nonexistence of the statutory pre-conditions. This of course, grants the basic postulate that appellant was the ""principal-employer" and liable as such. If, however, appellant is not the "principal-employer" u/s 2(9)(ii) of the Act, then the demand fails on account of the very non-liability of the appellant.

On contention (a) it requires to be held that the conditions for invoking Section 45A had been satisfied.

9. Re: Contentions (b) and (c) :

The point is that if the purported determination u/s 45A was a nullity then could the employer approach the ESI Court u/s 75 of the "Act" for a mere declaration--without seeking any other or further relief--that the determination was so void? Sri Ullal seeks an answer in the affirmative and says that the next proposition sequentially and logically following from this is that when such a limited challenge is brought, the "ESI Court" need only decide that question and that the Corporation, as respondent in such proceedings, cannot seek adjudication of the other question pertaining to the employers' liability.

As learned Counsel made elaborate submissions, we think it appropriate to make some observations of our own on the points. Sri Ullal presented his arguments with his accustomed emphasis and thoroughness. The arguments were, no doubt, some-what attractively presented. However, on a careful examination of

the submissions, it appears to us, his points are more attractive than sound.

10. Sri Ullal submitted that u/s 75 the employer as Arbiter-lit is can decide for himself what he should seek by way of relief and the scope of the proceedings are delimited by what he himself seeks. The proceedings u/s 75, Counsel says, is accusatorial proceedings and not inquisitorial and the Court need go only into what the party invoking that jurisdiction wants to be decided and nothing more. Sri Ullal, relying upon the language of Section 77 which provides that proceedings u/s 75 shall be commenced by an application, said that what is not so commenced--and this according him, rules, out any matter which the Corporation may, as respondent, seek to raise-- cannot be gone into.

Sri Ullal placed strong reliance on the observations of the Supreme Court in *Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others*, and *Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation*, where applying the enunciation in *Taylor v. Taylor* 1875 (1) Ch D. 426 it was held that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that the other methods of performance are necessarily forbidden.

Sri Papanna, Learned Standing Counsel for the Corporation, however, submitted that the assumptions underlying the contentions raised for the appellant are fundamentally unsound. Any such limited concept of the content of this jurisdiction would ignore the nature of the legislation ; the mischief sought to be suppressed and the remedy sought to be advanced by it. Any interpretation, says Learned Counsel, must aim at rendering a scheme of the law workable and that which hinders it and renders it unworkable must be eschewed. He submitted that this beneficent and social welfare legislation, brought-forth in realisation of the Directive Principles of State Policy, would attract a purposive construction, and the Courts must not make a fortress out of the dictionary and limit the otherwise lambent benevolence of the statute by semanticity.

11. On a careful consideration of the matter, it appears to us that the contentions advanced by Sri Ullal, if accepted, would put impediments in the way of the working of the statutory-scheme. The argument, in our opinion, also overlooks the correct inter-relationship between the functionaries exercising jurisdiction u/s 45A on the one hand and Section 75 on the other. The jurisdiction of the ESI Court u/s 75 is, it must be emphasised, not in the nature of an appeal against the determination u/s 45A. Nor does the ESI Court exercise powers of judicial review over the determination. The jurisdiction u/s 45A is an independent one ; though, however, once there is an adjudication u/s 75 that adjudication prevails over the corresponding matters determined u/s 45A. The jurisdiction u/s 75 is a superior jurisdiction. The jurisdiction of the Court of Reference u/s 18 of the Land Acquisition Act in relation to an award u/s 11 may provide some analogical assistance though we are sensible that the two positions may not, otherwise, be

comparable. A Court of Reference u/s 18 does not sit in appeal over an award u/s 11. The proceedings before the Land Acquisition Officer are not ipso facto a part of the record in the reference. The Court of Reference does not have the power to set aside the award and remit the award to the Land Acquisition Officer for a fresh determination.

12. The Legislation we are construing is a Social Welfare legislation. In *Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation*, the Supreme Court, referring to the very legislation had occasion to say :

"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....."

Again, in *Andhra University Vs. Regional Provident Fund Commissioner of Andhra Pradesh and Others*, the Supreme Court referring to the principles of construction of the "Act" said :

" In construing the provisions of the Act, we have to bear in mind that it is a beneficent piece of social welfare legislation aimed at promoting and securing the well being of the employees and the Court will not adopt a narrow interpretation which will have the effect of defeating the very object and purpose of the Act....."

In regard, generally, to the approach to legislations brought forth in furtherance and implementation of the Directive Principles of State Policy, Supreme Court in *National Textile Corpn. Ltd. Vs. Sitaram Mills Ltd. and Others*, observed :

".... In interpreting such a piece of legislation the Courts cannot adopt a doctrine or pedantic approach. It is a well known rule of construction that in dealing with such a beneficent piece of legislation, the Courts ought to adopt a construction which would subserve and carry out the purpose and object of the Act rather than defeat it"

It appears to us that the submission of Sri Papanna that a strict view suggested by Sri Ullal as to the scope of the jurisdiction u/s 75, if accepted, would, instead of promoting the objectives of the legislation, would hinder and impede its smooth effectuation, merits acceptance. In preferring this construction of Section 75 and interpret the scope of its jurisdiction so as to include a power to adjudicate all questions necessary for the ascertainment of the liability-- and the extent of it-- of an employer even where they are raised by the Corporation as a respondent in the proceedings and in holding that proceedings need not be confined to matters actually put in issue by the employer alone, we are not doing violence to the statutory language. While doing so, we are not faced with any

constructional difficulty or irreconcilability between the language of Section 45A on the one hand and that of Section 75 on the other. There are, on the contrary, strong and clear indications in the statutory language of Section 75 as to the wide scope and comprehensive and expansive ambit of that adjudication and the range of matters falling within it. The proceedings need not be made to spread over several stages at different points of time. The determination of the liability must be effective and expeditious. The construction suggested by Sri Ullal would help neither. There is no aspect of the dispute as between the Corporation and the employer touching the obligation of the employer for the contribution which can be said to be outside Section 45A and the jurisdiction u/s 75 is equally plenary. Indeed Sub-section (2) of Section 75 enjoins upon the ESI Court that it "shall decide" several important questions bearing on the liability of the employer. It does not really matter as to who--whether the employer or the Corporation -- puts them in issue. The jurisdiction of the ESI Court is original jurisdiction. It must decide all the questions raised itself. It cannot--except under extraordinary circumstances -- remand a matter for a fresh determination u/s 45A.

13. As regards the principle in Taylor's case⁷ that when a power is given to do a particular thing in a certain way, the thing must be done in that way and no other, we think that any appeal to that principle is wholly misplaced in this case. That rule is subservient to the intent and purposes of the statute. That principle as pointed out by Wills, J in *Colquhoun -v.-Brook*, (1888)21 QBD 52 (62) is "often a valuable servant but a dangerous master." In *Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd.*, . Supreme Court set-out the correct scope of and the limitation, that rule :

".... The rule is subservient to the basic principle that Courts must endeavour to ascertain the legislative intent and purposes, and then adopt a rule of construction which effectuates rather than one that may defeat these Moreover, the rule of prohibition by necessary implication could be applied only where a specified procedure is Laid down for the performance of a duty "

In our view, the application of this rule in construing Section 75 would defeat, rather than promote, the statutory-scheme.

14. What emerges from an. examination of the statutory-scheme is that the ESI Court is made the arbiter of all disputes that arise between the employer on the one hand and the Corporation on the other in regard to the several questions or disputes particularised in Section 75(1)(a) to (g). It is the obligation of that Court to decide these questions. What follows is that, except perhaps in very exceptional circumstances where a fresh consideration of the questions by the Corporation itself u/s 45A becomes absolutely necessary, the Court cannot merely set aside an adjudication u/s 45A and remit the matter back to the Corporation for a fresh determination. Having regard to the objects of the Legislation and to the plenitude of the special jurisdiction that the ESI Court is endowed with u/s 75, the Court must decide all disputes. If either of the parties

does not adduce sufficient evidence on any point, the matter will of course, be regulated by the consequences that flow from a party, who takes the risk of non-persuasion, failing to discharge the evidential burden.

Accordingly, we hold and answer contentions (b) and (c) against the appellant.

15. Re: Contention (d):

The submission of Sri. Ullal is that appellant had undertaken a new project called the ""Piston-project" and the work of putting up buildings for the project was entrusted to the contractors. In relation to the workmen engaged by the contractors, appellant cannot be held to be the "principal employer". He submitted that even in the "Employers Guide" published by it, the Corporation had itself declared that such workmen engaged in putting-up the buildings of the factory for the first-time would not be "employees" within the meaning of Section 2(9). His further submission was that even otherwise, in relation to the workmen of an independent contractor, the work done by them was not "Ordinary part of the work of the factory" nor work "preliminary to the work carried on in or incidental to the purposes" of the appellants's factory.

16. We do not know what the guidelines which the Corporation is stated to have published in this behalf. No copy of that publication was placed before us. The significance of any non-statutory exposition or clarification of the law could only be very limited. Such a publication may, at best, make manifest the Corporation's own understanding or misunderstanding of the effect of the provisions of the statute. There is no plea of any promissory estoppel in this case. We must examine the contentions in the light of the statutory provisions and decide the liability of the appellant accordingly.

17. There are atleast two fallacies in the contention of the appellant on the point. The first is factual, the second is as to the legal position.

Factually, the building project was envisaged in three stages though construction work in respect of all the three-stages had been entrusted to the Contractor at one and the same time. It is not disputed that during the period of the present construction, in relation to which the present demand for contribution arises, atleast a part of the buildings pertaining to the earlier-stage of the factory had been completed and the manufacturing process of the "Piston-Foundry" had been commissioned. It is indeed undisputed that by the time the construction, to which the present-dispute relates, was going on, the process of manufacture, atleast partially had commenced. Appellant was in fact paying the contributions covering the employees who were engaged in the work. In the application u/s 75, appellant admits :

".... The applicant is covered under the ESI Act and has been paying the ESI contribution in respect of all eligible employees of the applicant regularly without default".

In regard to the circumstance that the manufacturing-process had commenced in

the factory even by the time the construction, to which the present dispute relates, was going on, Sri R.V. Kaduva, Senior Civil Engineer of Appellant's establishment, who was examined as AW-1 before the ESI Court said :

"Manufacturing commenced in small scale during December, 1977 in one building only. The name of that building is piston foundry building".

What follows, therefore, is that though the contract for the construction of the different stages of the building had been farmed-out even at the beginning, the constructions were taken-up stage by stage and by the time the disputed construction commenced, the earlier stages, had been completed or at least so completed as to permit manufacturing operations to go on. Such manufacturing operations were admittedly going on. It is, therefore, idle to say that this was the very first-construction of the proposed enterprise and that, therefore, according to the guidelines published by the Corporation, the workmen engaged in such construction did not require to be covered, This is the factual side.

The legal position as to the liability of an employer in the position of the appellant, in relation to the workmen engaged by the Contractors, is clear by the authoritative pronouncements of the Supreme Court. The word "Employee" is a defined expression. Section 2(9) provides :

"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) (Omitted as unnecessary)

(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) (Omitted as unnecessary)

but does not include.

(Omitted as unnecessary)."

The definitional-net is kept, designedly, wide and comprehensive to promote the beneficent objects of the legislation. There need not be a direct master-servant nexus. The workmen engaged by an independent-contractor and not directly by the employer, are also brought within this artificial definition.

Any person engaged by or through an "immediate-employer", such as a contractor, would also, inter alia, become employee if he is employed on the premises of the factory on work which is preliminary to the work carried on or incidental to the purposes of the factory. What is so "preliminary" or "incidental" has come up for consideration in Royal Talkies, Hyderabad v. E.S.I.C.8 These expressions consistent with the objectives and purposes of this piece of

beneficent and social welfare legislation must receive a liberal and not a restrictive, construction so as to promote the social objectives. Supreme Court stated :

"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 considerations in the statutory construction, more weighty than more logomachy or grammatical nicety."

... ..

"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".

So, what is required to be established to make the work carried on by the contractors' workmen "preliminary" or "incidental" to the work of the factory is that it should not be irrelevant or extraneous to the work of the factory. The nexus required to be established is some-what broad and its degree need only be general.

18. By these liberal and broad tests the work of the construction cannot be said to be "irrelevant" to the work of the factory or "extraneous" to the work of the factory. The contention that the workmen of the Contractor are not employees is, therefore, unacceptable. The independent contractor becomes the "immediate-employer" and the appellant the "Principal-Employer" within the meaning of Section 2(9)(ii) of the Act. The view taken by the ESI Court on the point appears to us to be the correct one to take.

Contention (d) is also held and answered against the appellant.

19. Re : Contention (e) :

This point is squarely and fully covered against the appellant and we are referring to the contention out of deference to the learned Counsel who took the trouble to present it over again. Sri Ullal submitted that the workmen engaged by the Contractor were an unidentifiable and shifting mass of workmen and no services of the Corporation were available to them and that as there was no quid-pro-quo by way of services the levy of contribution is not supportable. There are two aspects. First, the imperatives of the concept of quid-pro-quo have themselves dwindled down. The contribution need no longer be required to be supported by the correlative of quid-pro-quo. The second thing is that even if quid-pro quo is required to be shown, it is not necessary that each and every payer of the contribution and each workman covered by the scheme is to be shown to have received the services. Service is to be rendered to the class of persons generally and not individually. Even if services are not available in an area the exaction is not rendered illegal.

20. In regard, generally, to the requirement of the correlative of quid-pro-quo for a "fee" the following observation of the Supreme Court in City Corporation of Calicut Vs. Thachambalath Sadasivan and Others, are to be recalled :

"It is thus well settled by numerous recent decisions of this Court that the traditional concept in a fee of quid-pro-quo is undergoing a transformation and that though the fee must have relation to the services rendered, or the advantages conferred, such relation need not be direct, a mere casual relation may be enough. It is not necessary to establish that those who pay the fee must receive direct benefit of the services rendered for which the fee is being paid. If one who is liable to pay receives general benefit from the authority levying the fee the element of service required for collecting fee is satisfied. It is not necessary that the person liable to pay must receive some special benefit or advantage for payment of the fee.

(Underlining supplied)

However, this proposition under the very legislation fell for consideration in Gasket Radiators Pvt. Ltd. Vs. Employees" State Insurance Corpn. and Another, . The Supreme Court observed :

"We are afraid that the very approach of the appellant to the problem at issue suffers from a basic defect. The appellant's argument proceeds on the fundamental misconception that the payment of contribution directed to be made by the employer under the Employees" State Insurance Act or other similar payment or benefit under various other social welfare legislations must either be labelled as a tax or a fee in order to attain legitimacy or not at all. The idea that such payment, contribution or whatever name is given to it should be so pigeon-holed and fitted in stems from a misunderstanding of the scheme of our Constitution in regard to social welfare legislation....."

"....The payment of contribution by an employer towards the premium.... of an employee's compulsory insurance under the Employees" State Insurance Act falls directly within entries 23 and 24 of List III and it is wholly unnecessary to seek justification for it by recourse to entry 97 of List I or entry 47 of List III in any circumlocutious fashion. We see no reason to brand or stamp the contribution as a tax or fee in order to seek to legitimise it. Legitimation need not be sought fictionally from entry 97 of List I or entry 47 of List III when legitimation is directly derived for the charge from entries 23 and 24 of List III".

... ..

"Even if the charge is to be construed as a fee as the High Court has done, it appears to us to be justifiable on that basis too. It is not disputed and indeed it is not capable of any controversy that services and benefits are indeed meant to be and are bound to be conferred on the employees and through them on the employer, in due course, when the scheme becomes fully operative in all areas....."

".....Merely because the benefits to be received are postponed, it cannot be said that there is no quid-pro-quo. It is true that ordinarily a return in present is generally present when fee is levied, but simultaneity or contemporaneity of payment and benefit is not the most vital or crucial test to determine whether a levy is a fee or not. In fact, it may often happen that the rendering of a service or the conferment of a benefit may only follow after the consolidation of a fund from the fee levied. Hospitals, for instance, cannot be built in a day nor medical facilities provided right from the day of the commencement of the scheme...."

The authoritative pronouncements also hold that, even if the correlative of services is necessary to support the levy, the correlation need not be shown in each case and there need not be service rendered to each of the intended beneficiaries. Service rendered to a class as a whole is sufficient.

Accordingly contention (e) also requires to be, and is hereby, held against the appellant.

21. Before concluding, we must advert to one other submission made by Sri. Papanna. Sri Papanna submitted that the ESI Court was not justified in abdicating its own jurisdiction to decide the issue pertaining to the quantum of the contributions. The Court, learned Counsel says, was entitled to take evidence and did record evidence. It should have, itself, determined the quantum of the contribution instead of remitting the matter to the corporation for re determination u/s 45A. That, Sri Papanna stated, is not only impermissible in law, but would also be a cumbersome process, making for repetitive recourse to the remedy u/s 75.

This submission, in our opinion, is well founded. Indeed there was material placed before the Court by the appellant itself in the form of certificates from the Architects furnishing a break-up of the amount paid to the Contractors in regard to the content of the labour charge in each of the bills to show what part of the sum of Rs. 45 lakhs and odd represented the labour-charges and what part cost of material.

22. In the result, all the contentions urged by the appellants are rejected. However, the order of remand made by the Court-below is set aside and the matter remitted to the ESI Court for an adjudication of the dispute in regard to the quantum of contribution in the light of the observations made; in the course of this order.