

**(2009) 07 KL CK 0055**

**In the High Court Of Kerala**

**Case No : Ins. APP. No. 29 of 2005**

Regional Director, ESI Corporation

APPELLANT

Vs

G. Sivaprasad, Proprietor, M.S. Bricks

RESPONDENT

**Date of Decision : 15-07-2009**

**Acts Referred:**

Employees State Insurance (General) Regulations, 1950 — Regulation 10B, 11, 12, 29, 30  
Employees State Insurance Act, 1948 — Section 1(3), 1(4), 1(5), 1(6), 2  
Evidence Act, 1872 — Section 101, 102  
Factories Act, 1948 — Section 2  
Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 — Section 2

**Citation : (2010) 1 LLJ 279**

**Hon'ble Judges : V. Ramkumar, J**

**Bench : Single Bench**

**Advocate : T.V. Ajayakumar, for the Appellant; K. Subash Chandra Bose, for the Respondent**

**Final Decision : Allowed**

## **Judgement**

V. Ramkumar, J.—In this appeal filed u/s 82(2) of the Employees' State Insurance Act, 1948 (hereinafter referred to as "the Act" for short), the Regional Director, E.S.I. Corporation, Thrissur, challenges the order dated October 28, 2004 passed by the Employees' State Insurance Court, Kollam (hereinafter referred to as the E.I. Court), holding that the establishment by name : M.S. Bricks at Nedumpana, Kollam belonging to the respondent herein is not covered under the provisions of the Act. The impugned order was passed by the E.I. Court on an application filed as I.C. 10/2000 by the respondent/employer under Sections 75 to 77 of the Act.

The Background Facts

2. The facts leading to the impugned order can be summarised as follows:

(A) The respondent herein namely G. Sivaprasad is the Proprietor of M.S. Bricks, Chalakkara, Pallimon, Nedumpana, Kollam. The said proprietary concern is engaged in the manufacture of bricks. Electric power is used for the manufacturing process by installing a 20 HP motor. The consumer number assigned by the Kerala State Electricity Board to the establishment is 7074. It is an E.S.I. Unit which was started in the year 1993.

(B) Two insurance Inspectors attached to the office of the Regional Director, Employees State Insurance Corporation (hereinafter referred to as "the E.S.I. Corporation") visited the premises of the manufacture of the respondent on March 30, 1998. The witness examined as R.W.I was one among the two inspectors who visited the manufacture unit. A head count conducted by the Inspectors showed that there were 13 employees working in the manufacturing unit (sic) of the respondent. The Insurance Inspectors thereupon prepared Exhibit B-I preliminary inspection report in Form No. C10. In Exhibit B-I report, the Inspectors prepared a list of the 13 employees found working in the factory, indicating their address and the wages paid to them. The signatures of those employees were also taken against their names. Those employees are:

|                                                                                               |            |           |     |      |               |
|-----------------------------------------------------------------------------------------------|------------|-----------|-----|------|---------------|
| -----                                                                                         |            |           |     |      | (i)           |
| Mangalanandan                                                                                 | Foreman    | receiving | Rs. | 75/- | as wages.     |
| -----                                                                                         |            |           |     |      | (ii)          |
| Kochupappu                                                                                    | Chathan    | Pullan    | Rs. | 60/- |               |
| -----                                                                                         |            |           |     |      | (iii)         |
| Kunhiraman                                                                                    |            | Rs.       |     | 56/- | Santha        |
| -----                                                                                         |            |           |     |      | Chitra Chothr |
| Both from West Bengal. Details could Vishnu Betharai not be obtained due to language problems |            |           |     |      |               |
| -----                                                                                         |            |           |     |      | (vi)          |
| Sirajudheen                                                                                   | Koyakunju  |           | Rs. | 60/- |               |
| -----                                                                                         |            |           |     |      | (vii)         |
| Sahadevan                                                                                     | Kunhiraman |           | Rs. | 56/- |               |
| -----                                                                                         |            |           |     |      | (viii)        |
| Krishnankutty                                                                                 |            | Rs.       |     | 55/- | Sreekala      |
| -----                                                                                         |            |           |     |      | (ix)          |
| Gopalakrishnan                                                                                |            | Rs.       |     | 55/- | Manju         |
| -----                                                                                         |            |           |     |      | (x)           |
| Madhavan                                                                                      |            | Rs.       |     | 65/- | Thulasi       |
| -----                                                                                         |            |           |     |      | (xi)          |
| Sathyan                                                                                       |            | Rs.       |     | 60/- | Aji           |
| -----                                                                                         |            |           |     |      | (xii)         |
| Chellappan                                                                                    |            | Rs.       |     | 65/- | Prasad        |
| -----                                                                                         |            |           |     |      | (xiii)        |
| Sadasivan                                                                                     | Sankaran   |           | Rs. | 60/- |               |
| -----                                                                                         |            |           |     |      |               |

(C) The respondent herein was treated as covered under the Act provisionally with effect from March 30, 1998 as there were thirteen persons found working on March 30, 1998. The coverage aspect was intimated to the respondent as per Exhibit B-2 notice dated April 30, 1998 in Form C-11 sent by registered post with acknowledgment due and received by the respondent on May 16, 1998 as evidenced by Exhibit B-2 postal acknowledgment.

(D) Thereafter the Insurance Inspector again visited the manufactory of the respondent on April 7, 1999 and on May 6, 1999 with prior intimation. But the registers and other employment records were not made available to the Inspector.

(E) The Inspector of the E.S.I. corporation sent Exhibits B-2 and B-3 letters dated April 7, 1999 and May 6, 1999 calling upon the respondent employer to start complying with the provisions of the Act. There was no response to those letters nor any gesture of compliance.

(F) Finally the Deputy Director of the Corporation issued Exhibit B-5 letter dated January 18, 2000 to the respondent employer asking him to show cause why he should not be prosecuted u/s 85 of the Act for non-production of records for verification and for non-payment of contribution and non-submission of returns.

(G) On February 19, 2000 the respondent employer filed I.C. 10/2000 before the E.I. Court, Kollam u/s 75 to 77 of the Act seeking the following reliefs:

(a) to declare that the applicant's concern namely M.S. Bricks is not an establishment covered under the E.S.I. Act.

(b) to quash the prosecution proceedings" initiated against the applicant as per Exhibit B-5 show cause notice.

(H) On the side of the employer two witnesses were examined as A.Ws. 1 and 2 of whom A.W.1 is the respondent herein who is the proprietor of M.S. Bricks and A.W.2 is Mangalanandan, an employee and Exhibits A-1 to A-12 were got marked. On the side of the E.S.I. Corporation, one of the two inspectors who conducted the inspection on April 30, 1998 was examined as RW1 and Exhibits B-1 to B-10 were got marked.

(I) The E.I. Court as per the impugned; order dated October 28, 2004 upheld the claim of the respondent employer and held that since the E.S.I. Corporation has not discharged the initial burden of coverage under the Act, the establishment of the applicant is not covered under the provisions of the Act and that the applicant before the E.I. Court is not liable to comply with the provisions of the the Act in respect of his employees as claimed by the E.S.I. Corporation. The E.I. Court also quashed Exhibits B-2, B-5, B-9 and B-10 notices. It is the said order which is assailed in this appeal by the E.S.I. Corporation.

#### Substantial Questions of Law Raised

3. The three substantial questions of law formulated in Ground - K of the

Memorandum of Appeal, as insisted by Section 82(2) of the Act, are the following:

(i) Whether the appreciation of evidence by the learned E.I. Court was not perverse and aforesaid findings are not sustainable in law?

(ii) Whether the findings of the E.I. Court, that the initial burden to establish the coverage of an establishment under the E.S.I. Act is upon the Corporation is against the basic principles of onus of proof set out in Section 102 of the Evidence Act and the ruling 199 8 (1) KLT 786?

(iii) Whether the reasons stated by the learned E.I. Court for not relying on Exhibit B-6 report and B-1 list employees are not legally unsustainable and against the judgment of this Hon'ble High Court in M.F.A. 296/1998?

The advocates Who Appeared

4. I heard advocate Sri. T.V. Ajayakumar, the learned Counsel for the appellant/ Corporation and Adv. Sri. K. Subash Chandra Bose the learned Counsel appearing for the respondent/employer.

The Employer's Arguments

5. The learned Counsel appearing for the respondent/employer made the following submissions before me in support of the impugned order:

The respondent/employer was examined as A.W.I before the Court below. He has definitely stated that the brick manufacturing unit was started in the year 1993 and there were only 5 workers till August 1999 and it was only from September 1999 onwards that he started employing two more workers to make up a total of 7 employees. His testimony has been corroborated by Exhibits A-1 and A-2 muster roles and Exhibits A-3 to A-5 wage registers. Eventhough he was absent on March 30, 1998, he has deposed that firewood used to be unloaded in his factory and the E.S.I. inspectors might have written down the names and details of the workers in the lorry which brought firewood on that day. A.W.2 Mangalandan has categorically stated that his signature in Exhibit B-1 list was obtained under duress and that he was asked to sign at the top and bottom of a plan paper and that on March 30, 1998 the 7 workers in that factory were himself, Kochu Pappu, Santha, Sadasivan, Sahadevan, Sreekala and Manju. The Inspectors did not take any statement from the alleged workers. The Inspectors did not also record any statement from the local people. A perusal of Exhibit B-1 list will show that the word "worker" is written only against Kochupappu and Santha. It was taking into account the testimony of A.Ws.I and 2 and the other circumstances that the Court below accepted the case of the employer. The order passed by the Court below does not call for any interference. Moreover, there is no substantial question of law arising for consideration in this appeal.

Judicial Evaluation

6. I am afraid that I cannot agree with the above submissions made on behalf of

the employer. I have perused the deposition of A.Ws.I and 2 and I have no hesitation to conclude that the view taken by the E.I. Court is egregiously wrong. The Court below has misread and misconstrued the evidence to reach the conclusion which it did. The respondent Sivaprasad is admittedly the sole proprietor of the brick manufacturing unit in question. There is no dispute that the said unit was started in the year 1993. It is also admitted that the brick manufacturing unit contains a machinery with a 20 H.P. Motor installed therein for making clay pulp. The crucial question for adjudication was as to whether 10 or more employees were engaged by the employer on March 30, 1998 as contended by the Corporation so as to make the brick manufacturing unit a "factory" within the meaning of Section 2(12) of the Act.

#### A. Appellate Re-Appraisal of Evidence

1. The Proprietor who is also the employer was examined as A. W. 1. He would depose that as revealed by Exhibits A1 and A2 muster roles, until August 1999 he had only five workers and it was only from September 1999 that two more workers were engaged to make up a total of 7 workers in his manufacturing unit. Exhibits A3 to A5 wage registers were also pressed into service to depose that until August 1999 five employees alone were paid wages and it was only from September 1999 that wages were paid to 7 employees. He admitted that A.W.2 Mangalanandan was one of his employees right from the inception of the unit and that he was a dependable worker. Admittedly on March 30, 1998 when two of the Inspectors visited the brick manufacturing unit the employer was not present there. His son Pradeep, who according to A.W.I used to manage the affairs during his absence was also not present. A.W.I would have it that the Inspectors might have taken down the names and details of the workers in the lorry in which firewood was brought to his premises for the consumption of his factory. When he and his son were admittedly not present he could not have been know of things as to what transpired in his factory. But A.W.2 Mangalanandan had a totally different case. He would depose that on March 30, 1998 including himself there were 7 employees and the other 6 employees were Kochupappu, Santha, Sadasivan, Sahadevan, Sreekala and Manju. But according to A.W.I, there were only five workers till September 1999 and they Were Mangalanandan, Kochupappu, Santha, Sadasivan and Thulasi Madhavan. A.W.2 has no case that a worker by name Thulasi Madhavan was an employee in the factory. But we find in Exhibit B-1 the name of Thulasi Madhavan as one of the 13 workers who were in the unit on March 30, 1998. The testimony of A.W.2 itself demolishes the case of A.W.I that there were only five employees in his factory until September 1999. This means that Exhibits A-1 to A-5 records are cooked up documents I created after the visit of the E.S.I. Inspectors. It is true that A.W.2 has stated that he was not the Foreman as is described in Exhibit B-1 list. But the testimony of R.W.1 the Inspector goes to show that A.W.2 introduced himself as the Foreman. What is relevant is the fact that A.W.2 (Mangalanandan) was a worker in the unit and this was admitted by both A.W.I and A.W.2. According to A.W.2, his signatures were obtained under duress in a plain paper at the top and

bottom. He has admitted that the E.S.I. Inspectors have absolutely no enmity towards him and that he has not complained before any official that he was compelled to sign in Exhibit B-I list. The irresistible conclusion can only be that Chithra, Vishnu, Sirajudheen, Aji and Prasad whose names figure in Exhibit B-I list were also employees in the brick manufacturing unit thus making up a total of 13 as on March 30, 1998 as evidenced by Exhibit B-I preliminary enquiry report and the list incorporated therein. If so, the unit run by the respondent employer: was a "factory " within the meaning of Section 2(12) of the Act.

8. The view taken by the E. I. Court that the E.S.I. Corporation has not discharged the initial burden to establish that the establishment was covered under the Act was erroneous. The Court below overlooked the fact that it was the respondent/employer who approached the Court with a prayer for a declaration that his establishment is not covered under the provisions of the Act and for consequential reliefs. It was he who had the exclusive knowledge regarding the total number of persons engaged by him and the names and other particulars pertaining to them. It was, therefore, his duty to reveal the names and other particulars of the employees engaged by him and exclusively known to him. By virtue of Section 101 of the Evidence Act the burden was on the employer to reveal the facts within his exclusive knowledge and prove that he had engaged only lesser number of employees than the minimum number stipulated by Section 2(12) of the Act. It is pertinent in this connection to observe that in the petition filed by him before the E.I. Court, the employer stated that at the relevant time he had only seven employees. But at the stage of evidence A.W.I gave the names of only 5 persons as his employees. His own worker A.W.2 would say that there were 7 workers. Going by Exhibit B-1 list the employees actually seen engaged were 13 in number. Even A.W.2 was free to confess that Sreekala and Manju were among the 7 employees in that Unit. A.W.I, avoided mentioning the names of Sreekala and Manju but mentioned the name of Thulasi Madhavan whose name was not mentioned by A.W.2. In the face of such discrepant and mutually contradictory evidence adduced by the employer I have no hesitation to accept the testimony of R.W.I coupled with Exhibit B-I list showing the names of 13 employees. R.W. 1 is none other than one of the two inspectors who visited the unit of the respondent/employer on March 30, 1998. Neither R.W.I nor any other E.S.I. Inspector has any enmity or oblique motive against A.Ws.1 and 2 so as to thrust upon them 13 workers so as to transform the unit into a factory.

#### B. The Statutory Scheme for coverage under the Act

9. Since the various legal aspects with regard to factories and other establishments covered by the Act are not happily dealt with in some of the judgments of the E.I. Courts coming up for consideration before this Court in the various insurance appeals, I consider it necessary to deal with some of the important provisions of the Act and the Rules and Regulations made thereunder as also the judicial interpretations governing the matter.

10. The Act is a beneficial piece of legislation providing for certain benefits to employees in case of sickness, maternity and employment injury. It also provides for medical benefit to employees and their families. It is a self financing Social Security Scheme in which every contributory is a beneficiary. The following are the benefits provided under the Act:

- (a) Periodical payments to any insured person in case of sickness, certified by a duly appointed medical practitioner
- (b) Periodical payments to an insured woman in the case of sickness arising out of pregnancy, miscarriage, confinement, premature birth of child, etc.
- (c) Periodical payments to an insured person suffering from disablement as a result of employment injury
- (d) Periodical payment to dependents of insured person who dies as a result of an employment injury
- (e) Medical treatment of insured person
- (f) Funeral expenses on the death of insured person at the prescribed rate of Rs. 1,500 (Rs. 2,500 w.e.f. October 1, 2001).

Section 38 of the Act provides as follows:

38. All employees to be insured: Subject to the provisions of this Act, all employees in factories, or establishments to which this Act applies shall be insured in the manner provided by this Act.

Thus, in the case of a factory or establishment to which the Act applies, all the employees therein are to be insured. Section 2(9) of the Act defines the expression "employee" as follows:

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 purchase 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 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 institution or sale of the products of, the factory or establishment or any person engaged as apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961) or under the standing orders of the establishment; 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 such wages as may be prescribed by the Central Government

Provided that an employee whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government 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;

The expression "insured person" has been defined u/s 2(14) as follows:

2(14) "Insured person" means a person who is or was an employee in respect of whom contributions are or were payable under this Act and who is, by reason thereof, entitled to any of the benefits provided by this Act;

The expression "contribution" is defined u/s 2(14) as follows:

2(14) "Contribution" means the sum of money payable to the Corporation by the principal employer in respect of an employee and includes any amount payable by or on behalf of the employee in accordance with the provisions of this Act.

Section 39 of the Act is the enabling provision for fixing the rate of contributions and the manner in which such contributions are to be paid. As has been seen, Section 38 enjoins that all employees in the factories or establishments to which the Act applies are to be compulsorily insured in the manner provided in the Act. By virtue of Section 1(4) of the Act, the Act was made applicable in the first instance to all factories including factories belonging to the Government other than seasonal factories. The expression "factory" has been defined u/s 2(12) of the Act as follows:

2 (12) "factory" means any premises including the precincts thereof-

(a) whereon ten or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on, or

(b) whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power or is ordinarily so carried on,

but does not include a mine subject to the operation of the Mines Act, 1952 (35

of 1952) or a railway running shed;

The above definition shows that in the case of a premises where manufacturing process is carried on with the aid of power, the minimum number of persons to be employed for wages to make it a factory is 10 and where the manufacturing process is carried on without the aid of power, the minimum number of persons employed for wages is 20. The expression; "manufacturing process" is defined u/s (14-AA) as follows:

(14-AA) "manufacturing process" shall have the meaning assigned to it in the Factories Act, 1948 (63 of 1948;)

"Manufacturing process" as defined u/s 2(k) of the Factories Act, 1948 is as follows: "Manufacturing process" means any process for -

(i) making altering, repairing ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or

(ii) pumping oil, water, sewage or any other substance, or

(iii) generating, transforming or transmitting power; or

(iv) composing types for printing, printing by letterpress, lithography, photogravure or other similar process or book binding or

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels or

(vi) preserving or storing any article in cold storage.

As for establishments other than factories as contemplated by Section 38 of the Act, Section 1(5) of the Act provides for notification by State Government with the approval of the. Central Government extending the provisions of the Act wholly or partly to any establishment or class of establishments, industrial, commercial, agricultural or otherwise. In exercises of the said power, the Government of Kerala has on September 18, 1974 issued the following notification extending the provisions of the Act to the establishments mentioned therein:

Government of Kerala

No. 27877/E2/73/LBR

Labour (E) Department, Trivandrum, Dt-September 13, 1974

Notification

S.R.O.

In exercise of the powers conferred by Sub-section (5) of Section 1 of the Employees' State Insurance Act, 1948 (Central Act 64 of 1948), the Government

of Kerala, in consultation with the Employees' State Insurance Corporation and with the approval of the Central Government, hereby given notice of its intention to extend the provisions of the said Act to the clauses of the Establishments specified in the Schedule annexed thereto, on or after March 29, 1975.

By order of the Governor,

Sd/- U. Mahabala Rao,

Secretary to Government.

| -----                                                                                                                                                                                                      | Description of                                 |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------|
| establishments                                                                                                                                                                                             | Areas in which the establishments are situated |
| -----                                                                                                                                                                                                      | -----                                          |
| establishments (1) Trivandrum, Navaikulam and whereon twenty or more persons are Pazhayakunnumel (Kilimanoor) in employed for wages on any day of Trivandrum District the preceding twelve months, namely: | The following                                  |
| -----                                                                                                                                                                                                      | (i) Hotels (2)                                 |
| Quilon, Kundara, Chathannur, Kottarakkara, Punalur and Sasthacotta in Quilon District                                                                                                                      | ----- (ii)                                     |
| Restaurants; (3) Alleppey, Kayamkulam and Shertailai in Alleppey District                                                                                                                                  | ----- (iii) Shops (4)                          |
| Kottayam town in Kottayam District                                                                                                                                                                         | ----- (iv) Road                                |
| Motor Transport (5) Ernakulam and Cochin in Establishment Ernakulam District                                                                                                                               | ----- (v) Cinema                               |
| including preview (6) Trichur Town in Trichur theatres; District                                                                                                                                           | ----- (vi) Newspaper                           |
| establishments as (7) Palghat town in Palghat defined in Section 2(d) of the District Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (5 of 1955)                       | ----- (8) Kozhikode                            |
| town in Kozhikode District and                                                                                                                                                                             | ----- (9) Cannanore                            |
| town, Tellicherry and Baliapatam in Cannanore District in the State of Kerala.                                                                                                                             | -----                                          |

A three Judges' Bench of the Apex Court in M/s. Cochin Shipping co. Vs. E.S.I. Corporation, , had occasion to consider the above notification and a liberal interpretation was given to the word "shops" occurring in the above notification. The following are the subsequent notifications issued by the Government of Kerala on the subject-

Government of Kerala

No. 22877/E2/75/LBR

Labour (E) Department Trivandrum, Dt. March 22, 1975

## NOTIFICATION

S.R.O.

In exercise of the powers conferred by Sub-section (5) of Section 1 of the Employees' State Insurance Act, 1948 (Central Act 64 of 1948), the Government of Kerala, having already given six months notice as required thereunder, vide Government of Kerala Notification No. 22877/E2/73/LBR dated September 18, 1974 and No. 22877/E2/73-1/LBR dated December 21, 1974 published as S.R.O. No. 702/74 and 64/75 in the State Gazette dated September 24, 1974 and January 21, 1975 respectively, hereby appoints March 29, 1975 as the date on which all the provisions of the said Act shall extend to the classes of establishments and in areas as specified in the schedule annexed hereto:

SCHEDULE By order of the Governor, U. MAHABALA RAO, Special Secretary.

| establishments                                                                        | Areas in which the establishments are situated                                                                                                        | Description of |
|---------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| -----                                                                                 | -----                                                                                                                                                 | -----          |
| establishments                                                                        | 1. Trivandrum, Navaikulam and whereon twenty or more persons are employed for wages on any day of the preceding twelve months, namely:                | The following  |
| -----                                                                                 | -----                                                                                                                                                 | -----          |
| -----                                                                                 | -----                                                                                                                                                 | (i) Hotels     |
| Quilon, Kundara, Chathannur, Kottarakkara, Punalur and Sasthacotta in Quilon District | -----                                                                                                                                                 | -----          |
| -----                                                                                 | -----                                                                                                                                                 | (ii)           |
| Restaurants;                                                                          | 3. Alleppey, Kayamkulam and Shertailai in Alleppey District                                                                                           | -----          |
| -----                                                                                 | -----                                                                                                                                                 | (iii) Shops    |
| Kottayam town in Kottayam District                                                    | -----                                                                                                                                                 | -----          |
| -----                                                                                 | -----                                                                                                                                                 | (iv) Road      |
| Motor Transport                                                                       | 5. Ernakulam and Cochin including Establishments Mattancherry, Fort Cochin and Willington Island in Ernakulam District                                | -----          |
| -----                                                                                 | -----                                                                                                                                                 | (v) Cinema     |
| including preview                                                                     | 6. Trichur town in Trichur theaters; District                                                                                                         | -----          |
| -----                                                                                 | -----                                                                                                                                                 | (vi) Newspaper |
| establishments as                                                                     | 7. Palghat town in Palghat defined in Section 2(d) of the District Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 | -----          |
| -----                                                                                 | -----                                                                                                                                                 | -----          |
| -----                                                                                 | -----                                                                                                                                                 | 8. Kozhikode   |
| town in Kazhikode District                                                            | -----                                                                                                                                                 | -----          |
| -----                                                                                 | -----                                                                                                                                                 | -----          |

Government of Kerala Labour (E) Department NOTIFICATION

No. 1641/E2/75/LBR.

Dated, Trivandrum, 27th May 1976

S.R.O. No. 559/76.-In exercise of the powers conferred by Sub-section (5) of Section 1 of the Employees' State Insurance Act, 1948 (Central Act 34 of 1948),

the Government of Kerala having already given six months" notice as required thereunder, vide the Government of Kerala Notification No. 1641/E2/75/LBR dated November 5, 1975 published as SRO. No. 1070/75 in the State Gazette dated November 18, 1975 hereby appoints the midnight of the May 29, 1976 as the date on which all the provisions of the said Act shall extend to the classes of establishments and in areas as specified in. the schedule annexed hereto:

| SCHEDULE                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | Ins.  | Appeal | No.   | 29/2005                         |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|--------|-------|---------------------------------|
| -----                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | ----- | -----  | ----- | Description of                  |
| establishment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | Area  | in     | which | the establishments are situated |
| -----                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | ----- | -----  | ----- | Any premises                    |
| including the Whole of the State of Kerala where precincts thereof whereon 10 or the benefit provisions of Chapter more persons but in any a case IV, V and VI of the Act have less than twenty persons are already been brought into force by employed or were employed for the Central Government under wages on any day of the preceding Section 1(3) of the Employees" twelve months, and in any part of State Insurance Act, 1948 Central which a manufacturing process is Act (34 of 1948) being carried on with the aid of power or is ordinarily so carried on but excluding a mine, subject to the operation of the Mines Act 1952 (Central Act 35 of 1952) or a railway running shed or an establishment which is exclusively specified in clause (12) of section 2 of the Employees" State Insurance Act, 1948 (Central Act 34 of 1948).                                                                                                                                                                                                                                 |       |        |       |                                 |
| -----                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | ----- | -----  | ----- | 2. Any                          |
| premises including Whole of the State of Kerala where precincts thereof wherein 20 or the benefit provisions of Chapter more persons are employed or were IV, V and VI of the Act have employed for wages on any of the already been brought into force by preceding twelve months and in any the Central Government under part of which a manufacturing Section 1(3) of the Employees" process is being carried on State Insurance Act, 1948, except without the aid of power, or is the areas where the scheme has ordinarily so carried on; but already been extended with effect excluding a mine subject to the from the midnight of March 29, operation of the Mines Act, 1952 1975 vide Notification No. (Central Act 35 of 1952), or a 2287/E2/73/LBR dated March 22, railway running shed or an 1975 published in the Kerala establishment which is exclusively Gazette dated March 25, 1975 as engaged in any of the SRO. No. 288/75. manufacturing processes specified in Clause (12) of Section 2 of the Employees" State Insurance Act, 1948 (Central Act 94 of 1948). |       |        |       |                                 |
| -----                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | ----- | -----  | ----- | 3. The                          |
| following establishments Whole of the State of Kerala where wherein 20 or more persons are the benefit provisions of Chapter employed or were employed for IV, V and VI of the Act have wages on any day of the preceding already been brought into force by twelve months namely; the Central Government under Section 1(3) of the Employees" (i) Hotels; State Insurance Act, 1948 (Central Act 35 of 1948), except the areas (ii) Restaurants; where the scheme has already been extended with effect from the (iii) Shops; midnight of March 29,                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |       |        |       |                                 |

1975 vide notification No. 22877/E2/73LBR (iv) Road Motor Transport dated March 22, 1975 published in Establishments; the Kerala Gazette dated March 25, 1975 as S.R.O. No. 288 of 1975. (v) Cinemas including preview theaters;

(vi) Newspapers establishments as defined in Section 2(d) of the Working Journalists (Conditions of Service and Miscellaneous Provisions) Act 1955 (45 of 1955) -----

By order of the Governor,

U. MAHABALA RAO,

Special Secretary.

GOVERNMENT OF KERALA

Labour and Rehabilitation (F) Department

NOTIFICATION

G.O.(P)No. 116/2007/LBR.

Dated, Thiruvananthapuram, September 6, 2007.

S.R.O. No. 749/2007 - In exercise of the powers conferred by Sub-section (5) of Section 1 of the Employees' State Insurance Act, 1948 (Central Act 34 of 1948), the Government of Kerala in consultation with the Employees' State Insurance Corporation and with the approval of the Central Government, and after having given six months notice of its intention so to do, hereby extend the provisions of the said Act to the classes of establishments, specified in Column (1) of the Schedule annexed hereto and situated in the areas specified in column (2) thereof with immediate effect.

SCHEDULE -----

| Description of establishments | Areas in which the establishments are situated |
|-------------------------------|------------------------------------------------|
|-------------------------------|------------------------------------------------|

|                                                                                                                                                                                                                                                                                                                                                                                                |  |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| Medical Institutions (including Areas where the Scheme has already Corporate, joint sector, trust, been brought into force under charitable and private ownership Sub-sections (3) and (5) of hospitals, nursing homes, Section 1 of the Act diagnostic centres, pathological laboratories, wherein 20 or more persons are employed or were employed on any day of the preceding twelve months |  |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|

----- By Order of the Governor C.K. Viswanathan, Secretary to Government GOVERNMENT OF KERALA

Labour and Rehabilitation (F) Department

NOTIFICATION

G.O.(P)No. 135/2007/LBR

Dated, Thiruvananthapuram, October 8, 2007.

S.RO. No. 836/2007 - In exercise of the powers conferred by Sub-section (5) of Section 1 of the Employees' State Insurance Act, 1948 (Central Act 34 of 1948), the Government of Kerala in consultation with the Employees' State Insurance Corporation and with the approval of the Central Government, and after having given six months notice of its intention so to do, hereby extend the provisions of the said Act to the classes of establishments, specified in column (1) of the schedule annexed hereto and situated in the areas specified in column (2) thereof with immediate effect.

SCHEDULE

| Description of establishments                                                                                                                                                             | Areas in which the establishments are situated                                                                                                  |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------|
| institutions                                                                                                                                                                              | Educational                                                                                                                                     |
| Areas where the Scheme has already (including public, private aided been brought into force under or partially aided) run by Sub-sections (3) and (5) of individuals, trustees, societies | Section 1 of the Act or other organizations wherein 20 or more persons are employed or were employed on any day of the preceding twelve months. |

By Order of the Governor

C.K. Viswanathan,

Secretary to Government

(the words "public" and "aided" are deleted as per amendment notification G.O. (P) No. 69/2008/LBR dated May 5, 2008).

Thus, a factory or other establishment to which the Act applies is to be registered under the Act as provided u/s 2-A of the Act read with Regulation 10B of The Employees' State Insurance (General) Regulations, 1950 (hereinafter referred to as the "General Regulations", for short). Section 39 of the Act providing for contributions reads as follows:

39. Contributions: (1) The contribution payable under this Act in respect of an employee shall comprise contribution payable by the employer (hereinafter referred to as the employer's contribution) and contribution payable by the employee (hereinafter referred to as the employee's contribution) and shall be paid to the Corporation.

(2) The contributions shall be paid at such rates as may be prescribed by the Central Government:

Provided that the rates so prescribed shall not be more than the rates which were in force immediately before the commencement of the Employees' State Insurance (Amendment) Act, 1989.

(3) The wage period in relation to an employee shall be the unit in respect of which all contributions shall be payable under this Act.

(4) The contributions payable in respect of each (wage period) shall ordinarily fall due on the last day of the (wage period), and where an employee is employed for part of the (wage period), or is employed under two or more employers during the same (wage period), the contributions shall fall due on such days as may be specified in the regulations.

(5) (a) If any contribution payable under this Act is not paid by the principal employer on the date on which such contribution has become due, he shall be liable to pay simple interest at the rate of twelve per cent, per annum or at such higher rate as may be specified in the regulations till the date of its actual payment;

Provided that higher interest specified in the regulations shall not exceed the lending rate of interest charged by any scheduled bank.

(b) Any interest recoverable under Clause (a) may be recovered as an arrear of land revenue or u/s 45-C to Section 451.

Explanation - In this sub-section, "scheduled bank" means a bank for the time being included in the Second Schedule to the Reserve bank of India Act, 1934 (2 of 1934).

Regulations 29 to 40 of the General Regulations deal with the mode of payment of contributions, time for payment of contribution, interest on contribution, refund of contribution erroneously paid etc.

The liability to pay the contribution by virtue of Section 40 of the Act is on the "principal employer" in the first instance and if the principal employer has paid the contribution in respect of the employee, he is entitled to recover the amount from the immediate employer, if any, by virtue of Section 41 of the Act. Section 40 of the Act reads as follows:

40. Principal employer to pay contribution in the first instance. (1) The principal employer shall pay 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.

(2) Notwithstanding anything contained in any other enactment but subject to the provision of this Act and the regulations, if any, made thereunder, the principal employer shall, in the case of an employee directly employed by him (not being an exempted employee), be entitled to recover from the employee the employee's contribution by deduction from his wages and not otherwise;

Provided that no such deduction shall be made from any wages other than such as relate to the period or part of the period in respect of which the contribution is payable, or in excess of the sum representing the employee's contribution for the period.

(3) Notwithstanding any contract to the contrary, neither the principal employer nor the immediate employer shall be entitled to deduct the employer's

contribution from any wages payable to an employee or otherwise to recover it from him.

(4) Any sum deducted by the principal employer from wages under this Act shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was deducted.

(5) The principal employer shall bear the expenses of remitting the contributions to the Corporation.

Section 2 (17) defines the expression "Principal Employer" as follows:

(17) "Principal employer" means -

(i) in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier and where a person has been named as the manager of the factory under (the Factories Act, 1948 (63 of 1948)), the person so named;

(ii) in any establishment under the control of any department of Government of India, the authority appointed by such Government in this behalf or where no authority is so appointed, the Head of the Department;

(in) in any other establishment, any person responsible for the supervision and control of the establishment;

Section 2(13) of the Act defines the expression "Immediate Employer" as follows:

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

Section 41 of the Act provides for recovery of contribution by the Principal employer from the immediate employer in cases where the principal employer has paid the contribution in respect of the employee employed either by the principal employer or through an immediate employer. The said provision reads as follows:

41. Recovery of contribution from immediate employer : (1) A principal employer, who has paid contribution in respect of an employee employed by or through an immediate employer, shall be entitled to recover the amount of the contribution so paid (that is to say the employer's contributions, as well as the employee's contribution, if any) from the immediate employer, either by

deduction from any amount payable to him by the principal employer under any contract, or as a debt payable by the immediate employer.

(1A) The immediate employer shall maintain a register of employees employed by or through him as provided in the regulations and submit the same to the principal employer before the settlement of any amount payable under Sub-section (1).

(2) in the case referred to in Sub-section (1), the immediate employer shall be entitled to recover the employees contribution from the employee employed by or through him by deduction from wages and not otherwise, subject to the conditions specified in the proviso to Sub-section (2) of Section 40.

The expressions "wages" and "wage period" have been defined under Clauses 22 and 23 of Section 2 of the Act which read as follows:

(22) "Wages" means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off and other additional remuneration, if any paid at intervals not exceeding two months, but does not include -

(a) any contribution paid by the employer to any pension fund or provident fund, or under this Act;

(b) any travelling allowance or the value of any travelling concession;

(c) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or

(d) any gratuity payable on discharge;

(23) "Wage period " in relation to an employee means the period in respect of which wages are ordinarily payable to him whether in terms of the contract of employment, express or implied or otherwise)

Section 44 of Act enjoins that every principal and immediate employer shall submit to the Corporation returns containing the particulars of the employees employed in any factory or establishment as specified in the regulations made under the Act. Section 45 of the Act empower the Inspectors appointed by the Corporation to make enquiries into the correctness of any of the particulars stated in the returns furnished by the employers and to inspect the premises of any factory or establishment and issue appropriate directions. In cases where no returns are filed by the employers, Section 45-A of the Act clothes the E.S.I. Corporation with the power to determine the contributions payable in respect of the employees in a factory or establishment after collecting the necessary information. Section 45-B provides for recovery of contributions as an arrear of land revenue. Section 45-C provides for the mode of recovery of contributions by the recovery officer. Section 45-G provides for other modes of recovery. Where

the E.S.I. Corporation in exercise of its power u/s 45-A of the Act determines the contributions payable by the employer who has failed to furnish returns, Sub-section 2 of Section 45-A provides as follows:

An order made by the Corporation under Sub-section (1) shall be sufficient proof of the claim of the Corporation u/s 75 or for recovery of the amount determined by such order as an arrear of land revenue u/s 45-B or the recovery under Sections 45-C to 45-I.

Another important aspect to be borne in mind is that once a factory or establishment to which the Act applies becomes covered under the Act, then the factory or establishment will continue to be governed by the Act notwithstanding that the number of persons employed therein falls below the specified limit or the manufacturing process carried on therein ceases to be carried on with the aid of power. Sub-section 6 of Section (1) reads as follows:

(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.

### C. The Case-Law On Various Aspects

11. A few important judicial pronouncements on the various aspects touching the question of coverage for the purpose of contribution under the Act are given below:

#### I. Object of the Act

1. The Buckingham and Carnatic Co.Ltd. Vs. Venkatiah and Another, , - The E.S.I. Act is a piece of social legislation intended to confer specialised benefits on workmen to whom it applies. So, it would be inappropriate to attempt to construe the relevant provisions in a technical or a narrow sense. A liberal construction must ultimately flow from the words used in the Section. If the words used in the Section are capable of two constructions one of which is shown patently to assist the achievement of the object of the Act, Courts would be justified in preferring that construction to the other which may not be able to further the object of the Act.

2. M/s. International Ore and Fertilizers (India) Pvt. Ltd. Vs. Employees' State Insurance Corporation, , - While construing a welfare legislation like the E.S.I. Act and the notifications issued thereunder a liberal construction should be placed on their provisions so that the purpose of the legislation may be allowed to be achieved rather than frustrated or stultified.

3. Cochin Shipping Company v. E.S.I. Corporation (supra) - The benefits conferred by the Act cover a large area of employees than what the Factories Act and the akin legislations intended. The conclusion is inescapable that it is a welfare legislation. The endeavour of the Court should be to place a liberal

construction so as to promote its object.

4. Transport Corporation of India Vs. Employees' State Insurance Corpn. and Another, - The E.S.I. Act is a beneficial piece of legislation intended to provide benefits to employees in case of sickness, maternity, employment injury and for certain other matters in relation thereto. It is enacted with a view to ensuring social welfare and for providing safe insurance cover to, employees who were likely to suffer from various physical illness during the course of their employment. Such a beneficial piece of legislation has to be construed in its correct perspective so as to fructify the legislative intention underlying its enactment. When two views are possible on its applicability to a given set of employees that view which furthers the legislative intention should be preferred to the one which would frustrate it... the express phraseology of Section 2(9) of the E.S.I. Act defining an "employee" read with Section 38 of the Act clearly projects the legislative intention of spreading the beneficial network of the Act sufficiently wide for covering all employees working for the main establishment covered by the Act even though actually stationed at different branches outside the State wherein the head office of the establishment is located. In any case, the said construction can reasonably flow from the aforesaid statutory provisions. If that is so, any other technical or narrower construction, even if permissible, cannot be countenanced, as that would frustrate the legislative intent underlying the enactment of such a beneficial social security scheme.

5. Employees State Insurance Corpn. Vs. Rajashri Pictures (P) Ltd., - The Kumbakonam Milk Supply Cooperative Society Vs. The Regional Director, Employees' State Insurance Corporation, . The Act is a beneficial piece of social legislation in the interest of labour in factories and other establishments to which the Act applies.

## II. Inspection Report

1. Organo Chemical Industries and Another Vs. Union of India (UOI) and Others, -There is always a presumption that public officials would discharge their duties honestly and in accordance with the rules of law.

2. Regional Director, ESIC, Thrissur v. Hotel Topstar - unreported judgment dated August 3, 2001 in M.F.A. 296/1998 (Kerala High Court)

(a) Absence in the inspection report regarding the wages paid, signatures of employees interviewed by the Insurance Inspector etc. is no reason to discard the report since there is no law which says that the Inspection report should contain signatures of the employees or their wages (para 2).

(b) With a view to avoid coverage under the E.S.I. Act an establishment may fail to record the names of the employees in the Attendance Register and connected records (para 2)

(N.B. the employer did not produce the attendance Register and connected records when demanded by the Inspector)

3. Benoy Kuruvila v. Regional Director, E.S.I.C. and Anr. Unreported judgment dated June 10, 2005 in M.F.A. 296/2002 (Kerala High Court) - Observed that the fact that the employer had no case that the officials of the E.S.I. department had some grouse against him is relevant in evaluating the testimony of the Inspector.

### III. Burden of Proof

1. Employees" State Insurance Corpn. Vs. M/s. Harrison Malayalam Pvt. Ltd., - Held that it was within the exclusive knowledge of the respondent Company as to how many workers were employed by its Contractor and if the respondent Company failed to get the details of the workmen employed by the Contractor, the Company has only to thank itself for its default.

2. M/s. Garage Kamat Vs. Regional Director Employees State Insurance Court and another, . The burden of proof regarding the number of employees would definitely be upon the employer of the establishment to discharge. The fact of number of employees being primarily within the knowledge of the employer, it cannot be said that the burden of proving the same would lie upon the Corporation.

2. E.S.I. Corporation Vs. Hotel Amred, . The person who comes to Court with a grievance has a duty to establish his case by leading evidence oral and documentary and substantiate his claim. The basic principle has been set out in Section 102 of the Evidence Act which reads as follows at. p. 1160:

8. On whom burden of proof lies: The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

3. Employees" State Insurance Corporation Vs. Rasu Tools Ltd., . The provisions of the E.S.I. Act contemplate that the E.S.I. Corporation before fixing contribution payable by the employers, has to give an opportunity to the employers. Thereafter, if the employers feel aggrieved by the order passed by the Corporation they have to approach the E.I. Court for the redressal of their grievance. In the present case, aggrieved by the order of the Corporation it was the employer who approached the Court. Therefore, the burden lies on him to prove the same by producing necessary registers etc. in terms of Section 44 read with Regulations 11, 12 and 32 inasmuch as the employer is the custodian of the records, registers etc.

### IV. Employee

1. Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation, , held that employees of Cycle Stand and Canteen run by Contractors in a Cinema Theatre in the twin cities of Hyderabad and Secundarabad are covered. Cinema Theatre owner was held liable as principal employer for the contribution of those employees.

2. Employees" State Insurance Corporation v. Harison Malayalam Pvt. Ltd. (supra) held that it is not open to the principal employer to contend that the

workers in respect of whom contribution is demanded by the E.S.I. Corporation were casual employees of the Contractor engaged by the principal employer for executing certain contract works and since the contract was over long ago, those workers are unidentifiable now.

3. E.S.I. Corporation v. Premier Timber Supplies 1993 III LLJ(Supp) 886 (Ker)-DB held that temporary employees as well as casual employees who may now be unidentifiable and employees employed through Contractors are certainly covered by the Act and the Principal Employer has the primary liability to pay contribution regarding the wages paid to them. The mere fact that no deductions were made from the wages does not absolve the principal employer from his liability to pay contribution to the Corporation.

4. E.S.I. Corporation Vs. Fertilisers and Chemicals Travancore Ltd., - Case No. 143 (Kerala) D.B. -held that loading and unloading workers employed to do such work in areas where the E.S.I. Act is applicable, are also covered by the Act as they are employees within the meaning of Section 2(9) of the Act and amounts paid to them are wages within the meaning of Section 2(22) of the Act.

5. E.S.I. Corporation v. Vattiyoorkavu H.W. Co-operative Society 1999 III LLJ (Suppl) 452 (Ker-DB) - held that self employed members of the Co- operative Society sharing the profits of the society are not employees of the Society and that the Society is not covered by the Act.

6. Kunnathunad C.C. Coop. Society Vs. Regional Director, ESIC, - held that a co-operative society is a separate legal entity distinct from its members and, therefore, a Society employing its members for wages for the manufacturing process carried on by the Society is liable to be covered under the Act.

7. M/s Udipi Hotel Sudha Vs. Employees State Insurance Corporation, - held that casual employees engaged in a hotel through a contractor will be covered under the Act.

8. M/s. Padmini Products, Bangalore Vs. The Regional Director, Employees" State Insurance Corporation, Bangalore and Others, held that home workers rolling beedies at home when the principal employer has control to reject the end products are "employees."

9. T.I. Cycles of India Vs. Labour Court and Another, - held that part time doctor employed for ambulance room as required under the Factories Act, 1948 is an "employee."

10. ESIC v. Kerala Kaumkudi (1967) 70 FJR 93 (Kerala) held that persons employed in the canteen of a club are "employees" even if they were engaged through independent contractor.

11. AIR Ltd. v. ESIC (1985) Lab IC 1181 (Bombay) - held that book binders engaged by a Contractor who had been entrusted with the task of the binding work by a Company engaged in the business of printing and book binding are

covered.

12. Tiffany's Bar and Restaurant Vs. Regional Director, E.S.I.C., - held that Band boys employed for wages to play music in the Bar and Restaurant are covered.

13. American Express Bakery v. E.S.I.C. (1972) Lab IC 1069 - (Bombay High Court) -held that hawkers employed on fixed wages to sell the products of the factory are employees.

14. Modi Industries Limited v. E.S.I.C. (1986) 52 FLR 196 (Allahabad H.C.) - Watch and Ward Staff, Accounts Staff, Transport Staff, Canteen Staff and Administrative Staff employed for wages in connection with the work of the factory were held to be employees.

15. Regional Director, Employees' State Insurance Corporation, Trichur Vs. Ramanuja Match Industries, held that partners of a firm are not employees even though they work for wages.

#### V. Relationship between two or more Premises of the same employer.

1. Employees State Insurance Corpn. Vs. Rajashri Pictures (P) Ltd., held that the main establishment at Jaipur in Rajasthan carrying on the business of distribution of films (motion pictures) is covered under the Act, the branch office at Gauhati which carries on the same business is also covered even if the number of employees at the branch is less than 20 in view of the definition of employee u/s 2(9) of the Act.

2. Transport Corporation of India v. E.S.I. Corporation (supra) -held that once the Transport Corporation having its registered office in Andhra Pradesh is covered by the E.S.I. Act, employees working in its branch office at Bombay in Maharashtra would also be covered by the Act.

3. Madona Textiles Vs. Employees' State Insurance Corporation, held that inspite of the apparent veil, having regard to the relationship between the units, if the units constitute one integrated whole, then it can be said that all those units are actually one.

4. M/s. Southern Agencies, Rajamundry Vs. Andhra Pradesh Employees State Insurance Corporation, . Here the question was whether the administrative office of a partnership firm engaged in the sales of Steel Furniture, Fans and allied products was a "shop." It was held that even if the activity of actual giving or taking of goods is not carried on in the premises, but if the activities leading to "sales/purchases take place in the premises then it is a shop.

5. Duvent Fans (P) Ltd. Vs. E.S.I. Corporation, held that where branches form an integrated part of the head office and carry on the same business as the head office and the profit and loss account of the head office reflect the profit and loss of the branches as well, the employees of the branches are to be included for the purpose of coverage.

6. Bata India Limited Vs. Employees" State Insurance Corporation and Others, held that even if the factory of Bata India Limited is located at a place which is a non-implemented area for the purpose of the E.S.I. Act, liability for contribution under the said Act can be fastened in respect of the employees working in the sales outlets located elsewhere.

7. Hyderabad Asbestos Cement Products Ltd. Vs. Employees Insurance Court and Another, held that the Act applies to employees working outside the factory in zonal and branch offices connected with the purchase of raw- materials, sale of finished goods or administrative work.

8. The Narasimha Mills Ltd. Vs. The Regional Director, E.S.I. Corporation, Madras-34, held that a godown away from the factory will be covered by the expression "premises of the factory" for the applicability of the Act.

## VI. Factory

1. Employees" State Insurance Corporation Vs. Jalandhar Gymkhana Club, - Here the establishment was a club rendering catering services to its own members or their guests. Held that preparation of food items in the kitchen and preservation and storage of articles in the cold storage etc. would amount to "manufacturing process" and, therefore, such a club rendering catering services to its members or its guests using power would be a "factory" qualifying for coverage under the Act irrespective of the question as to whether it was a voluntary organisation having no object of profit making.

2. G.L. Hotels Limited and Others Vs. T.C. Sarin and Another, . The question was whether the persons employed in a hotel were liable to be covered under the Act. Held that since the manufacturing process in the form of cooking and preparation of food is carried on in the kitchen and since kitchen is an integral part of the hotel and it is not possible to conceive of a hotel without a kitchen, it cannot be denied that the activity in the kitchen has a connection with the activities carried on in the rest of the premises of the hotel. It was, therefore, held that the hotel is a "factory" within the meaning of Section 2(12). Demand by the E.S.I. Corporation for contributions payable for the period prior to the notification treating the hotel as an establishment, was upheld.

3. Christian Medical College Vs. E.S.I.C, , held that the equipment maintenance department of the hospital which is part of the Christian Medical College, Vellore is a "factory" within the meaning of Section 2(1) of the Act.

4. New Grant High Class Bakery v. ESIC (1974) Lab I.C. 533 (Bombay)-It was held that a bakery where a slicing machine is being operated electrically is a factory.

5. Kalpana Dress v. ESIC 1977 (50) FJR 219 (Bombay) held that even though ready made garments are made on the premises without the aid of power, but ironing of those garments is done with the aid of power, the premises is a "factory."

## VII. Shop

1. The Management of Safdarjung Hospital, New Delhi Vs. Kuldip Singh Sethi, ; Workmen of Tirumala Tirupathi Devasthanam Vs. Management and Another, and V. Sasidharan Vs. Peter and Karunakar and Others, ." It is the dominant purpose of an establishment which determines whether the establishment is or is not a shop.

2. Hindu Jea Band, Jaipur Vs. Regional Director, Employees" State Insurance Corporation, Jaipur, held that a partnership firm carrying on the business of playing music on occasions of marriage and other social functions by employing more than 20 persons for wages was a "shop" within the meaning of the notification issued u/s 1(5) of the Act even if the said business of playing music was of intermittent or seasonal character.

3. Kuriakose Vs. Employees" State Insurance Corporation, - Here the question was whether an advertising concern doing consultancy work by engaging Visualizers, Copywriters, Art directors, models and photographers and making advertising materials for their customers for advertisement in the newspapers was a "shop" within the meaning of the notification issued u/s 1(5) of the Act. Mainly following the decision of the Bombay High Court which held that "shop" is a place where goods and services in tangible form are sold, the DB held that such a concern engaged in consultancy services was not a "shop."

4. The Regional Director, Employees" State Insurance Corporation and Others Vs. The Peerless General Finance and Investment Company Ltd. and Others, held that the Peerless General Finance and Investment Company Ltd. engaged in the business of finance and investment of the deposits made by its customers and earning profits is a "shop."

5. Madras Government Servants Co-operative Society Ltd., Madras Vs. Employees" State Insurance Corporation, Madras, held that a Co-operative Society engaged in financing its members and recovering the same with interest is carrying on a systematic, economic or commercial activity sufficient to bring it within the ambit of a "shop" which is one of the notified establishments covered by the Act.

6. Southern Agencies, Rajamundry v. A.P. E.S.I. Corporation (supra). The question was whether the administrative office of a partnership firm engaged in the sales of steel furniture, fans and allied products was a "shop" - Held that even if the activity of actual giving or taking of goods is not carried on in the premises, but if activities leading to sales/purchases take place in the premises, then it is a "shop."

7. K.R. Anitha and Others Vs. Regional Director, E.S.I. Corporation and Another, held that a toddy shop where the business of buying and selling toddy is a "shop" within the meaning of the notification issued u/s 1(5) of the Act. Also held that since the toddy shops in question neither belonged to the Government nor were

they under the control of the Government within the meaning of the proviso to Section 1(4) of the Act, the provisions of the Act were not inapplicable to such toddy shops.

8. The Bangalore Turf Club Limited Vs. The Regional Director, Employees" State Insurance Corporation, held that the Bangalore Turf Limited which was formerly known as the Bangalore Race Club which carries on activities such as sale of services to the members of the club and even to the general public is a "shop" within the meaning of the notification issued under the Act.

#### VIII. Wages

1. Indian Drugs and Pharmaceuticals Ltd. and Others Vs. Employees" State Insurance Corporation and Others, . It was held that wages includes payment made for overtime work.

2. Harihar Polyfibres Vs. Regional Director, ESI Corporation, Wages includes HRA, night shift allowance, incentive allowance and heat, gas and dust allowance.

3. Modella Woollens Limited v. Employees State Insurance Corporation held that wages includes "incentive bonus" though made at the end of each quarter.

4. Hind Art Press, Mangalore Vs. E.S.I. Corporation and Another, - held that special allowance and mid-day meal allowance payable in terms of a settlement are wages.

5. Employees State Insurance Corporation Vs. The Narasimha Mills Limited, Narasimha Naicken Palayam, Coimbatore, held that amount paid as interim relief as directed by the Government would not come within the purview of "wages" u/s 2(22) of the Act and that the Corporation is not entitled to demand contribution.

6. United Breweries Ltd. Vs. E.S.I. Corporation, held that incentive paid every 3 months as a part of settlement is part of "wages" and the periodicity of payment in the case was irrelevant.

7. The Regional Director, Employees" State Insurance Corporation Vs. I.T. Solutions (India) Private Limited, held that, conveyance allowance forms part and parcel of "wages" and the same cannot be executed while calculating contribution.

8. Regional Director, Employees" State Insurance Corporation and Another Vs. Bata Shoe Company (P) Ltd., held that; bonus by way of ex-gratia payment as a gesture of goodwill by branch factories of the Government to their workmen will not constitute "wages."

9. ESIC v. Kirloskar Systems Limited (1985) Lab I.C. 275 Karnataka - Subsistence allowance paid during suspension is not part of "wages."

10. Malabar Fruit Products Co. Vs. E.S.I. Corpn., - Reward for good work paid for exceeding the production target is not "wages."

11. Employees State Insurance Corpn. Vs. Malabar Cashewnut and Allied Products and Others, Wages paid, for holidays under the Kerala Industrial Establishment Act, 1958 are not "wages."

#### IX. Contribution

1. South India Viscose Co-operative Stores Ltd. Vs. Regional Director, Employees State Insurance Corporation, - u/s 39 of the Act the employer is statutorily bound to contribute whether he has sufficient resources or not.

2. Employees State Insurance Corporation Vs. M/s. Hotel Kalpaka International, . Even if the employees had not availed the benefit of Insurance, contributions for the past period are recoverable.

#### X. E.I. Court

1. Regional Director, ESIC v. Narayan Chandra Raj Khowa, (1997) 11 SCC 234, 1998 I LLJ 678 (SC) , the E.I. Court has jurisdiction to decide whether benefits availed of by the employees prior to the E.S.I. Scheme were more advantageous to them than those under the E.S.I. Scheme.

2. ESIC v. Webb's Motor Scooter Mart (1971) Lab. IC 1290 (Mysore) held that the E.I. Court cannot decide the vires of a rule.

3. E.S.I. Corporation Vs. Hindustan Tile Works, - A dispute in respect of contributions payable under the Act is to be decided by the E.S.I. Court and the writ jurisdiction cannot be invoked in such a case.

4 The Employees State Insurance Corporation, Bhopal Vs. The Central Press and Another, . The Insurance Court cannot refuse to perform its mandatory duty even if the E.S.I. Corporation had failed to perform its function.

5. Employees' State Insurance Corporation Vs. M/s. F. Fibre Bangalore (P) Ltd., , - the E.S.I. Corporation cannot approach the E.I. Court for resolving any difference or dispute with an employee.

6. Royal Plastics Industries and Another Vs. Employees' State Insurance Corporation and Others, - held that a dispute between the principal employer and the E.S.I. Corporation regarding the formers liability u/s 45-A can be decided by the E.I. Court.

#### D. Substantial Questions of Law Considered

12. This is a case where there has been failure on the part of the E.I. Court to consider important evidence on record thereby giving rise to a substantial question of law. (See Sonawati and Others Vs. Sri Ram and Another, . Failure to appreciate and determine the question of fact to be tried is an error of law. AIR 1943 208 (Privy Council) . Where the question depends upon the inferences to be drawn from the facts and surrounding circumstances, it is a question of law - (See Orient Distributors Vs. Bank of India Ltd. and Others, . Misreading or non-reading of evidence, as has been done in this case by the E.I. Court, raises a

substantial question of law. (See Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras, . Where a finding of fact is given after throwing the burden on the wrong party that itself is an error of law giving rise to a substantial question of law. (See Jogesh Chandra v. Emdad Meah AIR 1932 PC 28 and Kashmir Singh Vs. Harnam Singh and Another, . Substantial question of law does not mean a substantial question of general importance, but a substantial question of law as between the parties. (See AIR 1927 110 (Privy Council) and Guran Ditta v. Ram Ditta AIR 1928 PC 172). A decision not based on legal evidence raises a question of law R. Ramachandran Ayyar Vs. Ramalingam Chettiar, . A pure question of law can be raised for the first time even before the Court of last resort if it does not involve any investigation or re-trial on facts. Yeswant Deorao Deshmukh Vs. Walchand Ramchand Kothari, . Any finding which is not supported by the evidence brought on record or which is against the law or which suffers from the vice of procedural irregularity can be termed as "perverse finding." (Vide Gaya Din (D) through LRs v. Hanuman Prasad (D) through LRs AIR 2001 SC 386 : (2001) 1 SCC 501 and Parry's (Calcutta) Employee's Union Vs. Parry and Co. Ltd. and Others, . A finding can be said to be perverse if no reasonable person acting judicially and properly instructed in the relevant law could arrive at such a finding on the evidence on record. (See Helper Girdharbhai Vs. Saiyed Mohmad Mirasaheb Kadri and Others, .

#### E. Conclusion

13.I have no hesitation to conclude that the E.I. Court has come to a conclusion which no reasonable person well instructed in law would have arrived at on the evidence before him. The substantial questions of law raised are accordingly answered in favour of the appellant Corporation. After a careful evaluation of the evidence on record and the legal aspects adverted to above, I am of the view that the E.I. Court below was wrong in allowing the petition of the employer. The impugned order is set aside and I.C. 10/2000 filed by the respondent employer before the Court below shall stand dismissed.

In the result, this appeal is allowed as above. No costs.