

**(2005) 07 KL CK 0036**  
**In the High Court Of Kerala**  
**Case No : M.F.A. No. 337 of 2000**

Regional Director, E.S.I. Corporation

APPELLANT

Vs

Hindustan Lever Ltd.

RESPONDENT

**Date of Decision :** 05-07-2005

**Acts Referred:**

Employees State Insurance Act, 1948 — Section 2(13), 2(17), 2(9), 40, 41

**Citation :** (2005) 107 FLR 147 : (2005) 3 ILR (Ker) 496 : (2005) 3 KLT 622

**Hon'ble Judges :** P.R. Raman, J;K.T. Sankaran, J

**Bench :** Division Bench

**Advocate :** T.D. Rajalakshmi, E.R. Venkateswaran and P.N. Mohanan, for the Appellant; Antony Dominic, A.M. Shaffique and Priya Krishnamoorthy, for the Respondent

**Final Decision :** Allowed

## Judgement

P.R. Raman, J.—The appellant is the Regional Director of the Employees" State Insurance Corporation, Thrissur. The appellant challenges the order passed by the Employees" Insurance Court in I.C. No. 76 of 1996 to a limited extent. Respondent herein is a company incorporated under the Companies Act and is an establishment covered under the Employees" State Insurance Act and who was the applicant before the Employees" Insurance Court. Though the application was originally filed by M/s. Brooke Bond Lipton India Ltd., since M/s. Hindustan Lever Limited took over the said company, a plea was made to amend the cause title, which was allowed by the court below and thereafter, the matter was prosecuted by M/s. Hindustan Lever Limited, the respondent herein.

2. The respondent is engaged in the manufacturing, marketing and exporting of various products including tea and is having office at Willingdon Island, Kochi. The employees of the respondent Company are covered under the Employees" State Insurance Scheme. However, on an inspection conducted by the Employees" State Insurance Corporation through its officers, it was found that certain items were omitted to be taken into consideration for the purpose of

payment of contribution. The items which were thus excluded for the purpose of payment of contribution were: (1) repair and maintenance of quarters; (2) processing charges; (3) processing, conversion and packing; and (4) repair and maintenance of office building.

3. It was contended that the omitted items were not wages paid to the employees, but only payments made to various organisations for carrying out certain works on contract basis and that the contracting establishments were employing sufficient number of employees to cover themselves independently under the ESI Scheme. The above contention was not accepted by the E.S.I. Corporation. When they took coercive steps for recovering the amount, the respondent approached the Employees' Insurance Court for necessary reliefs.

4. The Employees' Insurance Court found that major portion of the contribution demanded relates to service charges, packing and conversion charges paid to three contracting establishments. It was contended by the respondent that payments were made to those contracting agencies on the basis of the terms and conditions of the contract and it cannot be treated as wages for the purpose of assessment and collection of contribution. It was also contended that those agencies are independent establishments carrying on similar work not only for the respondent but also for some other establishments who are also engaged in the export of tea, coffee, spices etc. The Employees Insurance Court found that the three contracting agencies are registered establishments and that the present demand is not confined to the wage part of the contracting agencies, but it would cover the whole payment made which includes the contracting agencies' other expenses and profit. What portion of the amount paid by the respondent to the three contracting agencies will satisfy the definition of the term "wages", however, does not, being a question of fact, arise for consideration in this Appeal and no such determination is made by the Employees insurance Court. However, the E.I. Court found that the three contracting agencies could themselves be covered as independent establishments under the Act. Therefore, it was held that it would be appropriate on the part of the appellant to issue notice of coverage to all the three contracting agencies and only if it is found that none of them would come under the purview of the E.S.I. Scheme, the liability will be shifted to the respondent in the capacity as the principal employer for the purpose of payment of contribution at the first instance. The above said finding give rise to a substantial question of law.

5. It is not disputed that the processing, conversion and packing were done for the respondent Company on contract basis by three independent agencies. There is also no dispute that the actual work is carried on in the respondent's premises. The question whether the three independent agencies have more than the required minimum strength to cover them as establishments under the ESI Act and if so whether that will absolve the liability of the principal employer u/s 40 of the Employees' State Insurance Act, arise for consideration. As per Section 40 of the Employees' State Insurance Act 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. The rest of the provisions contained in Section 40 may not have any relevance in the present case. Section 41 provides for recovery of contribution from the immediate employer. As per Section 41, 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 contribution so paid (that is to say the employer's contribution 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.

6. The word "immediate employer" is defined u/s 2(13) of the Employees' State Insurance Act as follows:

" "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;"

So also the word "principal employer" is defined u/s 2(17) of the Act, which reads as follows:

" "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 any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the Head of the Department;

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

7. It is thus clear from the definition of the term "immediate employer" that it is sufficient if he undertakes the execution on the premises of a factory or an establishment of the principal employer or is done 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. That the three contracting agencies who have thus undertaken the execution of any part of the work which is part of the work of the establishment of the principal employer, namely, the respondent Company herein, would therefore, satisfy the definition "immediate employer". The "immediate employer" may be an individual, a company incorporated under the Companies Act or a firm or a statutory corporation as the case may be, who may themselves be registered establishments under the Employees' State Insurance Act. But for the application of Section 40 of the Employees' State Insurance Act, the fact that the immediate employer itself is a covered establishment is not relevant. It is not the case of any of the three contracting agencies or that of the respondent Company before the court below that employees of the three contracting agencies who were actually doing the work in the principal employer's business premises were registered under the E.S.I. Scheme or that contribution was paid by any one of them in respect of the wages they earned while doing the work at the premises of the principal employer. Hence the mere fact that the three contracting agencies have sufficient number of employees to cover themselves independently under the Act will not however take away the statutory liability fastened on the principal employer to pay the contributions, both employer's and employee's, as contemplated u/s 40. Further the principal employer is enabled by Section 41 to recover such amounts which they have discharged on behalf of the immediate employer, to adjust the same against any payment due to the immediate employer from the principal employer or to treat the same as a debt recoverable.

8. In this connection we may refer to the decision of the Apex Court in *Saraswath Films v. Regional Director, E.S.I. Corporation* (2003 (1) KLT 886 (SC)), wherein the question as to whether the duties of security guards who were engaged on the premises of a cinema theatre are directly and intrinsically part of the work of the establishment was considered. It took notice of the definition contained in Section 2(9) of the Employees' State Insurance Act as well as the definition of the term "immediate employer" and "principal employer" under Sections 2(13) and 2(17) of the Act. It was held that on a plain reading of the definition of the expressions "principal employer" and "immediate employer" the position is manifest that the appellant is the principal employer of the security guards in the case. It may be that their immediate employer is the security agency with whom there has been a contract either by the lessor or the lessee of the cinema hall for the purpose of the service. On a fair reading of the relevant statutory provisions and keeping in view the object and purpose for which the legislation was enacted, it was held that in the case on hand the security guards came within the purview of "employee" as defined in Section 2(9) of the Act. There also a contention was raised that the two security guards were not to be included as employees of the establishment for the purpose of determining the total number of employees employed by the cinema theatre. It was also contended that there was no employer-employee relationship between the said cinema theatre and the security guards, which was however repelled.

9. We are, therefore, of the considered view that merely because the "immediate employer" have sufficient strength to cover them as independent establishment under the Act by itself is not a reason to hold that the liability of the principal employer u/s 40 is taken away. In a case where there is a principal employer and an immediate employer as in the present case, the liability to pay contribution at the first instance is on the principal employer who in turn has remedy to recover the same from the immediate employer. Hence we set aside the judgment passed by the court below and remand the matter for fresh consideration on the other questions. It is open to the E.S.I. Corporation to produce relevant materials to show as to what portion of the amount represents wages on which contribution is liable to be paid by the principal employer, respondent herein. Both sides shall be given an opportunity to adduce additional evidence in this regard.

Appeal is allowed as above.