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**(1989) 02 KL CK 0033**  
**In the High Court Of Kerala**  
**Case No : M.F.A. No. 260 of 1984**

Spencer and Co. Ltd.

APPELLANT

Vs

Regional Director, E.S.I.C.

RESPONDENT

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**Date of Decision :** 13-02-1989

**Acts Referred:**

Employees State Insurance Act, 1948 — Section 1(4), 1(5), 2(9), 82

**Citation :** (1989) 2 ILR (Ker) 360 : (1991) 1 LLJ 541

**Hon'ble Judges :** Varghese Kalliath, J;M.M. Pareed Pillay, J

**Bench :** Division Bench

**Advocate :** Sanjay Mohan and J.B. Koshy, for the Appellant; T. Ravi Kumar, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

Varghese Kalliath, J.—This appeal arises from Insurance Case No. 232/82. Petitioner in the case who is the appellant herein is Spencer and Company, Fort Cochin Branch, Ernakulam. Respondent herein who was the respondent before the Employees' Insurance Court is the Regional Director, E.S.I. Corporation, Trichur. By the judgment impugned in this appeal, the Employees' Insurance Court, Alleppey found that the appellant - Spencer and Company Ltd. Fort Cochin Branch is an establishment wherein the provisions of the Employees State Insurance Act, 1948, for short the Act, read with the notification issued by the Government of Kerala u/s 1(5) of the Act are applicable. The appellant contends that the provisions of the Act read along with the notification issued by the Government of Kerala u/s 1(5) of the Act are not applicable to the appellant. Hence the appeal. The short facts are these :-

2. Spencer & Company is a company registered under the Companies Act. Its Head Office is at Madras. It has got various branches at different places in different States. In Kerala, there are three branches, one at Ernakulam, the other at Trivandrum and the third at Fort Cochin - the appellant herein. There is no dispute that except the appellant branch, the other branches are covered

under the Employees State Insurance Scheme. It is also to be noted that the appellant - Fort Cochin Branch - has been closed with effect from 30th June, 1982. The employees of the appellant branch were transferred to Ernakulam Branch. There is no dispute that the other branches of Spencer & Company in this State are treated as shops and they were put under the coverage of ESI Scheme in view of the notification dated 27th May, 1976 issued by the Government of Kerala u/s 1(5) of the Act.

3. The power to issue notification is under subsection (5) of Section 1 of the Act. Section 1 of the Act deals with the application of the provisions of the Act. It is provided under sub-clause (4) of Section 1 that it shall apply in the first instance to all factories (including factories belonging to the Government) other than seasonal factories. Under sub-section (5) of Section 1, it is provided that the appropriate Government may, in consultation with the Corporation and where the appropriate Government is a State Government, with the approval of the Central Government, after giving six months' notice of its intention of so doing by notification in the Official Gazette, extend the provisions of the Act or any of them, to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise.

4. A reading of sub-sections (4) and (5) together, makes it clear that for the purpose of application of the Act, two broad divisions are made (1) factories and (2) other establishments. In regard to establishments, the application of the Act is controlled by the appropriate Government and the Act can be made applicable only after satisfying the provisions contained in sub-section (5) of Section 1. By clause (3) of the Kerala notification, the following establishments wherein twenty or more persons are employed or were employed for wages on any day of the preceding twelve months are included namely;

1. ....
2. ....
3. Shops
4. ....
5. ....

5. The contention of the appellant is that the appellant - establishment is not employing 20 or more than 20 persons. Appellant contended that for the application of the Act read with the notification, the appellant should be treated as an independent establishment of Spencer and Company unconnected with the other establishment of the same company in the State. This contention was not accepted by the Employees' Insurance Court, though there is no dispute that the appellant has not employed 20 persons. The appellant made it clear that the Ernakulam branch was dealing in retail business while the Fort Cochin branch was engaged in wholesale business, though the main business in both branches was the sale of articles usually sold in similar shops. The court found that the

employees in the Ernakulam branch and Fort Cochin branch were doing identical employment and therefore both branches were having functional integrity. Further the court found that the employees were liable to be transferred from one shop to the other. The court mainly relied on the fact that the employees are being transferable from one branch to another. If one branch is under the coverage of the Insurance Scheme under the Act, the employees in the other branch where the notification as such is not applicable on account of the fact that that branch was engaging only less than 20 persons, will also attract the provisions of the Act. There is no dispute that all the branches are working under the same management and the Head Office is at Madras. There is a notification issued by the Government of Tamil Nadu under sub-section (5) of Section 1 and all the branches satisfying the requirements of the notification issued by the Government of Tamil Nadu were under the coverage of the Insurance Scheme under the Act in the State of Tamil Nadu. The fact that branches are administered by the Head Office and the employees are controlled by the Head Office may not be an adequate and sufficient circumstance for applying the provisions of the Act in regard to branches in other States where there is no notification by the Government under sub-section (5) of Section 1 in the areas where such branches are operating. So, the question whether the provisions of the Act are attracted in regard to a particular branch depends upon the notification issued by the concerned State.

6. If this principle is not accepted, there is the possibility of application of a notification issued by the Government of Tamil Nadu getting extra territorial jurisdiction since that notification will have operation and effect in regard to establishments in the other States. Perhaps, accepting this principle, the court did not rely on the fact that the appellant-branch is controlled and administered by the Head Office at Madras and the employees have to be considered as employees engaged by Spencer and Company, Madras, which had come under the notification of Government of Tamil Nadu. The court linked the Fort Cochin Branch with Ernakulam Branch and found that the employees of the Ernakulam Branch together with the employees of the Fort Cochin Branch exceeded the required number and so held that the Act read along with the notification is applicable. To hold so, the court found that the main business in both branches are identical and that there is functional integrity.

7. In order to fortify this reason, the court also took note of the fact after the closure of the Fort Cochin Branch on 30th June, 1982, all the employees therein were shifted to Ernakulam Branch. The court finally observed:-

"Therefore the evidence in this case is that both shops at Ernakulam and Fort Cochin were more or less of the same nature and only thing was that those were functioning at two places merely for business interest. Except for the fact that both functioned at two different places, those were part and parcel of the same establishment which were directly under the control of Head Office at Madras."

8. The learned counsel for the appellant submitted before us that the reasons

adopted by the court are unsustainable in law. Counsel submitted that by virtue of the notification issued by the Government of Kerala, only shops employing 20 or more than 20 persons are within the coverage of the Insurance Scheme. Each establishment has to be considered as independent and the counsel submitted that there is ample evidence to show that each establishment is working under the direct control and supervision of the Head Office and there was absolutely no evidence regarding any control exercised by the Ernakulam Branch over Fort Cochin Branch. There is no case for the respondent that the Fort Cochin Branch was controlled by the Ernakulam branch.

9. Learned counsel relied on the decision reported in (1980-II-LLJ-232) E.S.I.C. v. New India Maritime Agencies. In this case an almost identical question came up for consideration. It was a case of an establishment which was a branch of a concern whose Head Office was outside the State. The branch in question was of the New India Maritime Agencies at Willingdon Island. The New India Maritime Agencies' Head Office was at Madras. The branch employed only 15 employees. It was found that besides the office at Willingdon Island, the company had offices at Alleppey and Quilon with 2 and 6 employees respectively. The case pleaded was that three establishments should be treated separately as independent establishments and that they will not come within the coverage of the Act, since the number of employees in each of these branches would be below 20. Of course, if these branches are taken as one unit, there is scope for coverage because the number of employees will exceed 20. The Employees' Insurance Court found that it is not possible to add all the employees of the three branches together for the purpose of applying the Act. The Insurance Corporation filed an appeal before this Court. Of course, in considering this question, this Court said it is not a correct interpretation of the law to hold that unless persons are working in one and the same premises, the question of their coverage as a unit may not arise. This court said so relying on the definition "employee" in Section 2(9) of the Act which embraced all persons employed for wages not only in an establishment or factory but all in connection with the work of an establishment or factory. It has to be noted that the definition of "employee" in Section 2(9) of the Act would certainly take in persons employed in factories but also in connection with the work of a factory. In the case of an establishment also the definition of employee makes it clear that employees are those persons employed for wages not only in an establishment but also in connection with the work of an establishment. But it is qualified by saying that the establishment must be an establishment to which the Act applies. Poti, J., as he then was, speaking for the Division Bench observed (P. 235):

"In a case where an establishment carries out its work not only in its office but also in other places employees who work at such other places could also be said to be employees in the establishment whose coverage would fall within Section 38 of the Act. That is because they are employed in establishments as the term has been explained. But this does not mean that independent branches of a company such as the one here controlled from outside the State have necessarily

to be treated as one unit, That would depend upon the evidence in the case. If different offices are carrying out work of one central establishment naturally despite the fact that the offices are located at different places employees who are so stationed in different places can be said to be employees in the establishment whose work they are carrying out at such places. But if they are not doing the work of the establishment which is sought to be covered though they may be branches of the same company there is no question of treating all of them as one establishment or any one of them as an establishment whose employees are employed in the other offices. When controversy on such a question arises the question for decision would be whether the employees in the other offices sought to be brought within the coverage or sought to be noticed for the purpose of determining the total number of employees, are employees "in" the particular establishment whose coverage is being considered. If they are doing work independent of the work of the office establishment which is sought to be covered there is no question of taking note of them. That will be the case where the establishment sought to be covered and the other offices whose employees are sought to be brought within coverage are independent branches of a company. That may normally be otherwise where the establishment sought to be covered is a Regional or Area Office and the other establishments whose employees are sought to be brought within coverage of such establishment are carrying out the work of the Regional or Area Office."

10. As the modality adopted in Section 1 of the Act that at the first instance the Act applies to all factories (including factories belonging to the government) other than seasonal factories and to attract the application of the Act for establishments a State notification u/s 1(5) is made necessary, it is obligatory to examine whether the branches of an establishment where the Head Office is outside the State which issued the notification are working independently under the control and directions of the Head Office or linked with area offices or a central office in the State which issued the notification. If the various offices in the State are connected with the area offices or the central office in the State applying the definition of employee u/s 2(9), the employees of all the branches in the State under the central or area office in the State can be taken as one unit for the purpose of the application of the provisions of the Act. The court did not find that the Ernakulam Branch was working as an area office or as a central office for the Kerala State or that the Ernakulam Branch was having any control over the Fort Cochin Branch.

11. The learned counsel for the respondent referred us to the decision reported in ). The question considered in this case was the scope of the definition of "employee" u/s 2(9) of the Act. The Supreme Court observed thus (P. 186):-

"An employee may be working within the factory or outside the factory or may be employed for administrative purposes or for purchase of raw materials or for sale of the finished goods, all such employees are included within the definition of "employee" in Section 2(9) of the Act. Therefore the persons employed in the

Zonal Offices and Branch Offices of a factory and concerned with the administrative work or the work of canvassing sale would be covered by the provisions of the Act."

The Supreme Court again said thus:-

"The provisions of Sections 2(9), 2(12), 38 and 39 do not warrant the restricted interpretation that in order to bring an employee within the scope of the Act, he should not only be an employee within the meaning of Section 2(9) of the Act but also that he should be an employee of a factory as defined in Section 2(12) of the Act."

The Supreme Court has made it very clear that by a proper reading of the definition of "employee" it is clear that the word employee would include not only persons employed in the factory but also persons connected with the work of the factory. In short, it is not necessary that to attract the definition of an employee, the person concerned should work in the premises of the establishment or factory, but it requires that the person must be doing some work in connection with the said establishment or the factory.

12. Learned counsel for the appellant submitted before us that the employees of the Fort Cochin Branch were in no way connected with the work of the Ernakulam Branch. Similarly, the employees of the Ernakulam Branch were not in any way connected with the work of the Fort Cochin Branch. The court only found that both the branches are controlled by the same Head Office and that both the branches are doing identical or similar work. These facts are not sufficient to say that the employees of the Ernakulam Branch are connected with the work of the Fort Cochin Branch or vice versa. Learned counsel referred us to a decision reported in (1983)63 FJR 88 *Spencer & Co. Ltd. v. E.S.I. Corporation* and submitted that an identical position has been considered by the Andhra Pradesh High Court wherein the petitioner was *Spencer & Company Ltd.* The Andhra Pradesh High Court held thus:-

"The employees of a branch of a factory or establishment would come within the purview of the Employees' State Insurance Act, 1948, notwithstanding that the total number of persons employed therein is less than 20, if the total number of persons employed in the several branches of the establishment is 20 or more in view of the extended definition of "employee" in the Act which includes persons connected with the work of the factory."

The Andhra Pradesh High Court relied on the decision of the Supreme Court reported in *Hyderabad Asbestos Cement Products Ltd. Vs. Employees Insurance Court and Another*, It has to be noted that the Supreme Court was dealing with the question of the extended meaning of the word "employee". The question whether the employees of a branch office can be linked with the employees of another branch of the same concern was directly considered by the Division Bench of this Court in *E.S.I.C. Vs. New India Maritime Agencies*, In the case that was considered by the Andhra Pradesh High Court, the Visakhapatnam branch

employed only 12 persons and as the staff did not exceed 20, it was contended that the Visakaha-patnam branch would not come under the purview of the Act. There it was also contended that the factory of the company is in Madras and the Regional Office of the E.S.I. Corporation at Madras alone can have jurisdiction over the branches of the Company in Andhra Pradesh and that the regional office in Andhra Pradesh cannot have jurisdiction over the branches of the Company.

13. Considering this aspect of the case, the Andhra Pradesh High Court relied on a Full Bench decision reported in Hyderabad Asbestors Cement Products Limited Vs. E.S.I. Court and Another, Hyderabad Asbestos Cement Products Limited v. E.S.I. Court. In that Full Bench case, it was found that the Zonal Office of the Company was at Vijayawada while the factory was located at Hyderabad. Considering the relevant provisions of the Act, it was held that the employees of the Vijayawada establishment are covered by reason of the inclusive part of the definition added to Section 2(9) of the Act by the Amending Act of 1966. That Full Bench decision was affirmed by the Supreme Court in Hyderabad Asbestos Cement Products Ltd. Vs. Employees Insurance Court and Another, In fact, the more important question that was highlighted in the judgment of the Andhra Pradesh High Court was in regard to how the power of the Corporation where it has got Regional Office outside the State, has to be exercised and in that context, the court said:-

"The Employees" State Insurance Corporation is one. It is for the Corporation to employ a procedure which is most beneficial to the employees. It is clear from the provisions of the Act and the Employees" State Insurance (General) Regulations, 1950, that the control is vested in the regional offices within whose jurisdiction the branches of a factory or establishment are situated so that the regional office which is nearer to the branches would be able to rush necessary help to the employees immediately. It cannot, therefore, be contended that the branch office in one State should look to the regional office in the State in which the head office of the employer is situated for the collection of the contributions or for rendering relief to the employees in the branch."

The question posed in this case was not considered in Andhra Pradesh case on the basis of the contentions now raised before us by the counsel for the appellant. The Division Bench of this Court considered the identical question. We prefer to rely on the Division Bench decision reported in E.S.I.C. Vs. New India Maritime Agencies,

14. In the impugned judgment, the Insurance Court has not recorded a finding that the employees in the Fort Cochin Branch are under the control or supervision of the Ernakulam Branch or that they are doing work connected with the work of the Ernakulam Branch. In the same way, the employees of Ernakulam Branch are not under the control and supervision of the Fort Cochin Branch or they are doing the work of the Fort Cochin Branch. There is no case that the Ernakulam Branch is acting as an area office under which the Fort Cochin Branch is functioning. In these circumstances, we feel that there is no

justification for linking the employees of Fort Cochin Branch with the Ernakulam Branch employees and applying the provisions of the Act read with clause (3) of the notification issued by the Government of Kerala u/s 1(5) of the Act.

15. In the result, we cannot agree with the conclusions of the Employees' Insurance Court. We set aside the judgment and allow the appeal. In the circumstances of the case, we do not order