
(1988) 04 CAL CK 0036
In the Calcutta High Court
Case No : Matter No. 1650 of 1985

Subhas Chandra Bose and Others	Vs	APPELLANT
E.S.I. Corporation and Others		RESPONDENT

Date of Decision : 04-04-1988

Acts Referred:

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

Citation : (1990) 1 LLJ 148

Hon'ble Judges : Dipak Kumar Sen, Acting C.J.; Shyamal Kumar Sen, J

Bench : Division Bench

Judgement

Dipak Kumar Sen, Actg. C.J.

1. The material facts and proceedings leading up to this appeal are, inter alia, that Subhas Chandra Bose and others, the appellants before us, are either proprietors of firms, or partnership firms or limited companies or partners or managing directors respectively of such partnership firms or companies. The appellants carry on the business of electrical installations in the State of West Bengal as independent contractors holding licences from the Government of West Bengal for carrying on such business. Under several and separate contracts entered into by and between the Calcutta Electric Supply Corporation (India) Limited, the respondent No. 4 on the one hand, and the appellants individually, on the other, the appellants have been and still are carrying on the work of erection of over-head electric lines or laying underground cables under public roads and repair and maintenance of the aforesaid.

The appellants do not own or run any factory or establishment and for the purpose of the aforesaid work the appellants have been engaging and engage workmen on temporary job basis.

2. The material terms and conditions of the contracts between the appellants and the respondent No. 4, as will appear from one particular contract dated 20th January, 1984, entered into by and between the appellant No. 4 and the

respondent No. 4, are as follows. The said contract relates to laying of new underground cables and conversion of overhead mains and service to underground system at Barrackpore Trunk Road between Paikpara to D.F.1/6 and from Baranagar P/T to D.F. 1/67:

"Please note that you will have to provide competent supervision while carrying out the work in accordance with the provisions of the Indian Electricity Rules, 1956. You will also have to provide adequate watch and ward arrangement for the safe custody of the materials till such time as complete installation is handed over to us. You will be required to insure against theft and pilferage of all materials while held in your site godown".

Material terms and conditions of the licences issued by the Government of West Bengal to the appellants will appear from one such licence issued to the appellant No. 6 and read as follows:

"Mr./Messrs. Eastern Engineers and Constructions is/are hereby authorised to carry out electrical installation work in the State of West Bengal. This licence is issued subject to the compliance with the conditions set out on the reverse, and also to the continued compliance with the conditions set out in Regulation 24 of the Regulations under Rule 45(1) of the Indian Electricity Rules, 1956.

(1) All electrical installation work coming within the purview of Rule 45(1) of the Indian Electricity Rules, 1956, undertaken by the holder of this licence, shall be carried out

under the direct supervision of a person holding a valid certificate of competency....

(2) The holder of this licence shall maintain a register of supervision and workmen in the form below and shall produce the register for inspection on demand by an electrical inspector or other person authorised in this behalf by the licensing Board.

(3) On the completion of any electrical installation work coming within the purview of Rule 45(1) of the Indian Electricity Rules, 1956, a test report in the form prescribed by the Board shall be submitted by the holder of this licence to the Secretary. The report shall be signed by the supervisor under whose supervision the work has been carried out, and countersigned by the holder of this licence, who shall be wholly responsible for the due execution of the work.

(4) If the holder of this licence ceases to be in possession of a valid supervisor's certificate of competency, or ceases to retain in his said employ atleast one supervisor holding a valid certificate of competency, this licence shall be invalid.

(5) If the holder of this licence accepts an employment under any other firm or person for the purpose of carrying out or supervising any electrical installation work coming within the purview of Rule 45(1) of the Indian Electricity Rules, 1956, this licence shall be invalid and the holder shall return the same to the

Secretary for cancellation".

3. On the 26th August, 1975, pursuant to queries raised by the respondent No. 4, the respondent No. 2, the Regional Director of the respondent No. 1, issued a communication to the Executive Director (Administration) of respondent No. 1, stating, inter alia, that persons employed for wages through a contractor will not normally fall within the meaning of the term "employee" as defined u/s 2(9) of the Employees' State Insurance Act, 1948 (hereafter referred to as the said Act) unless they are employed in any work incidental or preliminary to or in connection with the work of a factory of the respondent No. 1 inside the factory premises or in the event of their being employed elsewhere, they work under the supervision of the principal employer.

4. Subsequently, respondent No. 4 issued letters to the members of the Association of Electrical Contractors of Eastern India, including the appellants, that the workmen of the electrical contractors should be covered under the said Act immediately or otherwise the respondent No. 4 will deduct a lump sum of 7% from their bills. By its letter dated 19th October, 1982, the said Association contended that in view of the clarification issued earlier by the respondent No. 2 it was not necessary for the electrical contractors to register their employees under the said Act." Further correspondence was entered into by and between respondent No. 4, the said Association and some of the appellants. But the respondent No. 4 started deducting amounts from the bills of the electrical contractors issued to the respondent No. 4 on account of contribution to the employees' state insurance on and from 1984. Such deduction continued in 1986 at the rate of 10 per cent.

5. After further correspondence, the appellants moved the above writ petition on 6th December, 1986, against the Employee's State Insurance Corporation; the Regional Director, Employees' State Insurance Corporation; the Deputy Regional Director, Employees' State Insurance Corporation; the Calcutta Electric Supply Corporation (India) Ltd. and the Union of India impleaded respectively as respondents Nos. 1,2,3,4 and 5, for a writ in the nature of certiorari calling upon the said respondents to bring up to this Court the records relating to the deduction at the rate of 7 per cent from the bills of the appellants in the year 1984 and 10 per cent from the year 1985, a writ in the nature of prohibition prohibiting the respondents from proceeding to make further deductions from the bills of the appellants issued to respondent No. 4, and a writ in the nature of mandamus directing respondents Nos. 1, 2, 3 and 4 to recall the order for deduction from the bills of the appellants issued to respondent No. 4 on account of employees' state insurance.

6. The case of the appellants in their writ petition was, inter alia, that they were independent contractors working, under licences granted by the Government of West Bengal and did not own or run any factory or establishment. The employees of the appellants were not covered by the said Act of 1948. The work done by the appellants were carried out over public roads and underground by

themselves without any supervision from the respondent No. 4 or its agents, who had no control over carrying out the said works. The said works were carried out by the appellants outside the factory or establishment, of respondent No. 4. As such, the employees of the appellants did not come within the definition of the term "employee" in Section 2(9) of the said Act of 1948. It was contended that respondent No. 4 was deducting amounts from the bills of the appellants arbitrarily without any authority of law and retaining the same though there was no final determination that the employees of the appellants were covered under the said Act of 1948. In any event, no notice had been issued to the appellants by the Employees' State Insurance Authorities to treat their employees as covered under the said Act and calling upon the appellants to pay contributions on account of Employees' State Insurance. There was no evidence on record to show that the employees of the appellants worked in the factory or premises of respondent No. 4 or under the supervision of the latter or its agents elsewhere and as such the appellants did not come within the mischief of the said Act in respect of the said works.

6. The said writ petition of the appellants was heard on affidavits without any rule nisi being issued.

7. Sankar Bhattacharya, an Insurance Inspector of the office of respondent No. 2, affirmed an affidavit on the 10th December, 1985, which was filed in opposition to the petition. It was alleged in the said affidavit, inter alia, that respondent No. 4 was an establishment covered under the said Act and that the employees involved, namely, the employees of the appellants, were employed under the supervision of respondent No. 4 or its agents. The work of the said employees was ordinarily part of the work of the establishment or preliminary to the work of respondent No. 4 or such work was incidental to the purpose of the establishment of respondent No. 4. Therefore, the said employees of the appellant came within the definition of "employee" in Section 2(9) of the said Act and the principal employer, namely, respondent No. 4, was liable to pay the Employees' State Insurance dues in respect of the said employees. It was contended further that the deduction from the bills of the appellants on account of Employees' State Insurance dues was a dispute inter se respondent No. 4 and the appellants and the Employees' State Insurance Authorities were not concerned with the same.

8. It was contended that the appropriate forum for resolution of such dispute was the Employees' State Insurance Court u/s 75 of the said Act of 1948. It was contended further that it is not possible for this Court to find as a fact the actual nature of the work performed by the employees of the appellants. It was not open to the appellants to challenge that they were not liable for contribution for Employees' State Insurance or to challenge the decision of respondent No. 4 of deduction from the bills of the appellants in respect thereof.

9. Joyti Bhusan Ghosh Dastidar, an officer on special duty of respondent No. 4, affirmed an affidavit on 10th December, 1985, which was also filed in opposition

to the petition. It was alleged in this affidavit, inter alia, that the appellants were engaged by respondent No. 4 as contractors for carrying out such work through their employees. Such work consisted of laying of cables and distributors, repair of faults and breakdowns in underground cables throughout the area in which electricity was supplied by respondent No. 4. Such work was executed by engaging contractors with labourers employed by them and under their supervision and control. The respondent No. 4 did not exercise any supervision over such work.

10. It was alleged that by a notice dated 31st July, 1982, respondent No. 2, the Regional Director of the Corporation, alleged that the employees of the contractor engaged in the Mulajore Generating Station of respondent No. 4 were covered under the provisions of the said Act and that respondent No. 4 was the principal employer in respect of the said employees and liable for payment of contribution in respect of the said employees to the Employees' State Insurance. Respondent No. 4 was called upon to pay arrear contribution at the rate of seven per cent aggregating to Rs. 30,17,689.09 from November, 1980 to March, 1982. Upon receipt of the said notice, the respondent No. 4 in turn issued notice upon its contractor for registering themselves with Employees' State Insurance Authorities and further informed them that otherwise respondent No. 4 would be compelled to deduct a lump sum of seven per cent from their bills.

11. This was followed by a further notice from respondent No. 2 dated 24th September, 1982, alleging that the contribution demanded under the earlier notice had not been paid and respondent No. 4 was asked to show cause why an assessment should not be made against it u/s 45A of the said Act of 1948 and to recover the same along with interest as an arrear of land revenue u/s 45B of the Act. Respondent No. 4 -asked for time for necessary investigation. The respondent No. 4 contended further that the provisions of Section 45-A of the said Act were not attracted in the facts and circumstances and questioned the legality and validity of the demand. After several representations made in the matter through the Bengal Chamber of Commerce, respondent No. 4 moved this Court in an application under Article 226 of the Constitution challenging the said notices respectively dated 31st July and 24th September, 1982. The said application was disposed of on 23rd March, 1984, when a learned judge of this Court gave leave to respondent No. 4 to reply to the notice dated 24th September, 1982, and directed the authority concerned to afford an opportunity of personal hearing to respondent No. 4 and to consider the matter in accordance with law. It was recorded that the Employee's State Insurance Authorities would not take any steps to realise the contribution as demanded in the meantime.

12. Pursuant thereto, respondent No. 4 duly filed its reply on 3rd May, 1984, to the said notice dated 24th September, 1982. At the instance of respondent No. 2 certain clarifications and details were also furnished by respondent No. 4. The matter was heard on 5th January, 1985, and an order was passed on 30th March 1985, u/s 45-A of the said Act holding that the respondent No. 4 was liable to

pay Rs. 16,21,564.05 on account of contribution to the Employees' State Insurance in respect of the employees of its contractor within ten days from the receipt of the said order failing which the same would be recovered as arrears of land revenue u/s 45-B of the said Act and other legal steps including prosecution would be initiated.

13. The deductions from the bills of the appellants were justified by respondent No. 4 on the ground that in the event ultimately respondent No. 4 was held liable to pay to the Employees' State Insurance Authorities on account of contribution in respect of the employees of the appellants, respondent No. 4 would not be in a position to reimburse itself from the appellants. It was contended that the controversy remained to be determined finally.

14. Appellant affirmed two affidavits some time in December, 1985, which were filed respectively in reply to the aforesaid two affidavits of Sankar Bhattacharya and Jyoti Bhusan Ghosh Dastidar.

15. It is a matter of record that respondent No. 4 also filed another application under Article 226 of the Constitution, marked as Civil Order No. 8061(W) of 1985, against the Employees' State Insurance Corporation and others challenging the powers and jurisdiction of the Employees' State Insurance Authorities to demand from the respondent No. 4 contributions on account of insurance payable in respect of the employees of the appellants.

16. The said application filed by the respondent No. 4 as also the above writ petition of the appellants were heard together and disposed of by a judgment and order dated 11th January, 1986.

17. Construing the agreements between respondent No. 4 and the appellants, the learned judge noted that the same provided that the appellants would be required to supervise the work entrusted to them by respondent No. 4. But the learned judge found that the ultimate responsibility in respect of the works and installations lay with respondent No. 4 and the Electricity Act imposed an obligation on respondent No. 4 to take all safety measures in respect of laying underground lines. The learned judge noted further that in respect of the cables and lines laid underground and overhead and maintenance thereof, proper checks were effected by respondent No. 4 to fulfil its statutory obligations. The learned judge accordingly held that in the facts and circumstances ultimately supervision was effected by the respondent No. 4 prior to the cables and lines being put to use. Even though the agreement between the appellant and respondent No. 4 specified that the work would have to be done under the supervision of the appellants, in effect, respondent No. 4 retained the ultimate power of supervision which respondent No. 4 in fact did exercise.

18. The learned judge held further that as the said Act of 1948 was a beneficial legislation promulgated for protection and benefit of the workers, the same should be interpreted liberally. Therefore, the question whether the employees of the appellants worked within the factory or premises of respondent No. 4 or

elsewhere was irrelevant. Following the decision of the Supreme Court in the case of Mangalore Ganesh Beedi Works and Others Vs. Union of India (UOI) and Others, , the learned judge held that the appellants in the instant case were agents of respondent No. 4, the principal employer, and respondent No. 4 was answerable for such labour.

19. The present appeal is from the said judgment dated 11th January, 1986. At the instance of the parties the appeal was treated as in the day's list when the application made in the appeal came up for hearing. The appearing respondents waived service of the notice of the appeal. By consent, filing of the paper book was dispensed with and the undertaking given in that behalf was directed to stand discharged. The appeal and the application were heard together. Separate briefs were prepared for the appeal Court including therein all records and pleadings before the first Court including the judgment under appeal which was reported in (1987) 1 CHN 208.

20. At the hearing of this appeal, learned advocate for the appellants drew our attention to the relevant sections of the said Act of 1948, the material provisions of which are noted hereafter:

Employees' State Insurance Act, 1948:

Section 2(9) - In this Act, unless there is anything repugnant in the subject or context,-

(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 purpose of the factory or establishment.

Section 2(12).- "factory" means any premises including the precincts thereof 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 with the aid of power or is ordinarily so carried on but does not include a mine.....

Section 2(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.

Section 45A.- (1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of Section 44 or any inspector or other official of the Corporation referred to in Sub-section (2) of Section 45 is obstructed by the principal or immediate employer or any other person, in exercising his functions or discharging his duties u/s 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment.

(2) 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 45B.

Section 75 -(I) If any question or dispute arises as to-

(a) whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution, or.....

(g) any other matter which is in dispute between a principal employer and the Corporation or between a principal employer and an immediate employer, or between a person and the Corporation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues payable or recoverable under this Act or any other matter required to be or which may be decided by the Employees' Insurance Court under this Act,

(3) No Civil Court shall have jurisdiction to decide or deal with any question or dispute as aforesaid or to adjudicate on any liability which by or under this Act is to be decided by a medical board or by a medical appeal Tribunal or by the Employees' Insurance Court.

Section 82.- (1) Save as expressly provided in this section, no appeal shall lie from an order of an Employees' Insurance Court.

(2) An appeal shall lie to the High Court from an order of an Employee's Insurance Court if it involves a substantial question of law.

21. Learned Advocate for the appellants further drew our attention to the relevant terms and conditions of the contracts by and between respondent No. 4, on the one hand, and the appellants, on the other, as also to the terms and conditions of the respective licences of the appellants in terms of which they were entitled to carry on business as licensed electrical contractors. The same have been noted hereinbefore.

22. Construing the aforesaid, learned Advocate for the appellants submitted that

it could not be disputed that the appellants worked as independent contractors engaged by respondent No. 4. Work carried on by the appellants of laying underground cables and overhead lines and maintenance thereof Were carried out under the supervision provided entirely by the appellants and that the respondent No. 4 on its own admission and in terms of the contracts were not entitled to and did not supervise such work.

23. Learned Advocate next submitted that the said works were carried out not within the generating station or the sub-stations or at the premises of respondent No. 4 or at the factory of the latter. Such work was carried out on public highways. The said transmission lines and underground cables were laid and maintained either in public roads or in premises belonging to the persons other than respondent No. 4 and, therefore, it could not be said that the employees of the appellants worked either in the factory or in the premises of respondent No. 4.

24. Learned Advocate for the appellants next submitted that in the facts and circumstances and on proper construction of the relevant provisions of the statute, it also could not be held that the employees of the appellants were "employees" within the meaning of Section 2(9)(ii) of the said Act of 1948. The appellants did not dispute that the works carried out by the appellants were works which were preliminary to the work carried on or incidental to the purposes of the work carried on by respondent No. 4 in its establishment, namely, generation and transmission of electricity. But such work was done entirely outside the factory or premises of respondent No. 4. It was also not disputed that the works carried out by the appellants were ultimately checked by respondent No. 4. It was submitted, however, that such checking was for the purpose of acceptance of the works by respondent No. 4 for the passing of and payments of the bills of the appellants for the work done. It was submitted that checking of completed works did not imply that the same was supervised by respondent No. 4 or its agents when the same were being executed.

25. Learned advocate for respondent No. 1 supported the appellants on all points.

26. In support of their respective contentions, learned advocates for the appellants and respondent No. 4 cited the following decisions:

(a) Nagpur Electric Lights and Power Co. Ltd. Vs. Regional Director Employees State Insurance Corporation, etc., . In this case, it had been held by the High Court that a manufacturing process was carried on by the electric supply company not only in the workshop or the receiving stations but over the whole area over which the process of transmission was carried on and every part of the area over which this process was carried on would be a factory within the meaning of the Employees' State Insurance Act, 1948. The Supreme Court on appeal rejected the conclusion of the High Court and observed as follows (at pp. 43-44):

"We cannot accept this line of reasoning. It seems to us a startling proposition

that every inch of the wide area over which the transmission lines are spread is a factory within the meaning of Section 2(12). "A factory must occupy a fixed site" see Halsbury's Laws of England, Third Edition, Volume 17, Article 15, page 15. The company's factory has a fixed site, It is located inside the Kamptee Road premises and its boundaries are fixed by the compound wall of the premises."

(b) Commissioner of Income Tax, Gujarat Vs. A. Raman and Company, . In this case it was held by the Supreme Court that the High Court exercising jurisdiction under Article 226 of the Constitution had power to set aside a notice u/s 147 of the Income Tax Act, 1961, if the condition precedent to the exercise of the jurisdiction did not exist.

(c) Kandaswami Weaving Factory and Company (by Managing Partner J.K.K. Sundararajan) Vs. Employees' State Insurance Corporation (by Regional Director) and Another, . A learned judge of the Madras High Court held in this case following the Supreme Court in Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, , that the principal requirement of a contract of service was the right of the master to reasonably control the method of doing the work. In the facts of the case it was held that the writ petitioner who employed persons to work at his hand-loom and power factory, entered into a contract of service with the employees as it was found that there was a provision for supervision by the employer of the work of the employees. This was held to be a contract of service and not a contract for service.

(d) Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another, . In this case it was held by the Supreme Court that where in a writ petition filed before the High Court it was alleged that the impugned action of the municipal authorities was unlawful, high-handed, arbitrary or unjust and no complicated questions of fact were raised for determination, the same should have been heard and disposed of on merits and not dismissed in limine.

(e) Raza Textiles Ltd. Vs. Income Tax Officer, Rampur, . In this case it was held by the Supreme Court that no authority, much less a quasi-judicial authority, could confer jurisdiction on itself by deciding a jurisdictional fact wrongly. The question whether the jurisdictional fact had been rightly or wrongly decided is a question which is open for examination by the court in an application for a writ of certiorari.

(f) The Superintendent of Post Offices and Others Vs. P.K. Rajamma, . In this case, the Supreme Court quoted with approval the statement of law contained in Halsbury's Laws of England, (Hailsham edition) volume 1 at page 193 as follows:

"An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct control and supervision of his master and is bound to conform to all reasonable orders given him in the course of his work; an independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to

produce a specified result, employing his own means to produce that result. An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control and supervision of the principal."

(g) Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation, . In this case the Supreme Court considered and construed Section 2(9)(ii) of the Employees' State Insurance Act, 1948, and observed as follows at p.395:

"Here again, the language used is extensive and diffusive imaginatively embracing all possible alternatives of employment by or through an independent employer. In such cases, the "principal employer" has no direct employment relationship since the "immediate employer" of the employee concerned is someone else Even so, such an employee, if he works (a) on the premises of the establishment (b) under the supervision of the principal employer or his agent "on work which is ordinarily part of the work of the establishment or which is preliminary to the work carried on in or incidental to the purpose of the establishment" qualifies u/s 2(9)(ii). The plurality of persons engaged in various activities who are brought into the definitional net is wide and considerable, and all that is necessary is that the employee be on the premises or be under the supervision of the principal employer or his agent. Assuming that the last part of Section 2(9)(ii) qualifies both these categories, all that is needed to satisfy that requirement is that the work done by the employee must be (a) such as is ordinarily not necessarily non-statutorily, part of the work of the establishment, or (b) which is merely preliminary to the work carried on in the establishment, or (c) is just incidental to the purpose of the establishment"

(h) The Inspector, Central Excise v. Bengal Paper Mills Co. (1978) CHN 611. This decision of a Division Bench of this Court was cited for the proposition that an alternative remedy will not be a bar to a proceeding under Article 226 of the Constitution where the right sought to be enforced was one of the rights conferred by the provisions of Part III of the Constitution. In the facts of this case it was held that the impugned demand of excise duty had been raised beyond the period of limitation prescribed under Rule 10-A of the Central Excise Rules, 1944.

(i) Madhya Pradesh State Electricity Board v. State, (1981) Lab I.C 1678. In this case, the Madhya Pradesh High Court held that the sub-station of an electricity generating station, where electricity generated at the station was transformed and transmitted, did not carry on any manufacturing process and could not be held to be factories requiring licence and registration under the legislation relating to factories in Madhya Pradesh. The process undertaken in the sub-stations was not a manufacturing process.

(j) ESIC Vs. Pooppally Foods, . In this case, the respondent firm carried on business in export of fish. The firm engaged independent contractors who through their own labour had the fish peeled and graded outside the premises of

the firm. It was held by a Division Bench of the Kerala High Court that as the persons carrying on the work of peeling and grading were not directly employed by the respondent firm as they were not working in the factory premises and as there was no evidence to show that the work of peeling and grading were supervised by the firm, the persons carrying on the said work could not be held to be employees within the meaning of Section 2(9)(ii) of the Employees' State Insurance Act, 1948.

27. Learned Advocate for respondents Nos. 1,2 and 3 submitted, on the other hand, that the employees of the appellants in laying cables and overhead lines and maintenance thereof worked under the supervision of respondent No. 4, the Calcutta Electric supply Corporation. Learned Advocate also submitted that the said work was ordinarily a part of the work of the factory or establishment of respondent No. 4, or was preliminary to the work carried on in or incidental to the purpose of the factory or the establishment of respondent No. 4. This case had been made categorically in the affidavit of Sankar Bhattacharyya affirmed on 10th December, 1985. The same was also recorded in the order dated 30th March, 1985, passed by respondent No. 2, the Regional Director of the Corporation, a copy of which had been annexed to the said affidavit of Jyoti Bhusan Ghosh Dastidar filed on behalf of respondent No. 4. Learned Advocate drew our attention to the relevant part of the said order which reads as follows:

"The job which is performed by these employees engaged through the contractor, was principally maintenance and distribution of electricity generated by the C.E.S.C. and also consumer service. It was conceded during the course of hearing that after the work entrusted to such contractors was completed, it was subject to checking by C.E.S.C. for compliance with their job specifications and work related to main business of the C.E.S.C. It cannot therefore be argued that merely because such job was performed outside the factory premises, as stated, it did not concern the C.E.S.C. The definition of the term "premises" includes such work site where the job of the factory is being done. I cannot agree therefore with the argument that such job was not done for the factory and/or that there was no supervision of the C.E.S.C. over such job. It could not but be a fact that the C.E.S.C. was executing its own job through the agency of the contractors engaged by them. The C.S.E.C.'s contention that they have acted upon the guidelines as provided in the letter dated 26th August, 1975, does not hold good as the said letter dated 26th August, 1975, annexure E issued by the Regional Director of E.S.I Corporation, only contained broad guidelines regarding provisions of the E.S.I. Act and the truth has to be ascertained from the realities of the situation."

28. Learned Advocate for respondents Nos. 1, 2 and 3 submitted further that, in any event, the aforesaid work of the employees of the appellants even though done under the supervision of the appellants or their supervisors was for and on behalf of respondent No. 4, the Calcutta Electric Supply Corporation Ltd. As such it was submitted that the employees of the appellant in the aforesaid work came

within the purview of Section 2(9)(ii) of the said Act of 1948 and the appellants were bound to contribute on account of State Insurance in respect of the employees.

29. Learned Advocate next submitted that the dispute raised by the appellants as to whether the work done by their employees as aforesaid was done under the supervision of respondent No. 4 or not was a dispute of fact and this Court, exercising jurisdiction under Article 226 of the Constitution, was not called upon to adjudicate on such dispute and ascertain the facts. The said Act of 1948, provided an adequate forum in the State Insurance Court where such disputes of fact could be properly and effectively adjudicated on evidence. From the decision of the State Insurance Court the appellants had a further remedy by way of appeal to this Court. It was submitted that as adequate alternative remedy was available to the appellants, the writ petition filed by them should not have been entertained.

30. In any event, it was submitted that disputed questions of fact raised by the appellants should not be entertained or decided by this Court.

31. In support of his contentions the learned Advocate for respondents No. 1, 2 and 3 relied on and cited the following decisions:

(a) Sarawatipur Tea Co. v. State of West Bengal 1976 Lab IC 1398 (Cal). This decision, in the context of an industrial dispute under the Industrial Disputes Act, 1947, does not appear to us to be of relevance to the controversies before us and the same need not be considered any further.

(b) Regional Director, Employees State Insurance Corporation Vs. Fibre Bangalore (P) Ltd., . In this case, it was held by a Full Bench of the Karnataka High Court that where u/s 45A of the Employees' State Insurance Act, 1948, an order was made determining the amount of contribution payable by the employer and the employer disputed the decision, it would not be necessary for the Corporation to move u/s 75. The amount determined u/s 45A was recoverable as arrears of land revenue and if the employer disputed the claim it was for him to move the Insurance Court for relief.

(c) Employees' State Insurance Corporation v. R. Reddiar (1981ILLJ166). The decision of a Division Bench of the Kerala High Court was cited for the proposition that an adjudication u/s 45A of the Employees' State Insurance Act, 1948, was not final though it could be enforced. The aggrieved party, however, could initiate proceedings before the Employees' Insurance Court u/s 75 of the said Act.

(d) Hegde and Goley Ltd., Bangalore v. Employees' State Insurance Corporation 1981 59 FIR 15 (Kar). In this case, a learned judge of the Karnataka High Court held that an order passed u/s 45A of the Employees' State Insurance Act, 1948, can be properly challenged u/s 75 of the said Act before the Employees' Insurance Court where the disputes could be appropriately decided by the

authority empowered to make all investigations after taking appropriate evidence. This was an effective alternative remedy. It was held that the writ petition filed before the Court challenging an order u/s 45A of the said Act was not maintainable.

(e) *British Paints (India) Ltd. v. Employees' State Insurance Corporation* (1981) Lab IC 27. In this case the question arose whether persons working in the Head Office and the Sales Branch Office of the concern were working in connection with the work of the factory and whether persons organising sales of products of the factory were employees within the meaning of Section 2(9) of the Employees' State Insurance Act, 1948. It was held by a learned single judge of this Court in a writ proceeding that whether persons, in respect of whom impugned demands for the State Insurance contribution had been made, were doing the work of the aforesaid nature or not were disputed questions of fact and could not be decided in the writ jurisdiction. Liberty was given to the petitioners to agitate their contentions before the Employees' Insurance Court.

(f) *E.S.I. Corporation, Trichur v. Marikkar Engineers Ltd.* (1982) Lab IC 140 (Ker). In this case, a learned judge of the Kerala High Court held where an order made u/s 45A of the Employees' State Insurance Act, 1948, was not acceptable to the establishment it was the duty of the latter to refer the matter to the Insurance Court. No duty was cast upon the E.S.I. Corporation to make such a reference to the Insurance Court.

(g) *Prabartak Jute Mills Ltd. v. E.S.I. Corporation* (1983) Lab IC 15. In this case, a learned judge of this Court followed the decision of the Kerala High Court in *Marikkar Engineers Ltd. case*, (supra) and held that where an employer, was aggrieved by the decision of the Corporation to levy damages and interest for breach of the provisions of the Employees' State Insurance Act, 1948, it would be open to the employer to approach the Employees' Insurance Court to raise a lis and have the same duly and conveniently decided, agitated and settled.

(h) *Employees' State Insurance Corporation v. Masco Pvt. Ltd.* (1982) 60 FJR 13. In this case, a Division Bench of the Delhi High Court held that the Employees' State Insurance Corporation was entitled to make a determination u/s 45A of the Employees' State Insurance Act, 1948. Before the Corporation proceeded u/s 45B of the said Act it was not necessary for it to give a hearing to the employer concerned. It was further held that a determination u/s 45A of the Act was not final and the employer could invoke the jurisdiction of the Employees' Insurance Court u/s 75 of the said Act to challenge the same.

32. We first take up for consideration the contention whether in the instant case there are any disputed questions of fact as contended on behalf of respondents Nos. 1, 2 and 3. The case of the appellants is that their employees, while carrying on the work of laying underground cables and overhead lines and maintenance thereof, do not work under the supervision of respondent No. 4, the Calcutta Electric Supply Corporation Ltd. The case of respondents No. 1, 2 and 3

was that the employees of the appellants in carrying out the aforesaid work do so under the supervision of the Calcutta Electric Supply Corporation Ltd.

33. There is no dispute that respondent No. 4 is the principal employer in respect of the said work and that the appellants are the immediate employers of the said employees in connection with the said work. There is no dispute that the employees of the appellants are not directly employed by respondent No. 4. There is also no dispute that the employees of appellants do not carry out the aforesaid work either in the premises or the factory or establishment of respondent No. 4. It is also not disputed that the work which is carried out by the employees of the appellants can be stated to be work which is ordinarily part of the work of respondent No. 4 or preliminary or incidental to such work. The only dispute appears to be whether there is any supervision of the employees of the appellants by respondent No. 4 or its agents.

34. No doubt, in para 3 of the affidavit affirmed by Shankar Bhattacharya on the 10th December, 1985, there is an averment that the employees of the appellants carry out such work under the supervision of respondent No. 4 or its agents. The said paragraph has been verified as true according to the information derived by the deponent from records. No such record was produced before us to show that the aforesaid works were or are carried out by the employees of the appellants under the supervision of respondent No. 4 or its agents. On the other hand, learned Advocate for respondents Nos. 1, 2 and 3 relied solely on the finding in the order of respondent No. 2 dated 30th March, 1985, passed u/s 45A of the said Act of 1948 which we have noted hereinbefore. It has not been found by respondent No. 2 as a fact that in carrying out the aforesaid work the employees of the appellants are under the supervision of respondent No. 4 or its agents. All that has been found is that after the works which are entrusted to the appellants are completed the same are checked by respondent No. 4. A conclusion has been drawn from the aforesaid that though works are performed outside the factory or the premises of respondent No. 4, the same concern respondent No. 4 and that the expression "premises" includes the work-site where the work of respondent No. 4 is done.

35. From the aforesaid it is obvious that it has not been found by the Employees' State Insurance Authorities that there is actual supervision by respondent No. 4 or its agents of the aforesaid works which are performed by the employees of the appellants. All that has been found is that after the aforesaid work is completed respondent No. 4 checks the same. In our view, checking of a work after the same is completed and supervision of the same while the same is being performed are entirely different. Checking of a work after its completion is always done in every case by the person who ordered the same to be done so that the work can be finally accepted and payment made therefore. After the work is completed, a further checking cannot mean or imply any or any further supervision.

36. Therefore, in the circumstances aforesaid, it cannot be held that it is the

finding of respondents Nos. 1, 2 and 3 that the employees of the appellants carry on the aforesaid work under the supervision of respondent No. 4 or its agents. On the facts as on record, respondents Nos. 1, 2 and 3 are not entitled to and cannot be held to have raised a valid or any real dispute on this issue.

37. On the other hand, it is the positive case of the appellants that the aforesaid works are done by their employees under the exclusive supervision of the appellants and not under the supervision of respondent No. 4 or its agents. The same is also the case of respondent No. 4. The agreements between respondent No. 4 and the appellants preclude such supervision of the employees of the appellants by respondent No. 4 or its agents. The terms of the Government licences issued to the appellants under which the appellants perform their work, which have been noted hereinbefore, are quite clear. Under the terms of the licence the works carried on by the appellants as licensed contractors have to be supervised by person or persons holding valid certificates of competency. The licence holders have to maintain a register of supervision. After the completion of the work the licence holders have to furnish a test report to the Secretary which has to be signed by the supervisor under whose supervision the work had been carried out and counter-signed by the holder of the licence. The licence holders are required to hold a valid supervisor's certificate of competency or to retain in their employ at least one supervisor holding such a certificate. A licence holder cannot accept any employment under any one else for the purpose of carrying out supervision of any electrical installation work. If the licence holder accepts such an employment, his licence will stand cancelled.

38. In view of the aforesaid, it is clear that in law the appellants are precluded from working under the supervision of respondent No. 4, the Calcutta Electric Supply Corporation Limited, or its agents. Respondent No. 4 or its agent cannot be registered as supervisors of the appellants, the licence holders, for the purpose of supervising the work including submission of test reports. Conversely, the agreements between the appellants and respondent No. 4 cannot be construed to be supervisory agreements and under the same the appellants cannot be held to supervise the aforesaid work for and on behalf of respondent No. 4. If the agreements are construed to be otherwise, then the same would violate the terms and conditions of the licences of the appellants which would be liable to be cancelled.

39. For the reasons as aforesaid, we hold that it stands established from the records before us that the employees of the appellants while carrying out the aforesaid works do so under the supervision of the appellants or the supervisors engaged by the appellants and not under the supervision of respondent No. 4 or its agents. There is no finding or determination of facts by respondents Nos. 1, 2 and 3 to the contrary and there cannot be any valid dispute on this issue.

40. In the judgment and order under appeal it has been held that the said Act of 1948 being a beneficial legislation promulgated for the protection and benefit of the workers should be interpreted liberally and, therefore, the question whether

the employees of the appellants work within the factory or the premises of respondent No. 4 or elsewhere is irrelevant. We are unable to accept this conclusion of the learned Judge of the first court. Section 2(9)(ii) of the said Act of 1948 categorically provides that where the employees of the immediate employer work within the factory or premises of the principal employer, they would come within the purview of the said Act of 1948. If the fact whether the employees of the immediate employer work within the factory or the premises of the principal employer or elsewhere is irrelevant, as held, a material part of the said Section 2(9)(ii) of the said Act of 1948 would become redundant and otiose. It is not open to courts to stretch interpretation of statutory sections to that extent in order to afford benefit or protection to the workers which the Legislature did not provide. It is obvious that on proper construction of Section 2(9)(ii) of the said Act of 1948 where the employees of the immediate employer work outside the factory or the premises of the principal employer, they would have the benefit of the Employees' State Insurance only if they work under the supervision of the principal employer or its agents.

41. It has also been held by the learned judge in the first court that in the instant case the appellants in supervising the aforesaid work act as the agents of respondent No. 4, the principal employer. This conclusion, in our view, also appears to be erroneous. Section 2(9)(ii) of the said Act of 1948 specifically mentions the following three categories: (a) the principal employer, (b) the immediate employer, and (c) the agent of the principal employer. On a proper interpretation of the said section an immediate employer and an agent of the principal employer cannot be equated. In any event, under the conditions of their licences the appellants are precluded from acting as agents of any other person for the purpose of supervision as has been noted earlier. The decision of the Supreme Court in the case of M.G. Beedi Works, (supra) was a case of contract labour and the principles laid down in the said case cannot apply to a case where a particular work is entrusted to an independent contractor to be performed with the labour of the latter.

42. We are unable to accept the conclusion of respondent No. 2 in its order dated the 30th March, 1985, that the term "premises" in Section 2(9)(ii) of the said Act of 1948 includes the public highways and other places where the work of laying underground cables and overhead lines and the maintenance thereof are carried out. The observations of the Supreme Court in the case of Nagpur Electric Light and Power Co. Ltd., (supra) are conclusive on this point. The entire area over which the transmission lines spread cannot be held to be the premises or the factory of respondent No. 4.

43. Next to be considered is whether the appellants have any alternative remedy and, as such, were not entitled to move this Court under Article 226 of the Constitution. Law appears to stand well settled that existence of an alternative remedy does not affect the jurisdiction of the High Court to entertain proceedings under Article 226 of the Constitution. It is a rule of practice that normally the

aggrieved party has to exhaust his statutory remedies before he can proceed under Article 226 of the Constitution. Where there is absence of jurisdiction or authority to make the impugned order or to take the impugned action or where an order prejudicial to the aggrieved party has been passed in violation of the principles of natural justice, the existence of an alternative remedy would be no bar.

44. In the instant case, the learned judge in the first court entertained the writ petition of the appellants in exercise of his jurisdiction under Article 226 of the Constitution and adjudicated thereon. The respondents submitted to the jurisdiction of this Court and it is not open to respondents to agitate in appeal that the writ petition of the appellants should not have been entertained at all.

45 In the instant case, respondents Nos. 1, 2 and 3 have assumed jurisdiction under the said Act of 1948 and sought to collect contribution to Employees' State Insurance from the bills of the appellants submitted to respondent No. 4 on the basis that the employees of the appellants in carrying out the aforesaid works were under the supervision of respondent No. 4 or its agents. This is a jurisdictional fact which did not exist nor was found to exist by respondents Nos. 1, 2 and 3. Respondents Nos. 1, 2 and 3 exercised their jurisdiction on the assumption that such jurisdictional fact did exist. In the absence of such jurisdictional fact, respondents Nos. 1, 2 and 3 would have no jurisdiction whatsoever to proceed in the manner as they did. We also note that respondent No. 2 passed the said order dated 30th March, 1985, in the absence of the appellants. The appellants were not given any opportunity to make any representations or adducing any evidence before the said order was passed. The said order u/s 45-A is sufficient to prove all the claims of respondents Nos. 1, 2 and 3 u/s 75 and it may be futile for the appellants to proceed before the Employees' State Insurance Court. In any event, respondents Nos. 1, 2 and 3 have not proceeded directly against the appellants, but only against the Calcutta Electric Supply Corporation Ltd., respondent No. 4, and it might not be open to the appellants to move the Employees' State Insurance Court as there is no direct dispute between the appellants and respondents Nos. 1, 2 and 3.

46 For the reasons as aforesaid, we hold that the proceedings initiated by the appellants under Article 226 of the Constitution cannot be thrown out on the ground of alternative remedy at the stage of appeal.

47 For the reasons as aforesaid, this appeal succeeds. The judgment and order dated 11th December, 1986, is set aside. The writ petition is allowed. Appropriate writs are directed to be issued calling upon respondents Nos. 1, 2, 3 and 4 prohibiting them from deducting any amount from the bills of the appellants towards respondent No. 4 on account of the Employees' State Insurance and directing them to refrain from making such further deductions in future.

48 The deductions already made by respondent No. 4 from the bills which have

been kept in a separate account are directed to be refunded to the appellants with the accrued interest within three weeks from date.

49. We make it clear that this judgment will be operative only in respect of the works done by the employees of the appellants in the public highways and other places not being the premises or the factory of respondent No. 4. If any work is being done by the employees of the appellants in the factory or the premises including substations or generating stations or any other establishment of respondent No. 4 or any part thereof, the employees engaged in such work would come within the purview of the said Act of 1948. All parties to act on the signed copy of the operative part of this judgment.

Shyamal Kumar Sen, J.

50. I agree.