

*Before K. Kannan, J.*

**EMPLOYEES' STATE INSURANCE  
CORPORATION—Appellant**

*versus*

**M/S JAY BEE INDUSTRIES, MALOUT ROAD, BATHINDA  
AND ANOTHER—Respondents**

**FAO No. 636 of 1986**

July 10, 2013

*A. Employees' State Insurance Act, 1948 - Sec. 1(3), 1(5) and 82(2) - Employees' State Insurance (General) Regulations, 1950 - Reg. 10B - Date of enforcement - Provisions of the Act became applicable to the factory on a notification being issued under Section 1(3) - Compliance under the Act not started - Subsequently provisions extended to other establishments vide notification under Section 1(5) by the Appropriate Government i.e. State Government - Inspection made and consequently notice issued on the basis of the notification under Section 1(3) - Employer raised dispute with regard to the date of extension of the Act, as to commence only after the State Government issued the notification under Section 1(5) - Held, Section 1(5) notification cannot efface Section 1(3) notification already made applicable to any State/ part of the State - Contribution would arise immediately after the Act is extended to a particular place and to a particular factory - Has nothing to do with the knowledge of the provisions of the Act or when a notice was made by the officials to submit reference - It shall be on a suo moto basis.*

*Held*, that it is a facilitative provision for a State Government to extend the notification also to areas which are not notified by the Central Government. There can be some overlapping but it does not mean that if in a given situation, the Central Government had already issued a notification to be operative in a particular area and if the State Government also makes a notification in respect of the very same area, it would not cause the notification already issued by the Central Government to cease to operate or annul the effect of notification made already under Section 1(3). Such

(K. Kannan, J.)

reading of the Section will lend violence to the clear meaning of Section 1(3). Section 1(5), therefore, adopts even a language that sounds careful that it is extended to "any other establishment or class of establishments, industrial, commercial, agricultural or otherwise." I, therefore, discard the argument advanced by the learned counsel appearing on behalf of the respondent and the contention that was accepted by the Court below that the Act was extended only from the date when the notification was issued by the Central Government.

(Para 10)

*Held further*, that Section 10B of ESI Regulations, 1950 is contained in Chapter II that makes provision for collection of contributions. Sub-clause (a) of the said provision deals with a factory or establishment which applies for the first time for issue of an employer's code number. The provision enjoins that the application shall be made to the appropriate original office not later than 15 days after the Act becomes applicable. The application shall be in form 01 called as the Employer's Registration Form. This provision, therefore, makes it clear that the registration shall be applied within 15 days from the day when the Act was extended. If the Act, therefore, was extended by a Central Government notification in the year 1982, that is when the registration shall immediately follow. Clause (d) of the same provision directs that if a code has been issued, the appropriate Regional Officer shall inform the same and the employer shall enter the Employer's Code Number on all the documents prepared and completed in connected with the Act. Section 1(3) and (4) read with Section 10B(a) of the Regulations admit of no doubt that the liability for contribution would arise immediately after the Act is extended to a particular place and to a particular factory.

The contribution that shall be made by the employer on the extension of the Act has nothing to do with the knowledge of the provisions of the Act or when a notice was made by the officials to submit reference. It shall be on a suo motu basis and it cannot be argued that since a notice had not been issued earlier, the liability was not to be fastened for a period from which the Act came into force.

(Paras 11 and 12)

*B. Employees' State Insurance Act, 1948 - Sec. 1(4) and 82(2) - Provisions of the Act extended to the factory - Compliance not started - Inspection made and consequently notice issued - Employer responded that ESI facilities not available when notification under Section 1(3) issued - Employer had itself covered for health risk with National Insurance Company and they had facilities which were more beneficial than what is provided under the ESI Act - Exception applies only to those factories which are under the control of the Government and which have superior facilities - Both circumstances must exist.*

*Held*, that as regards the first contention that in terms of Section 1(4), the respondent had already been providing better facilities to the employees in the year 1982 and therefore, the provisions of the Act could not be extended, it is not a correct statement of law. Section 1 (4) that provides exceptions applies only to factories under the control of the Government viz; to except only those factories which are under the control of the Government and which have superior facilities. Both circumstances must exist. It is nobody's case that the respondent falls within the control of the Government and therefore, even if there were better facilities available, exception under Section 1(4) cannot be invoked. The said contention, therefore, is rejected.

(Para 8)

Vikas Suri, Advocate, *for the appellant.*

Arun Bansal, Advocate, *for the respondent.*

**K. KANNAN, J.**

**I. The genesis of dispute**

(1) The appeal is against the order of the Senior Subordinate Judge, Bathinda which was designated as Employees Insurance Court. The ESI Corporation had originally issued a notice on 08.12.1983 seeking for ESI contributions to be made and fore-warning the respondent of action if the contributions as demanded were not paid. After eliciting a reply, order was passed on 07.02.1984 directing that an amount of Rs. 17,040.15 was required to be paid from April 1981 to May 1983 as arrears plus interest

(K. Kannan, J.)

amounting Rs. 919/- upto the date of order. This order was also communicated to the Collector for recoveries. The Central Government has issued a notification extending the Act to all industrial establishment and factories at Bathinda on 24.03.1982 but the contributions had not been made until after May, 1983. The demand order was with reference to the period from when the Act was extended till the date when the contributions were made for the first time in the year 1983.

(2) This notice was contested before the ESIC Court by the respondent on a plea that the respondent did not know about the notification at all but the State Government which was the Appropriate Government issued a notification only on 13.05.1983 under Section 1 (5) of the ESI Act. The respondent did not contest the applicability of the Act or the contribution that was necessary to be paid but was only contending that the liability would arise only from the date when the State issued the notification and when ESI facilities were available for the workmen in order that the contribution could be made to secure the benefits. The relevant date cannot, therefore, be the order when Section 1(3) notification was issued by the Central Government and the payment demanded by the ESI on such basis was required to be quashed. The ESI Court accepted the contentions of the petitioner and set aside the demand made. It is against this order that the appeal has been filed.

**II. Point for resolution: Effect of interplay of Section 1(3), 1(4) & 1 (5) of ESI Act.**

(3) There is no dispute of the liability for contribution and the scope of applicability of the Act to the establishment. The dispute is confined to the date of extension of the Act to the respondent and whether there was a failure on the part of the respondent to make a contribution in the manner contended by the ESI Corporation. This issue could be settled in the light of the rival contentions regarding the respective scope of operation of Section 1(3) that deals with Central Government's power to issue notification for extending the provisions of the Act and Section 1(5) that deals with the notification to be issued by the Appropriate Government for applicability of the Act to other establishments. The counsel have argued with reference to the relevant provisions and therefore, it would be fruitful to direct the attention to the relevant provisions.

### III. Relevant provisions reproduced

(4) Section 1(3) refers to the Central Government's notification for appointing the date of applicability of the Act for various States or different parts thereof. The Section is reproduced as under:-

“1(3) it shall come into force on such date or dates as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and for different States or for different parts thereof.”

Clause 5 of Section 1 refers to the power of the Appropriate Government which in consultation with the Corporation provides for a procedure for giving six months' notice of the intention of applying the provisions of Act by issue of notification in the Official Gazette. The Section reads thus:-

“1(5) 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 this Act or any of them, to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise.

Provided that where the provisions of this Act have been brought into force in any part of a State, the said provisions shall stand extended to any such establishment or class of establishments within that part if the provisions have already been extended to similar establishment or class of establishments in another part of that State.”

The Appropriate Government is defined under Section 2(1) as the Central Government for respective establishments under the control of the Central Government or the Railway Administration or a major port or a mine or oil field and in all other cases the State Government. It may be immediately pointed out that the respondent is not any one of the specific categories to which the Central Government could be treated to be the Appropriate Government. That the Appropriate Government shall be the State Government cannot, therefore, be in doubt.

(5) The controversy can still not conclude by making a simplistic observation that the State Government shall be the Appropriate Government for it has to be resolved only by examining Sections 1(3) and 1(5) which

(K. Kannan, J.)

were extracted above and see whether they are mutually exclusive and whether the Central Government has a power to issue notification for a factory or industrial establishment in any State and by the extension of the Act by the Appropriate Government, a notification already issued by the Central Government to a place which falls within a particular State will be eclipsed by a subsequent State notification. It can be seen that Section 1(3) does not make any reference to the applicability of the Act to factory or establishment. It merely refers to the power of the Central Government to notify in official gazette a date from when the different provisions of the Act could be extended for different States or parts thereof. That is dealt with in Clause 4 of Section 1 which reads thus:-

“1(4) It shall apply, in the first instance, to all factories (including factories belonging to the Government) other than seasonal factories:

Provided that nothing contained in this sub-section shall apply to a factory or establishment belonging to or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.”

(6) If the provisions of the Act under sub-section 3 are extended to a State by a notification, then by virtue of Clause 4, the Act will apply to all factories including factories belonging to the Government other than seasonal factory. The exclusion is only with reference to a factory or establishment, which is under the control of the Government and its employees, who receive better benefits than what are conferred under the Act. Consequently on the face of it, it would be seen that a notification issued under Section 1(3) as applicable to State will become applicable to a factory other than a factory under the control of the Government which has better or more superior benefit that is there in the ESI Act.

#### **IV. Text of Section 1(3) notification**

(7) In this case it is not denied that the Central Government notification was issued on 17.04.1982, which is reproduced as under:-

“In exercise of the powers conferred by sub-section (3) of Section 1 of the Employees State Insurance Act, 1948 (34 of 1948), the Central Government hereby appoints the 18th day of April, 1982 as

the date on which the provisions of Chapter IV (except sections 44 and 45 which have already been brought into force) and Chapters V and VI (except sub section (1) of Section 76 and Sections 77, 78, 79 and 81 which have already been brought into force) of the said Act shall come into force in the following areas in the State of Punjab, namely:-

“The areas within the revenue villages:-

(i) Barnala Had Bast No.55 Harigarh Had Bast No.54 in the district of Sangur.

(ii) Bhatinda Had Bast No.70 Hazzi Rattan Had Bast No.69 Phus Mandi Had Bast No.60 and Jassi Powali Had Bast No.61 in the District of Bhatinda.”

The factory is situate at Bathinda is not in doubt. As per the text of the notification, the provisions of the Act except Sections 44 and 45 which are already brought into force and certain other Sections in Chapter V and VI which have also been brought into force were together to come into force in Bathinda from 17.04.1982.

#### **V. Contention of respondent**

8. Learned counsel appearing on behalf of the respondent contends that the applicability of this notification must be confined only to factories to which the Appropriate Government has not made a notification under Section 1(5). The counsel refers me to the State Government notification issued on 26.04.1983 under Section 1(5) for several districts including Bathinda. The counsel would point out that only after the Appropriate Government issued the notification, a notice had been served by the Regional Director that as per the said notification, the respondent factory that fell within the purview of Section 2(12) will be covered under the provisions of the Act. The learned counsel would point out that it was only subsequent to the State notification and explanation that the factory had been made and notice was subsequently issued under Ex.A4. I have examined the notice and I found that the extension has not been made subsequent to the notification issued in the year 1983 but it states that an inspection was made on 22.12.1982 and that the factory fell within the purview of the Act w.e.f.

(K. Kannan, J.)

18.04.1982 as the appointed day. Significantly, the reference is not to 26.04.1983 in the notice issued under Ex.A4 but it makes a reference only to 18.04.1982 that is a day immediately following the day when the Central Government notification was issued. The factory has responded to this notice by stating that ESI facilities were not available from the year 1982 but, however, if the extension were made in 1982 the respondent made its registration on 22.12.1982 and the declaration forms had been filled but since the employees had not been provided with any medical facility, no contributions would be made till the facilities were extended. The counsel for the respondent would argue that the respondent itself had covered for health risk with National Insurance Company and they had facilities which were more beneficial than what is provided under ESI Act, when actually there were no medical facilities provided to any of the employees in the year 1982 by ESIC. The counsel would refer to Section 1(4) that excludes the applicability of the Act to factories where better and more superior facilities are already available. The learned counsel would also refer to judgment of the Supreme Court in *Basant Kumar Sarkar and others versus The Eagle Rolling Mills Ltd and others (1)*, to contend that the Act must be taken as extended only from the day when Section 1(5) notification was made.

**VI. Basis of rejection of respondent's contention**

*(a) only government controlled factories with better facilities will be excluded*

(9) As regards the first contention that in terms of Section 1(4), the respondent had already been providing better facilities to the employees in the year 1982 and therefore, the provisions of the Act could not be extended, it is not a correct statement of law. Section 1(4) that provides exceptions applies only to factories under the control of the Government viz; to except only those factories which are under the control of the Government and which have superior facilities. Both circumstances must exist. It is nobody's case that the respondent falls within the control of the Government and therefore, even if there were better facilities available, exception under Section 1(4) cannot be invoked. The said contention, therefore, is rejected.



*(b) Section 1(5) notification cannot efface Section 1(3) notification already made applicable to any State/part of State*

(10) The reference to the judgment of the Supreme Court in *Basant Kumar Sarkar's case* is also of no avail, for the said judgment deals only with the validity of Section 1(3) and has nothing to do with the interplay of Section 1(3) and 1(5). The Court was considering that Section 1(3) that allowed for a delegated legislation to extend the Act on such day as the notification provided was not a case of excessive delegation. The reference to Appropriate Government under Section 2(1) in the said judgment is only to cover a situation that the Act provides also for the Appropriate Government to make notifications for applicability of the Act and such of those provisions of the Act, as the State would think it appropriate. The Court was taking notice of the fact that the ESI could not be extended to the whole of the country at once and that beneficial measures that needed careful experimentation could have been adopted at various stages and in various phases. The Court had observed, which learned counsel cited and I will reproduce at para 5 thus:-

“.....Thus it is clear that when extending the Act to different establishments the relevant Government is given the power to constitute a Corporation for the administration of the scheme of Employees' State Insurance. The course adopted by modern legislatures in dealing with welfare scheme has uniformly conformed to the same pattern. The legislature evolves a scheme of socio-economic welfare, makes elaborate provisions in respect of it and leaves it to the Government concerned to decide when, how and in what manner the scheme should be introduced. That, in our opinion, cannot amount to excessive delegation.”

The above observations of the Supreme Court has nothing to do with restricting the power of the Central Government to apply the provisions of the Act to any State or any factory from a particular date as notified by it. It is a facilitative provision for a State Government to extend the notification also to areas which are not notified by the Central Government. There can be some overlapping but it does not mean that if in a given situation, the Central Government had already issued a notification to be operative in a particular area and if the State Government also makes a notification in

(K. Kannan, J.)

respect of the very same area, it would not cause the notification already issued by the Central Government to cease to operate or annul the effect of notification made already under Section 1(3). Such reading of the Section will lend violence to the clear meaning of Section 1(3). Section 1(5), therefore, adopts even a language that sounds careful that it is extended to "any other establishment or class of establishments, industrial, commercial, agricultural or otherwise." I, therefore, discard the argument advanced by the learned counsel appearing on behalf of the respondent and the contention that was accepted by the Court below that the Act was extended only from the date when the notification was issued by the Central Government.

#### **VII. View adopted – Support of other judicial pronouncements**

(11) Learned counsel appearing on behalf of the appellant-Corporation cites before me also some provisions of the Regulations and decisions of other Courts that support the view which I have taken. Section 10B of ESI Regulations, 1950 is contained in Chapter II that makes provision for collection of contributions. Sub-clause (a) of the said provision deals with a factory or establishment which applies for the first time for issue of an employer's code number. The provision enjoins that the application shall be made to the appropriate original office not later than 15 days after the Act becomes applicable. The application shall be in form 01 called as the Employer's Registration Form. This provision, therefore, makes it clear that the registration shall be applied within 15 days from the day when the Act was extended. If the Act, therefore, was extended by a Central Government notification in the year 1982, that is when the registration shall immediately follow. Clause (d) of the same provision directs that if a code has been issued, the appropriate Regional Officer shall inform the same and the employer shall enter the Employer's Code Number on all the documents prepared and completed in connected with the Act. Section 1(3) and (4) read with Section 10B(a) of the Regulations admit of no doubt that the liability for contribution would arise immediately after the Act is extended to a particular place and to a particular factory. The duty of the employer to make the contribution is underscored in the judgment of the Orissa High Court in *National Aluminium Company Ltd. and others versus Employees State Insurance Corporation and others (2)*. The Court has

observed that the liability for contribution shall arise in respect of which the Act is extended, whether the Corporation has provided full-fledged hospital or not or whether the employers are willing or not to be covered under the ESI Scheme. This explains the particular objection taken by the counsel appearing on behalf of the respondent that even the hospital was not established at the time when Section 1(3) notification was made and that therefore, the contribution could not have been demanded from a day before the hospital was established or when the services were provided. The Bombay High Court dealt with effect of Section 1(5) in *Fariyas Hotels Pvt. Ltd. and another* versus *State of Maharashtra and another* (3) and explained that it must be understood as a notification by the State in respect of an establishment not covered under Section 1 (3). In paragraph 15 of the judgment, the Court observed that "the power given by sub-section (5), therefore, is to extend the provisions to any other establishment or class of establishments, that is to say, to an establishment or class of establishments other than factories, to which the Act or part of it already apply by reason of sub-section (4). This seems to me clear also from the context in which the words "industrial commercial, agricultural or otherwise" appear." This conforms to the interpretation which I have adopted above.

(12) The contribution that shall be made by the employer on the extension of the Act has nothing to do with the knowledge of the provisions of the Act or when a notice was made by the officials to submit reference. It shall be on a suo motu basis and it cannot be argued that since a notice had not been issued earlier, the liability was not to be fastened for a period from which the Act came into force. This was the tenor of judgment of the Calcutta High Court in *Employees' State Insurance Corporation Vs. Jaiswal Rolling Mill* 2008-II-I.L.J-1021.

### **IX. Disposition**

(13) On a due consideration of all the facts and law as detailed above, the judgment of the Court below cannot be sustained and no exception could be taken to the demand as made by the ESI Corporation on the respondent. The impugned order is set aside and the notice already issued for recovery is confirmed. The appeal is allowed.

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*V. Suri*