

EMPLOYEES' STATE INSURANCE CORPORATION

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v.

VENUS ALLOY PVT. LTD.

(Civil Appeal No. 1464 of 2019)

FEBRUARY 05, 2019

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**[ABHAY MANOHAR SAPRE AND
DINESH MAHESHWARI, JJ.]**

Employees' State Insurance Act, 1948 – ss.2(9), 75 and 82 – Respondent-Company, covered under the ESI Act had been depositing the amount of contribution with reference to the wages paid to some of its employees, however, did not make the contribution in respect of the remuneration paid to the Directors – By order dated 06.04.2005, the Deputy Director of the appellant-Corporation called upon the respondent to make payment of contribution in relation to the remuneration paid to the Directors – Challenged by the respondent u/s.75 – ESI Court declared the said order as void – In appeal by the appellant, the High Court concluded that the Directors of the respondent establishment do not come within the purview of the “employees”, as defined u/sub-sec. (9) of s.2 of the ESI Act and dismissed the appeal – Held: Appellant in order dated 06.04.2005 asserted that the Directors of the Company were paid remuneration @ Rs. 3,000/- p.m. and they were falling within the definition of “employee” under the ESI Act and hence, contribution was payable in regard to the amount paid to them – However, while challenging the said order, the respondent chose not to lead any evidence before the Court – Hence, there was nothing on record to displace the facts asserted on behalf of the appellant in its order dated 06.04.2005, rather the factual assertions in the said order remained uncontroverted – High Court in the present case has been in error in assuming that the Director of a Company, who had been receiving remuneration for discharge of duties assigned to him, may not fall within the definition of an employee for the purpose of the ESI Act – No reason to interfere with the order dated 06.04.2005 issued by the appellant – Impugned order set-aside and the application filed by the respondent-Company u/s.75 of the ESI Act is dismissed.

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A **Allowing the appeal, the Court**

Held: 1.1 In the present case, the appellant-Corporation in its impugned order dated 06.04.2005 specifically asserted that the Directors of the Company were paid remuneration at the rate of Rs. 3,000/- p.m. and they were falling within the definition of “employee” under the Employees’ State Insurance Act, 1948 and hence, contribution was payable in regard to the amount paid to them. Interestingly, even while seeking to challenge the aforesaid order dated 06.04.2005 by way of proceedings under Section 75 of the ESI Act, the respondent-Company chose not to lead any evidence before the Court. Hence, there was nothing on record to displace the facts asserted on behalf of the appellant-Corporation in its order dated 06.04.2005; rather the factual assertions in the said order remained uncontroverted. The order dated 06.04.2005 had been questioned by the respondent only on the contention that the Directors do not fall within the category of “employee” but no attempt was made to show as to how and why the remuneration paid to its Directors would not fall within the purview of “wages” as per the meaning assigned by sub-section (22) of Section 2 of the ESI Act? [Para 13][682-C-E]

1.2 The High Court in the present case has been in error in assuming that the Director of a Company, who had been receiving remuneration for discharge of duties assigned to him, may not fall within the definition of an employee for the purpose of the ESI Act. There had been no reason to interfere with the order dated 06.04.2005 as issued by the appellant. The application filed by the respondent under Section 75 of the ESI Act is dismissed. [Paras 14, 15][682-H; 683-A-B]

Employees’ State Insurance Corporation v. Apex Engineering Pvt. Ltd. (1998) 1 SCC 86 : [1997] 5 Suppl. SCR 57 – held applicable.

Sakal Papers Private Limited v. Employees’ State Insurance Corporation MHLJ 1995 Vol. 2 Page 69; Employees’ State Insurance Corporation v. Apex Engineering Pvt. Ltd. MHLR 1990 Vol. 2 Page 850; Saraswath Films v. Regional Director, Employees’ State Insurance Corporation, Trichur (2010) 11 SCC 553 – referred to.

Case Law Reference

[1997] 5 Suppl. SCR 57 **held applicable** **Para 6**
(2010) 11 SCC 553 **referred to** **Para 6**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1464 of 2019.

From the Judgment and Order dated 17.02.2014 of the High Court of Madhya Pradesh Bench, Indore in Civil Miscellaneous Appeal No. 1213 of 2006.

Mahesh Srivastava, Vaibhav Manu Srivastava, P. N. Puri, Advs. for the Appellant.

Dushyant Parashar, Adv. for the Respondent.

The Judgment of the Court was delivered by

DINESH MAHESHWARI, J. 1. Leave granted.

2. The short question calling for determination in this appeal by special leave against the judgment dated 17.02.2014 passed by the High Court of Madhya Pradesh, Bench at Indore in Miscellaneous Appeal No. 1213 of 2006 is as to whether the Directors of respondent-Company, who are receiving remuneration, come within the purview of "employee" under sub-section (9) of Section 2 of the Employees' State Insurance Act, 1948 ('the ESI Act')?

3. Put in brief, the relevant background aspects of the matter are that the respondent-Company had been covered under the ESI Act and had been depositing the amount of contribution with reference to the wages paid to some of its employees. However, in an inspection carried out by the Appellant-Employees' State Insurance Corporation ('the Corporation'), it was observed that the respondent-Company had not made the contribution in respect of the remuneration paid to the Directors. There had been exchange of communications in regard to the liability of the respondent-Company and ultimately, by the order dated 06.04.2005, the Deputy Director of the appellant-Corporation called upon the respondent to make payment of contribution in relation to the remuneration paid to the Directors. Such a demand was questioned by the respondent-Company by way of an application under Section 75 of the ESI Act (Case No. 171 of 2005) that was considered and decided by the

- A Employees State Insurance Court at Indore ('the ESI Court') by its order dated 24.12.2005.

4. The ESI Court noted that both the parties had not adduced any evidence and sought disposal of the case only on the basis of arguments. The parties referred to a few citations but in essence, both the parties
 B relied upon the decision of this Court in the case of ***Employees' State Insurance Corporation Vs. Apex Engineering Pvt. Ltd.***, as reported in **1997 (77) F.L.R. 878¹**. The ESI Court observed that in the said case, the Managing Director was found performing some particular work but there was no illustration that the provisions of the ESI Act were
 C applicable on the amount received by the Directors; and rather took the view that the illustrations produced by the respondent-Company were to the effect that Directors do not fall under the category of the employees. The ESI Court, therefore, declared the aforesaid order dated 06.04.2005 void and unfair, while observing as under:-

D *"5....I viewed the above judicial illustration produced in case. The illustration on which both parties put their faith according to their view, has been adjudicated by Hon'ble Supreme Court. It seems by its perusal that managing director performs some particular works. The provisions of ESI Act are applicable on the payment that is made to him for those particular and
 E additional works. There is no dispute in relation to the amount receiving by managing director in this case but there is dispute in relation to the amount receiving by directors. There has no judicial principle been established in any of judicial illustration produced in the case that the provisions of ESI Act are applicable on the amount receiving by the directors
 F on the other hand judicial illustration produced by the plaintiff reveals that neither amount receiving by the directors fall under the category of pay nor directors fall under the category of employee. Hence in the right (sic) of above judicial illustration the order dated 06.04.05 passed by defendant is
 G proved void and unfair."*

5. In the appeal preferred by the appellant-Corporation under Section 82 of the ESI Act against the aforesaid order dated 24.12.2005, the High Court of Madhya Pradesh at Indore Bench, while relying on

¹ Equivalent citation (1998) 1 SCC 86

the decision of the Bombay High Court in the case of *Sakal Papers Private Limited Vs. Employees' State Insurance Corporation* reported in *MHLJ 1995 Vol. 2 Page 69* and another decision of the Bombay High Court in the case of *Employees' State Insurance Corporation Vs. Apex Engineering Pvt. Ltd.* reported in *MHLR 1990 Vol. 2 Page 850*, concluded that the Directors of the respondent establishment do not come within the purview of the "employees", as defined under sub-section (9) of Section 2 of the ESI Act and dismissed the appeal with the following observations:-

"10. On due consideration of the aforesaid and in view of the law laid down by the Bombay High Court, I am of the view that the Directors of the respondent establishment does not come within the purview of the employee as defined under section 2(9) of the ESI Act. The learned court has not committed any legal error in setting aside the order dated 06.04.2005"

6. Assailing the judgment aforesaid, learned counsel for the appellant-Corporation, while strongly relying on the decision of this Court in *Employees' State Insurance Corporation Vs. Apex Engineering Pvt. Ltd.: (1998) 1 SCC 86*, has argued that if remuneration is paid to a person who satisfies the definition of "employee" as per Section 2(9) of the ESI Act for discharge of the work assigned to him, such remuneration would be covered under the definition of "wages" as per Section 2 (22) of the ESI Act and, therefore, necessary contribution for that employee is to be paid. Learned counsel has also relied upon the decision in *Saraswath Films Vs. Regional Director, Employees' State Insurance Corporation, Trichur: 2010(11) SCC 553*. Per contra, learned Counsel for the respondent has duly supported the judgment impugned with the submissions that the facts of the present case are different from the facts in the case of *Apex Engineering* (supra), inasmuch as therein, one of the Directors of the company was entrusted with the work of Managing Director on remuneration of Rs. 1,000/- per month and in view of this remuneration, he had to discharge extra duties, apart from his function as an ordinary Director. According to the learned counsel, the said Managing Director fell within the definition of "employee" under Section 2(9) of the ESI Act but in the present case, the Directors of the respondent-Company were not employed for wages in or in connection with the work of factory or establishment and hence,

- A they do not fall within the essential ingredients of Section 2(9) of the ESI Act.

7. Having given anxious consideration to the rival submissions and having examined the record with reference to the law applicable, we are clearly of the view that the impugned orders cannot be sustained

- B and the application filed by the respondent-Company under Section 75 of the ESI Act deserves to be dismissed.

8. For determination of the question involved, appropriate it would be to take note of the exhaustive definition of “employee” as contained in sub-section (9) of Section 2 of the ESI Act that reads as under:-

- C “2(9). “employee” means any person employed from wages in or in connection with the work of a factory or establishment to which this Act applies and-

- D (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

- E (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 purposes of the factory or establishment; or

- F (iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;

- G and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment, or any person engaged as apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), [and

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*includes such person engaged as apprentice whose training period is extended to any length of time]*² but does not include-

(a) any member of the Indian naval, military or air forces; or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government a month:

Provided that an employee whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period;"

9. The expression "wages" is defined in sub-section (22) of Section 2 of the ESI Act in the following terms:-

"2(22). "wages" means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off and other additional remuneration, if any, paid at intervals not exceeding two months, but does not include-

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

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

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

(d) any gratuity payable on discharge;"

10. This Court, in the case of *Saraswath Films* (supra), has expounded on the amplitude of the definition of "employee", as contained in sub-section (9) of Section 2 of the ESI Act in the following:-

"6. From the provision in Section 2(9) it is clear that the definition is wide and of comprehensive nature. It includes

² Note: the expressions in parenthesis were substituted by Act No. 18 of 2010 w.e.f. 01.06.2010 in place of the expressions "or under the standing orders of the establishment".

- A *any person employed for wages in or in connection with work of the establishment to which the Act applies and also includes any person employed by or through immediate employer on the premises of the establishment or under the principal employer or his agent of work which is ordinarily a part of*
- B *the work of establishment or which is preliminary to work carried on in or incidental to the purpose of the establishment. In clause (iii) the position is further clarified; a person whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service*
- C *is also brought within the purview of the statute. On a plain reading of the definitions of the expressions “principal employer” and “immediate employer” the position is manifest that the appellant is the principal employer of the security guards in the case. It may be that their immediate employer is the security agency with whom there has been a contract either*
- D *by the lessor or the lessee of the cinema hall for purpose of the service. On a fair reading of relevant statutory provisions and keeping in view the object and purpose for which the legislation was enacted it is clear to us that in this case the security guards come within the purview of the expression*
- E *“employee” as defined in Section 2(9) of the Act. “*

11. In the case of *Apex Engineering* (supra), the Board of Directors of respondent-Company resolved to elect one of its Directors as Managing Director of the Company and to grant him annual remuneration of Rs. 12,000/- for rendering services as Managing Director.

- F The question was as to whether the said Managing Director was an “employee” within the meaning of Section 2(9) of the ESI Act? Though the High Court and the ESI Court had answered this question against the Corporation, but this Court allowed the appeal and, *inter alia*, held that the Managing Director, even when to be treated as principal employer, could also be an employee and could carry such dual capacity.
- G This Court said,-

- H *“8. But even assuming that the High Court was right that Shri Dhanwate could be said to be principal employer there is nothing in the Act to indicate that a managing director being the principal employer cannot also be an employee. In other words he can have dual capacity....”*

This Court also approved the interpretation of relevant provisions of the ESI Act by the Karnataka High Court in the following:- A

“13. A Division Bench of the Karnataka High Court in the case of *Regional Director, ESI Corpn. v. Margarine & Refined Oils Co. (P) Ltd.* [1984 Lab IC 844; (1983) 2 LLN 918 (Kant)] took the view which has commanded (sic B
commended) to us in the present proceedings. It was held by the High Court that the Managing Director of a private limited company was an employee as defined by Section 2 sub-section (9) of the Act. In this connection it was observed by the High Court that a company is a legal person and a corporate entity C
and as such it can employ one of its directors as Managing Director. The Managing Director of the company covered by the Act becomes an employee of the company within the meaning of Section 2(9) of the Act and the remuneration paid to him for the functions he discharges as Managing Director would amount to wages as defined under Section 2(22) of D
the Act for the purpose of calculating employees' contribution. The aforesaid decision of the High Court correctly interprets the relevant provisions of the Act.”

After a survey of the other cited decisions, this Court held as under:- E

“19. As a result of the aforesaid discussion it must be held that the Division Bench of the High Court in the impugned judgment had erred in taking the view, on the facts of the present case, that Shri Dhanwate as Managing Director of the company was not an employee within the meaning of F
Section 2 sub-section (9) of the Act. On the other hand it must be held that he was an employee of the company and as such could be added to the list of the remaining 19 employees so as to make a total of 20 for covering the establishment under Section 2 sub-section (12) of the Act which defines G
“factory” to mean, “ any premises including the precincts thereof-

(a)....., or

(b) whereon twenty or more persons are employed or were employed for wages on any day of the preceding H

- A *twelve months, and in any part of which a manufacturing process is being carried on without the aid of power or is ordinarily so carried on”.*

12. We are clearly of the view that what has been observed and held by this Court in *Apex Engineering* (supra), in relation to the Managing Director of a Company, applies with greater force in relation to a Director of the Company, if he is paid the remuneration for discharge of the duties entrusted to him.

13. It is noticed that in the present case, the appellant-Corporation in its impugned order dated 06.04.2005 specifically asserted that the Directors of the Company were paid remuneration at the rate of Rs. 3,000/- p.m. and they were falling within the definition of “employee” under the ESI Act and hence, contribution was payable in regard to the amount paid to them. Interestingly, even while seeking to challenge the aforesaid order dated 06.04.2005 by way of proceedings under Section 75 of the ESI Act, the respondent-Company chose not to lead any evidence before the Court. Hence, there was nothing on record to displace the facts asserted on behalf of the appellant-Corporation in its order dated 06.04.2005; rather the factual assertions in the said order remained uncontroverted. The order dated 06.04.2005 had been questioned by the respondent-Company only on the contention that the Directors do not fall within the category of “employee” but no attempt was made to show as to how and why the remuneration paid to its Directors would not fall within the purview of “wages” as per the meaning assigned by sub-section (22) of Section 2 of the ESI Act?

14. The ESI Court cursorily attempted to distinguish the decision of this Court in *Apex Engineering* (supra) only with reference to the fact that therein, the amount was being received by the Managing Director. The High Court, on the other hand, overlooked the said decision of this Court and relied only on the decisions of the Bombay High Court though the propositions in the referred decisions of the Bombay High Court stood effectively overruled by the decision in *Apex Engineering* (supra) where this Court held in no uncertain terms that the High Court was in error in taking the view that the Managing Director of the Company was not an employee within the meaning of Section 2 (9) of the ESI Act. The said decision directly applies to the present case and we have no hesitation in concluding that the High Court in the present case has been in error in assuming that the Director of a Company, who had been

EMPLOYEES' STATE INSURANCE CORPORATION v. VENUS 683
ALLOY PVT. LTD. [DINESH MAHESHWARI, J.]

receiving remuneration for discharge of duties assigned to him, may not A
fall within the definition of an employee for the purpose of the ESI Act.
There had been no reason to interfere with the order dated 06.04.2005
as issued by the appellant-Corporation.

15. In view of above, this appeal is allowed; the impugned orders B
are set-aside and the application filed by the respondent-Company under
Section 75 of the ESI Act is dismissed.

Divya Pandey

Appeal allowed.