LEGAL REMEDIES

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ESI AND PF ISSUES

Lecture to Final Year MBA Students at the
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by

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ESI and PF: Legal Structure

Entries in List III of the Seventh Schedule – Concurrent List of the Constitution of India

23. Social security and social insurance; employment and unemployment

24. Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits

Article 254 of the Constitution of India - Inconsistency between laws made by Parliament and laws made by the Legislatures of States

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

ESI Legislation

- The Employees' State Insurance Act, 1948 (34 of 1948)
- The Employees' State Insurance (Central) Rules, 1950
- The Employees' State Insurance (General) Regulations, 1950
- The Employees' State Insurance Corporation (General Provident Fund) Rules, 1995

PF Legislation

- Provident Funds Act, 1925
- Employees' Provident Funds and Miscellaneous Provisions Act, 1952
- Employees' Provident Funds Scheme, 1952
- Employees' Pension Scheme, 1995 (as amended by Employees' Pension (Third Amendment) Scheme, 2009
- Employees' Deposit-Linked Insurance Scheme, 1976
- The Employees' Provident Funds Appellate Tribunal (Procedure) Rules, 1997

ESI & PF Issues

- Whether employer/employee is covered
- Quantum of contribution payable by the employer/employee, if covered
- Issues in disbursement of benefits to contributors
- Prosecution of offenders
- Constitutional issues

Remedies for ESI Issues

(1) ESIOP / CMA / CMSA / SLP
(2) Penalties / Criminal Cases
(3) Writs / others

(1) ESIOP / CMA / CMSA / SLP

Dispute resolution under ESI Act

S. 75 of ESI Act: Matters to be decided by Employees' Insurance Court:

(1) 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

(b) the rate of wages or average daily wages of an employee for the purposes of this Act, or

(c) the rate of contribution payable by a principal employer in respect of any employee, or

(d) the person who is or was the principal employer in respect of any employee, or

(e) the right of any person to any benefit and as to the amount and duration thereof, or

(ee) any direction issued by the Corporation under section 55A on a review of any payment of dependants' benefits, 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, such question or dispute subject to the provisions of sub-section (2A) shall be decided by the Employees' Insurance Court in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (2A), the following claims shall be decided by the Employees' Insurance Court, namely:--

(a) claim for the recovery of contributions from the principal employer;

(b) claim by a principal employer to recover contributions from any immediate employer; (c) ***

(d) claim against a principal employer under section 68;

(e) claim under section 70 for the recovery of the value or amount of the benefits received by a person when he is not lawfully entitled thereto; and

(f) any claim for the recovery of any benefit admissible under this Act.

(2A) If in any proceedings before the Employees' Insurance Court a disablement question arises and the decision of a medical board or a medical appeal tribunal has not been obtained on the same and the decision of such question is necessary for the determination of the claim or question before the Employees' Insurance Court, that Court shall direct the Corporation to have the question decided by this Act and shall thereafter proceed with the determination of the claim or question before it in accordance with the decision of the medical board or the medical appeal tribunal, as the case may be, except where an appeal has been filed before the Employees' Insurance Court under sub-section (2) of section 54A in which case the Employees' Insurance Court may itself determine all the issues arising before it.

(2B) No matter which is in dispute between a principal employer and the Corporation in respect of any contribution or any other dues shall be raised by the principal employer in the Employees' Insurance Court unless he has deposited with the Court fifty per cent. of the amount due from him as claimed by the Corporation:

Provided that the Court may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this sub-section.

(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 77 of the ESI Act:

Commencement of Proceedings:

(1) The proceedings before an Employees' Insurance Court shall be commenced by application.

(1A) Every such application shall be made within a period of three years from the date on which the cause of action arose.

Explanation.--For the purpose of this sub-section,--

(a) the cause of action in respect of a claim for benefit shall not be deemed to arise unless the insured person or in the case of dependants' benefit, the dependants of the insured person claims or claim that benefit in accordance with the regulations made in that behalf within a period of twelve months after the claim became due or within such further period as the Employees' Insurance Court may allow on grounds which appear to it to be reasonable;

(b) the cause of action in respect of a claim by the Corporation for recovering contributions (including interest and damages) from the principal employer shall be deemed to have arisen on the date on which such claim is made by the Corporation for the first time: Provided that no claim shall be made by the Corporation after five years of the period to which the claim relates;

(c) the cause of action in respect of a claim by the principal employer for recovering contributions from an immediate employer shall not be deemed to arise till the date by which the evidence of contributions having been paid is due to be received by the Corporation under the regulations.]

(2) Every such application shall be in such form and shall contain such particulars and shall be accompanied by such fee, if any, as may be prescribed by rules made by the State Government in consultation with the Corporation.

Section 78 of the ESI Act:

Powers of Employees Insurance Court:

78. Powers of Employees Insurance Court.- (1) The Employees' Insurance Court shall have all the powers of a Civil Court for the purposes of summoning and enforcing the attendance of witnesses, compelling the discovery and production of documents and material objects, administering oath and recording evidence and such Court shall be deemed to be a Civil Court within the meaning of 1*[section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).]

(2) The Employees' Insurance Court shall follow such procedure as may be prescribed by rules made by the State Government.

(3) All costs incidental to any proceeding before an Employees' Insurance Court shall, subject to such rules as may be made in this behalf by the State Government, be in the discretion of the Court.

(4) An order of the Employees' Insurance Court shall be enforceable as if it were a decree passed in a suit by a Civil Court.

Section 81. Reference to High Court.-

An Employees' Insurance Court may submit any question of law for the decision of the High Court and if it does so shall decide the question pending before it in accordance with such decision.

Section 82. Appeal to the High Court.-

(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 Employees' Insurance Court if it involves a substantial question of law.

(3) The period of limitation for an appeal under this section shall be sixty days.

(4) The provisions of section 5 and 12 of the Limitation Act, 1963 shall apply to appeals under this section. (To condone delay in filing for sufficient case)

E.S.I.Corporation, rep. by its Regional Director, 143, Sterling Road, Madras-34. -vs- Bethall Engineering Company, rep.by Mrs.S.V.Umayal, Proprietrix, 5, Poonamallee High Road, Madras-602 102

Online report at: http://www.judis.nic.in/chennai/qrydisp.asp?tfnm=10085

Coram: THE HONOURABLE MR.A.P.SHAH, THE CHIEF JUSTICETHE HONOURABLE MRS.JUSTICE PRABHA SRIDEVAN and THE HONOURABLE MR.JUSTICE P. JYOTHIMANI

Appeal filed under 82 of the Employees' State Insurance Act, 1948 against the order, dated 16.12.1996 made in E.S.I.O.P. No.46 of 1990 on the file of the learned Principal Judge, City Civil Court, Chennai.

The learned single Judge made the reference to the Larger Full Bench as he felt that there is an apparent conflict between the two Division Bench Judgments of this Court as regards the issue whether the right of the principal employer to reject or accept work on completion, on scrutinizing compliance with job requirements, as accomplished by a contractor, the immediate employer, through his employees, is in itself an effective and meaningful 'supervision' as envisaged under Section 2(9) of the Employees State Insurance Act, 1948

Brief facts of the case:

The Southern Railway placed orders in respect of certain engineering works with the respondent and for execution of the works, the respondent used to assign some job work to outside parties by supply of materials. The outside parties were having their own establishment and employees. According to the respondent, the work was done on the specifications provided by the respondent at the premises of the third parties under their own supervision and control and the parties were paid on the basis of job works done by them and the respondent had no supervision or control over the workmen of the outside parties. There was thus no master and servant relationship between the respondent and the employees of the third parties. The appellant - Regional Director, Employees State Insurance Corporation in exercise of his power under Section 45-A of the Act, determined the contribution payable by the respondent towards labour charges in respect of job work entrusted to third parties at Rs.13,604.40 and he also determined as regards the loading and unloading charges with which we are not concerned in the present reference.

The respondent filed E.S.I.O.P.No.46 of 1990 under Section 75 of the Act before the Employees' State Insurance Court. The Employees' State Insurance Court on a consideration of the oral and documentary evidence available on record and by relying upon the decision of the Supreme Court in Calcutta Electric Supply Corporation (C.E.S.C.) Limited etc. -vs- Subhash Chandra Bose and Others, 1992 (1) LLJ 475 (SC) and that of the Division Bench of Bombay High Court in Parle Bottling Company (Private) Limited -vs- Employees' State Insurance Corporation, Bombay, 1989 (2) LLN 494 (DB) held that the respondent is not liable to pay any contribution in respect of the work done outside the establishment and the employees of the contractor are not covered by the Act. Being aggrieved by that, the Employees' State Insurance Corporation has filed the present appeal.

Ruling by the Full Bench of the Madras High Court:

“9. In our opinion, there is no conflict between the judgments of the Division Benches, since the fact situations are totally different. So far as the issue referred to us is concerned, we answer the same in the negative and hold that the right of the principal employer to reject or accept the work done by the contractor through his employees is by itself cannot be construed as effective and meaningful 'supervision' as envisaged under Section 2(9) of the Act.

10. Registry is directed to place the papers before the learned Single Judge for disposal of the appeal in accordance with law.”

Allied Industries vs. ESI Corporation

Online report at: http://www.judis.nic.in/chennai/qrydisp.asp?tfnm=14503

The Civil Miscellaneous Appeal was directed against the order dated 29.08.2000 passed by the E.S.I. Court (First Additional Judge, City Civil Court, Madras) in E.S.I.O.P.No.41 of 1990. The competent authority under the Employees State Insurance Act passed the impugned order dated 23.02.1989 fixing the contribution to be paid by the appellant at Rs.1,11,311.22P for the period from April 1985 to March 1987. The said determination of the contribution was challenged before the E.S.I.Court by the appellant herein on the ground that there were immediate employers, namely contractors and the amount paid to the contractors were taken by the authority under the Employees State Insurance Act to be the wages paid to the employees. It was also the contention of the appellant herein before the E.S.I.Court that the workmen employed by the immediate employers (contractors) were earning more than Rs.1,600/- per month and hence they were not covered by the scheme of insurance under the Employees State Insurance Act and that this aspect was not properly taken into account and considered by the authority concerned. However, the E.S.I.Court dismissed the above original petition holding that the records furnished by the appellant herein were not genuine and were prepared for the purpose of the case. The said order of the E.S.I.Court dismissing the E.S.I.O.P.No.41 of 1990 was challenged in the Civil Miscellaneous Appeal.

Section 45-A of the Act enables the appropriate authority to recover such dues both from the principal as also the immediate employer. It provides for an opportunity of hearing to both of them. The Hon'ble Supreme Court proceeded further and passed the following order:- "It appears that the determining authority did not give an opportunity of hearing to the petitioner in regard to the names and other particulars of the contractors. The impugned judgment, therefore, cannot be sustained. It is set aside accordingly. The appeal is allowed and the matter is remitted to ESI Corporation/ determination authority for considering the matter afresh. The authority shall either implead the contractors as parties and/or summon them for producing necessary records for the said purpose."

Following the apex court the court concluded that the order of the authority has got to be interfered with and set aside and the matter has to be remitted back to the said authority to to re-determine the contribution payable by the appellant, if any, after either impleading the alleged contractors or summoning them and examining them.

The Kumbakonam Milk Supply Cooperative Society vs. ESI Corporation

Online report at: http://www.judis.nic.in/chennai/qrydisp.asp?tfnm=1556

The appellant is registered under the Co-operative Societies Act and their main object is to purchase milk from its members and to sell the same. The said work was being done for the last 45 years. While so, on 14-5-85, a memo was issued claiming Rs.87,101/- towards E.S.I. contribution for the period between 1-4-79 and 31-12-84. Again, on 26-5-86 it received another notice demanding Rs.1,11,488.40 towards E.S.I. Contribution. The appellant sent a reply stating that it is a society and not an industry, that no manufacturing process is being carried out and that the persons working in the society are not employees within the meaning of Section 2 (9) of the Employees' State Insurance Act, 1948. The society then filed E.S.I.O.P. No.33/87 before the District Court under Section 75 (1) of the Act.

The learned District Judge, after framing necessary issues and after considering the evidence, both oral and documentary, and after holding that the appellant society is an organisation under the Act, dismissed the O.P., filed by the society. The District Court also permitted the society to approach the Corporation for modification of the quantum, if there is any variation in the contribution. Questioning the said award, the society has preferred the above appeal.

he following substantial questions of law in the Memorandum of Grounds of Appeal:

> Whether the appellant-Society attracts the provisions of the State Employees' Insurance Act, 1948, in view of the fact that the Appellant-Society's duty is only to preserve the milk purchased from the purchasers for the purpose of distributing the same to its customers and as such no question of manufacturing process arises, as contemplated under the provisions of the said Act?

“First we shall refer the relevant provisions of the Employees' State Insurance Act and the Factories Act which are required for the disposal of this appeal. Section 2(9) of the Employees' State Insurance Act, 1948 reads thus:

"Section 2(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-..."

Section 2 (12) "factory" means any premises including the precincts thereof- (a) whereon ten 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, or

(b) 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 without the aid of power or is ordinarily so carried on ...

Even according to the appellant-Society, though they employed 24 persons, except two who are working in cold storage, the others, namely, 20 persons are mainly working outside the premises. According to the Society, their main job is to procure milk from the members.

The Employees' State Insurance Act is a piece of social welfare legislation enacted primarily with the object of providing certain benefits to employees in case of sickness, maternity and employment injury and also to make provisions for certain other matters incidental thereto. In an enactment of this nature, the endeavour of the Court should be to interpret the provisions liberally in favour of the persons for whose benefit the enactment has been made. In the light of the statutory provisions of the Employees' State Insurance Act, 1948 and the Factories Act, 1948, coupled with the factual details available in the case on hand, we are in agreement with the conclusion arrived at by the learned District Judge.”

M/S. WHIRLPOOL OF INDIA LTD. v. ESI CORPORATION

Online Judgement at: http://www.commonlii.org/in/cases/INSC/2000/114.html

"The appellant under a `Production Incentive Scheme' pays to its workers production incentive at the rates specified in the Scheme besides normal wages. For the purpose of calculating contributions towards Employees' State Insurance Fund, the payment of production incentive by the appellant to its workers is not treated by it as `wages' within the meaning of the term as defined in Section 2(22) of the Employees' State Insurance Act, 1948 (for short `the Act'). The respondent-Employees' State Insurance Corporation (for short `the Corporation') treating the said payment as `wages' issued a demand to the appellant for payment of contributions towards the Employees' State Insurance Fund. This led to filing of an application under Section 75 of the Act by the appellant before Employees' Insurance Court challenging the said demand. The said court allowed the application and quashed the demand. It held that the payment was made quarterly and was not `wages' under the Act as it did not fall either under the first part of Section 2(22) or under third part thereof. The payment made by the appellant, it was held, did not fall under the first part of the definition of `wages' as there was no agreement between the appellant and its workers for payment of production incentive and also that it did not fall under the third part of the definition as the actual payment was made quarterly which means at intervals exceeding two months.

The appeal filed by the Corporation against the order of the Employees' Insurance Court was allowed by a learned Single Judge of the High Court holding that the production incentive was calculated on the basis of the extra work done by the workers in each month but to avoid contribution under the Act, the payment was postponed and was made quarterly.

The Letters Patent Appeal of the appellant was dismissed and, therefore, the present appeal.

The question for decision is whether payments towards production incentive made by the appellant to its workers under the `Production Incentive Scheme' falls within the scope and ambit of `wages' as defined in Section 2(22) of the Act and also the effect of payments being made quarterly i.e. at intervals exceeding two months."

Hon'ble Supreme Court held the provisions of the Act cannot be rewritten, and confirmed the ESI Court.

THE REGIONAL DIRECTOR, ESI CORPORATION v. M/S. POPULAR AUTOMOBILES

Online Judgement at: http://www.commonlii.org/in/cases/INSC/1997/754.html

The Employees' State Insurance Corporation (in short `the corporation') functioning in the State of Kerala as well as in the State of Karnataka in the appeals concerned, raised the following question of law:

"Whether a suspended employee and his employer are liable to remit under the Employees' State Insurance Act, 1948 (hereinafter referred to as `the Act') the requisite contributions under the said Act in connection with the subsistence allowance amounts received by the suspended employee during the period of his suspension pending domestic enquiry."

In the impugned judgments under appeal the High Courts of Kerala and Karnataka have taken the view that there is no such liability on the part of the suspended employee or his employer. The learned counsel for the appellant-Corporation submitted to the contrary for consideration.

"(22) `Wages' means all remuneration pair 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 allowance 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;"

It was held that before any payment made by the employer to the employee is covered by the said definition of `wages' it should be a remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled. That in case of a suspended employee the terms of contract of employment would not be fulfilled as he is not actually rendering any service during the period of suspension.

A regular employee who is willing to work and whose services are taken by the employer gets the remuneration for the work actually done by him under the contract of employment. But in case of a suspended employee he gets lesser amount by way of subsistence allowance but that is also as a remuneration for being continued on the roll of employment as an employee and so far as he is concerned he cannot be said to have not fulfilled his part of the terms of contract of employment as he is willing to offer his services but it is the employer who prohibits him from service under the contract of employment. The situation almost resembles to grant of half pay leave or leave on even more than half pay as the case may be. Therefore, it cannot be said that the suspended employee does not fulfil his part of the contract of employment or commits breach of any of the terms of the contract of employment.

The Division Bench of the Hon'ble Supreme Court comprising of Hon'ble Mr. Justice S.B. Majmudar & Hon'ble Mr. Justice S. Saghir Ahmad ruled:

“As a result of the aforesaid discussion it must be held that the High Courts in the impugned judgments erred in taking the view that subsistence allowance was not a part of wages as defined by Section 2 sub-section (22) of the Act.

It must be held that such allowance forms part of wages as per sub-section (22) of Section 2 of the Act and consequently on the said amount the employee will be liable to contribute under Section 39 by way of employee's contribution and equally the employer would be liable to contribute his share by way of employer's contribution on the amount of subsistence allowance paid to the suspended employee. The appeals are allowed. The impugned judgments and orders of the High Courts in respective cases are set aside. The appellant- Corporation is held entitled to enforce the recovery of the contributions centering round subsistence allowance paid to the suspended employees concerned for the respective period in accordance with law.”

Other Cases:

REGIONAL DIRECTOR, EMPLOYEE'S STATE INSURANCE CORPORATION v. HIGH LAND COFFEE WORKS OF P.F.X. SALDANHA AND SONS AND ANR [1991] INSC 166 : Examined the amendment to expression “Seasonal factory”

HINDU JEA BAND, JAIPUR v. REGIONAL DIRECTOR, EMPLOYEES' STATE INSURANCE CORPORATION [1987] INSC 56 : The power conferred upon the State under section 1(5) does not suffer from the vice of excessive delegation.

EMPLOYEES' STATE INSURANCE CORPORATION & ANR v. TATA ENGINEERING & CO. LOCOMOTIVE CO. LTD. & ANR [1975] INSC 251 : Apprentices not covered.

B. M. LAKSHMANAMURTHY v. THE EMPLOYEES' STATE INSURANCE CORPORATION, BANGALORE [1974] INSC 15 : The underlying aim of the Act is to insure the employees against, various risks to their life, health and well being and the charge is upon the principal employer even though he may get his usual work done through an intermediary who is described in the Act as 'immediate employer'. Any dispute between the principal employer and the immediate employer has to be settled between themselves de hors, the employees and the Act charges the principal employer with the liability to pay the contribution not only of its own but also that of the employees subject to his right to deduct the employees' contribution from their wages under s. 40(2) Of the Act

OSMANIA UNIVERSITY v. REGIONAL DIRECTOR, EMPLOYEES STATE INSURANCE CORPORATION, A [1985] INSC 225 : Publications and Press Department of University - Running printing press and printing of text books, journals and stationery items for University - Employees of such Department held eligible for benefits of ESI Act.

REGIONAL DIRECTOR EMPLOYEES A STATE INSURANCE CORPORATION T v. RAMANUJA MATCH INDUSTRIES [1984] INSC 215 : The Respondent challenged its liability before the Employees Insurance Court by contending that partners were not employees and that when the three partners were excluded, the total number of employees did not exceed the statutory minimum – contention upheld.

THE REGIONAL DIRECTOR, EMPLOYEES' STATE INSURANCE CORPORATION v. BATA SHOE COMPANY (P) LTD. [1985] INSC 232 : Bonus does not fall under any category or class mentioned in the definition of "wages".

(2) Penalties / Criminal Cases

Penalties under ESI Act

Chapter VII :: Penalties

Section 84: Punishment for false statement

Section 85: Punishment for failure to pay contributions, etc.

Section 85A: Enhanced punishment in certain cases after previous conviction

Section 85B: Power to recover damages

Section 85C: Power of Court to make orders

Section 86: Prosecutions

Section 86-A: Offences by companies

S. Ranganathan & Others v. ESI Corporation

These revision petitions have been preferred against the judgment in C.A.Nos.7,8 and 6 of 2002 respectively passed by the learned Additional Sessions Judge, (FTC) Vellore, which had arisen out of the judgment in C.C.Nos.295, 296 and 294 of 1994 respectively on the file of the Judicial Magistrate NO.I, Vellore. A3 and A4 in C.C.No.295/1994 are the appellants in C.A.No.7 of 2002, A2 and A3 in C.C.No.296/1994 are the appellants in C.A.No.8 of 2002 and A3 and A4 in C.C.No.294 of 2004 are the appellants in C .A.No. 6 of 2002. The revision petitioners along with the co-accused have been charged under Section 85(a)of the Employees' State Insurance Act,1948 for having violated the provisions contemplated under Section 40(1) of the E.S.I.Act r/w Rule 31 of the Employees State Insurance Act under which they bound to collect the E.S.I.contribution from the employees and to remit the same with the E.S.I.Corporation Fund.

2. P.W.1 Thiru Kumar, the Inspector of E.S.I.Corporation, Vellore, while conducting an inspection of A1 spinning Mill on 14.12.1993, it was brought to light that for the period from April 1993 to September 1993 on behalf of the A1 spinning Mill, the E.S.I.Contribution collected from the employees of A1 Spinning Mill were not remitted with the E.S.I. Corporation Fund, thereby contravening the provisions under Section 41 of E.S.I.Act r/w 31 of State Insurance Act punishable under Section 85(a) of the E.S.I.Act. After taking cognizance, the learned Judicial Magistrate No.1, Vellore had taken the complaint on file as C.C.Nos.295, 296 and 294 of 2004 respectively and issued summons to the accused on their appearance, copies under Section 207 Cr.P.C. were furnished to the accused when the charges were explained to the accused, they pleaded not guilty.

The High Court ruled:

As per G.O.No.139 dated 5.7.1995, A1, North Arcot District Cooperative Spinning Mills, Ariyur, Vellore District has been declared as a sick Unit by the Government. The learned counsel appearing for the revision petitioners would contend that now the mill has been closed. It is seen from the records that the complaint filed by the complainant before the Court on 26.7.1994. But it is seen from Ex D12 that the arrears of contribution were paid by the accused only on the next day ie., on 27.7.1994. Under such circumstances, it cannot be said that even before taking cognizance of the offence by the Magistrate, the accused have deposited the arrears of E.S.I.Contribution.

Taking into consideration, the subsequent payment of arrears of contribution by the accused and also the fact that A1 spinning Mill is a Sick Unit declared by the Government as per Ex D1 and also representation made by the learned counsel appearing for the revision petitioners that A1 spinning Mill has been closed now, I am of the view that while confirming the conviction, the sentence alone can be modified to that of "till the rising of the Court" instead of 6 months RI, while confirming the fine imposed by the trial Court. The point is answered accordingly.

ESI Corporation by its Inspector v. Sri Ragavendra Theatre, Hosur

This criminal appeal was against the Judgment in C.C.No.173 of 1996 on the file of the Court of Judicial Magistrate No.II, Hosur, Dharmapuri District. The complainant had lodged the prosecution against the accused under Section 85 (a) of the Employees' State Insurance Act, 1948 (hereinafter referred to as 'the Act'), for the failure to remit 7.25 % of the ESI contribution from out of the ESI contribution collected from the employees, who were found working at the time of inspection by the Inspector of ESI P.W.1.

After going through the evidence both oral and documentary, the trial Court on the basis of the ratio decidendi in the ratio relied on on the side of the accused in I.L.R. 88 Karnataka 180J, has held that the fact that ESI Coporation has failed to furnish the particulars of the employees, who were working at the time of the inspection of P.W.1 is fatal to the case of the prosecution, had dismissed the complaint thereby acquitting the accused under Section 235(1) of Cr.P.C., which necessitated the complainant / ESI Corporation to prefer this appeal.

The Madras High Court confirmed the verdict of the CJM, Hosur and dismised the CA

(3) Writs / Others

Other issues

Sections 87, 88: Exemption of factories and persons from Act

Disputes not covered by Act with regard to benefits

Matters not covered by dispute resolution mechanism under the Act

Easy Weld Electrodes(P) Ltd, rep.by Director Thiru L. Jebaraj, Gummidipoondi - 601 201, Tiruvallur District vs. The Recovery Officer, ESI Corporation, No.143, Sterling Road, Chennai-600 034

Online report at: http://www.judis.nic.in/chennai/qrydisp.asp?tfnm=13208

In this writ petition the petitioner challenged the proceedings of the respondent dated 9.1.2006, a show cause notice for issuance of warrant of arrest, under Rule 73(1) of Income Tax Act 1961, read with Section 45-C to 45-I of the ESI Act, 1948.

The issue relates to non-payment of ESI contribution for the period from 1.5.1994 to 31.3.2001. According to the petitioner, contributions were duly paid on 13.12.2006.

The ESI Corporation contended that unless the petitioner challenges the said order of determination passed by the respondent under Section 45-A of the Act, no relief can be granted to the petitioner in this writ petition as against the impugned show cause notice for arrest. ESI Act provides the remedy under Section 75 to challenge any determination made under Section 45-A of the Act. Under Section 77(1-A) of the Act, a period of three years has been fixed by way of limitation for preferring any application before the Commissioner of ESI Court under Section 75 of the Act

Per contra, the petitioner contended that due to serious dislocation in the affairs of the company, the order passed by the respondent under Section 45-A of the Act could not be challenged in time.

Hon'ble Mr. Justice F.M. Ibrahim Kalifulla decided as follows:

A conspectus reading of Sections 74 to 83 falling under Chapter VI of the Employees' State Insurance Act discloses that the Employees' State Insurance Court would fall within the definition of 'civil Court' and consequently, the provisions of the Limitation Act, in particular Section 5 of the Act, can very well be applied.

Applying the principle set out in the decisions of the Honourable Supreme Court, the Madras High Court concluded that even the Employees' Insurance Court, apart from the apparent fact that it is a judicial Tribunal, it has got necessary power to render a decision or a definite judgement with authoritativeness, which are the essential tests of a judicial pronouncement and that it decides the rights of the parties and thereby, it satisfies the definition of the expression 'Court' as held by the Honourable Supreme Court. Further having regard to Section 78 of the Act, wherein the ESI Court is vested with all the powers of 'civil Court' as provided under the Code of Civil Procedure, Code of Criminal Procedure as well as the Evidence Act, the ESI Court can validly called as a 'Court' for all practical purposes.

Section 5 of the Limitation Act can be extended even to the applications filed under Section 75 of the ESI Act to seek for condonation of delay in filing such applications.

Fenner India Ltd v. Joint Regional Director, ESI Corporation

Online report at: http://www.judis.nic.in/chennai/qrydisp.asp?tfnm=1326

The writ petitioner, the management of Fenner (India) Ltd., has prayed for the issue of a writ of prohibition prohibiting the respondent from claiming interest of Rs.1,89,564/= on the belated payment of ESI contribution for the period between January 1997 and October 1997 as not maintainable in law.

The writ petitioner a company registered under the Indian Companies Act has its office at Madurai employing about 1000 workman. The petitioner's establishment is covered under the Employees State Insurance Act and contributions both employer as well as employees used to be remitted regularly in respect of all eligible employees in time. In respect of employees who were not covered under the ESI Act, the petitioner company used to provide medical benefits.

By a notification dated 16.12.1996 the Government of India extended the coverage to those employees who draw wages up to 6,500/= Challenging the said notification, the Madurai Fenner (India) workers' Union, a registered Union filed W.P.No.2250 of 1997. By order dated 19.2.1997 interim injunction was granted restraining the petitioner from recovering and remitting ESI contribution from the month of January 1997. The Madras High Court subsequently dismissed the writ petition filed by the workers Union.

After the dismissal of the writ petition, the petitioner company remitted both employer and employees contribution amounting to Rs.31 ,37,500/= for the said period on 3.1.1998. While so, the respondent by Notice dated 17.12.1997 called upon the petitioner to pay contribution and also remit interest at the rate of 15% per annum on the contribution payable under Section 39(5) of the Act on arrears of contribution for each day of default or delay in payment of contribution.

The Hon'ble High Court held:

There is no dispute as to the orders of injunction passed by this court pending the writ petition filed by the employees Union and there is no dispute about the quantum of contribution payable both by the employer and employee and the period during which the orders of injunction was in force and as a result of which contribution could not be deducted from the employees and consequently the contribution both employer and employee could not be remitted.

The legal maxim "actus curiae neminem gravabit" namely, an act of the court shall prejudice no man is based upon justice and good sense with which serves a safe and certain guide for the administration of law. The other legal maxim "lex non cogit ad impossibilia" means the law does not compel a man to do what he cannot possibly perform.

In the present case, the writ petitioner management cannot possibly perform what it was expected to during the material period in view of the orders of stay secured by the employees. There is no provision to pay employer's contribution alone and contribution if any required to be paid should be both employer as well as employees. What was being impossible for the employer was, namely, the remittance of the contribution has been rendered impossible at least for the interregnum period and for which the petitioner shall not be punished.

The writ petition was therefore allowed.

Mass Shipping and Trading Private Limited v. ESI Corporation

Online Judgement at: http://www.judis.nic.in/chennai/qrydisp.asp?tfnm=15910

The main contention raised on behalf of the petitioner company was that the said company does not come under the purview of the provisions of the Employees State Insurance Act, 1948. The petitioner company, is a shipping agent, having a total of twenty eight employees. Twelve of the employees draw a gross salary of over Rs.6500/- per month and sixteen of them draw a gross salary of less than Rs.6500/- per month.

According to Section 2(9) of the Employees State Insurance Act, 1948, an employee is a person employed for wages, in connection with the work of a factory or establishment to which the Act applies. Under the provisions of Section 2(9), the Central Government may prescribe a wage ceiling for the application of the Act. Accordingly, the Central Government, under a notification, dated 23.12.96, had enhanced the wage ceiling for coverage under the Act from Rs.3000/- to Rs.6500/- per month, with effect from 1.1.97. Section 2(12) of the Act defines a factory to mean any premises where ten or more persons are employed on wages, where the manufacturing process is being carried on with the aid of power, or where twenty or more persons are employed in the manufacturing process, without the aid of power.

Ruling: “As the main contention of the learned counsel for the petitioner is that the provisions of the Employees State Insurance Act, 1948, does not apply to the said company, in view of the fact that the said company does not employ twenty or more persons as defined under Section 2(9) of the Act, at the relevant point of time, it goes without saying that it is for the said company to substantiate its claims by producing the relevant records before the authorities concerned.”

KISHORE LAL V. CHAIRMAN, ESI CORPORATION

Online Judgement at: http://www.commonlii.org/in/cases/INSC/2007/519.html

The appellant was insured with the respondent-Employees' State Insurance Corporation (for short "the Corporation") with Insurance No. 913644. The employee's/appellant's contribution towards the insurance scheme under the Employees' State Insurance Act, 1948 (hereinafter referred to as "the ESI Act") was being deducted regularly from his salary and deposited by his employer with the Corporation. In 1993, the appellant's wife was admitted in the ESI dispensary at Sonepat for her treatment for diabetes. However, the condition of his wife continued to deteriorate. As alleged by the appellant, there were instances when the doctors were not available even during emergencies.

Later, the appellant got his wife medically examined in a private hospital. The tests done revealed that his wife had been diagnosed incorrectly in the ESI dispensary; and that the deterioration in the condition of the appellant's wife was a direct result of the wrong diagnosis. The appellant filed a complaint under the Consumer Protection Act, 1986 (hereinafter referred to as "the CP Act") before the District Consumer Disputes Redressal Forum seeking (i) compensation towards mental agony, harassment, physical torture, pains, sufferings and monetary loss for the negligence of the authorities; (ii) direction for removal of, and improvement in, the deficiencies; and (iii) direction for payment of interest on the amount of reimbursement bills.

The Corporation through its officers entered appearance and raised certain preliminary objections, namely, (i) that the complaint filed is not maintainable in the District Consumer Forum and is liable to be dismissed as the wife of the complainant was treated in the ESI dispensary, Sonepat, which is a government dispensary and the complainant cannot be treated as a consumer; It was also contended that the facility of medical treatment in government hospital cannot be regarded as a `service' hired for consideration, apart from the other defences raised in the written statement.

Two questions arose for consideration before the Supreme Court:

1. Whether the service rendered by an ESI hospital is gratuitous or not, and consequently whether it falls within the ambit of `service' as defined in the Consumer Protection Act, 1986?

2. Whether Section 74 read with Section 75 of the Employees' State Insurance Act, 1948 ousts the jurisdiction of the consumer forum as regards the issues involved for consideration?

Answer to #1: The service rendered by the medical practitioners of hospitals/nursing homes run by the ESI Corporation cannot be regarded as a service rendered free of charge. The person availing of such service under an insurance scheme of medical care, whereunder the charges for consultation, diagnosis and medical treatment are borne by the insurer, such service would fall within the ambit of `service' as defined in Section 2(1)(o) of the CP Act. We are of the opinion that the service provided by the ESI hospital/dispensary falls within the ambit of `service' as defined in Section 2(1)(o) of the CP Act. ESI scheme is an insurance scheme and it contributes for the service rendered by the ESI hospitals/dispensaries, of medical care in its hospitals/dispensaries, and as such service given in the ESI hospitals/dispensaries to a member of the Scheme or his family cannot be treated as gratuitous.

Answer to #2: A bare perusal of the provisions of clauses (a) to (g) of Section 75(1) clearly shows that it does not include claim for damages for medical negligence, like the present case which we are dealing with. Although the question does not directly arise before us, we shall consider what in the ordinary course shall constitute negligence. Further, it can be seen that any claim arising out of and within the purview of the Employees' Insurance Court is expressly barred by virtue of sub- section (3) to be adjudicated upon by a civil court, but there is no such express bar for the consumer forum to exercise the jurisdiction even if the subject matter of the claim or dispute falls within clauses (a) to (g) of sub-section (1) of Section 75 or where the jurisdiction to adjudicate upon the claim is vested with the Employees' Insurance Court under clauses (a) to (f) of sub- section (2) of Section 75 if it is a consumer's dispute falling under the CP Act.

Remedies for PF Issues

(1) Authorities / Appellate Tribunal
(2) Penalties / Criminal cases
(3) Writs / others

(1) Authorities / Appellate Tribunal

Dispute resolution under PF Act

Section 7A. Determination of moneys due from employees.-

(1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner or any Assistant Provident Fund Commissioner may, by order,--

(a) in a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and

(b) determine the amount due from any employer under any provision of this Act, the Scheme or the Family Pension Scheme or the Insurance Scheme, as the case may be,

and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary;

(2) The officer conducting the inquiry under sub-section (1) shall, for the purposes of such inquiry, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908), for trying a suit in respect of the following matters, namely:-

(a) enforcing the attendance of any person or examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavit;

(d) issuing commissions for the examination of witnesses;

and any such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code (45 of 1860).

(3) No order shall be made under sub-section (1), unless the employer concerned is given a reasonable opportunity of representing his case.

(3A) Where the employer, employee or any other person required to attend the inquiry under sub-section (1) fails to attend such inquiry without assigning any valid reason or fails to produce any document or to file any report or return when called upon to do so, the officer conducting the inquiry may decide the applicability of the Act or determine the amount due from any employer, as the case may be, on the basis of the evidence adduced during such inquiry and other documents available on record.;

(4) Where an order under sub-section (1) is passed against an employer ex parte, he may, within three months from the date of communication of such order, apply to the officer for setting aside such order and if he satisfies the officer that the show cause notice was not duly served or that he was prevented by any sufficient cause from appearing when the inquiry was held, the officer shall make an order setting aside his earlier order and shall appoint a date for proceeding with the inquiry:

Provided that no such order shall be set aside merely on the ground that there has been an irregularity in the service of the show cause notice if the officer is satisfied that the employer had notice of the date of hearing and had sufficient time to appear before the officer.

Explanation.--Where an appeal has been preferred under this Act against an order passed ex parte and such appeal has been disposed of otherwise than on the ground that the appellant has withdrawn the appeal, no application shall lie under this sub-section for setting aside the ex parte order.

7B. Review of orders passed under section 7A.-

(1) Any person aggrieved by an order made under sub-section (1) of section 7A, but from which no appeal has been preferred under this Act, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the order was made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of such order may apply for a review of that order to the officer who passed the order:

Provided that such officer may also on his own motion review his order if he is satisfied that it is necessary so to do on any such ground.

7I. Appeals to Tribunal.- (1) Any person aggrieved by a notification issued by the Central Government, or an order passed by the Central Government or any authority, under the proviso to sub- section (3), or sub-section (4), of section 1, or section 3, or sub- section (1) of section 7A, or section 7B [except an order rejecting an application for review referred to in sub-section (5) thereof], or section 7C, or section 14B, may prefer an appeal to a Tribunal against such notification or order.

(2) Every appeal under sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed.

7J. Procedure of Tribunals.

7J. Procedure of Tribunals.- (1) A Tribunal shall have power to regulate its own procedure in all matters arising out of the exercise of its powers or of the discharge of its functions including the places at which the Tribunal shall have its sittings.

(2) A Tribunal shall, for the purpose of discharging its functions, have all the powers which are vested in the officers refered to in section 7A and any proceeding before the Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code (45 of 186) and the Tribunal shall be deemed to be a civil court for the all purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

NOOR NIWAS NURSERY PUBLIC SCHOOL v. REGIONAL PROVIDENT FUND COMMR. & ORS

Online Judgement at: http://www.commonlii.org/in/cases/INSC/2000/633.html

The appellant-institution is run by Baptist Union North India, a registered Society under the Registration of Societies Act, 1860. The said Society runs two schools at 17, Darya Ganj, Delhi, namely, Francis Girls Higher Secondary School which was established in 1916 and the appellant-school which runs nursery classes. The appellant-school was started in the year 1971. The claim of the appellant-school is that Francis Girls Higher Secondary School and the appellant-school, Noor Niwas Nursery Public School, are two different institutions having separate and independent accounts and are managed by two different Managing Committees. The appellant has four employees, namely, 1 Head Mistress, 1 Teacher, 1 Peon and 1 Aaya and it being a separate establishment is not covered by the provisions of the Act. Therefore, it is contended that Francis Girls Higher Secondary School and the appellant-school cannot be treated as one establishment for the purpose of the Act.

The respondents contention is that an Inspector of the Department visited Francis Girls Higher Secondary School when Mrs. P. Wadhavan, the Head Clerk in Francis Girls Higher Secondary School gave particulars not only in regard to Francis Girls Higher Secondary School but also in regard to the appellant-school. The said Inspector was examined as a witness before the Provident Fund Commissioner. He was thoroughly cross-examined suggesting that the letter seeking for a common number for depositing the contribution to the provident fund was obtained under duress. But while denying the same he clearly stated that this information had been furnished by Mrs. P. Wadhavan on 21.04.1982 voluntarily.

The Provident Fund Commissioner on this material held that the two institutions constitute one and the same establishment and, therefore, is covered by the Act. This order of the Provident Fund Commissioner was unsuccessfully challenged before the High Court. Hence this appeal.

Whether two units are one or distinct will have to be considered in the light of the provisions of Section 2-A of the Act which declares that where an establishment consists of different departments or has branches whether situate in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment. In such cases, the court has to consider how far there is functional integrality between the two units, whether one unit cannot exist conveniently and reasonably without the other, and on the further question, in matters of finance and employment, the employer has actually kept the two units distinct or integrated. In fact, this Court set out certain tests in Management of Pratap Press, New Delhi v. Secretary, Delhi Press Workers Union, Delhi, AIR 1960 SC 1213. However, we may point out that each case would depend upon its own peculiar facts and has to be decided accordingly.

In the present case, when two units are located adjacent to one another and there are only two Teachers with an Aaya, a Clerk and a Peon, it is difficult to believe that the Society which runs 30 schools would run a separate school consisting of such a small number of staff. If the unit of the appellant-school was not part of the unit of Francis Girls Higher Secondary School, the Head Clerk, Mrs. Wadhavan could not have been in possession of the particulars of the appellant-school and could not have furnished such particulars to the Inspector when he visited the school in connection with the grant of a code number.

Undisputably, the two units are run by the same Society and they are located in one and the same address thereby establishing geographical proximity and nothing worthwhile has been elicited in the cross- examination of the Inspector in regard to inquiries made by him from Mrs. P. Wadhavan.

Mrs. P. Wadhavan was not examined before the Provident Fund Commissioner. All these facts clearly point out to one factor that the two units constitute one single establishment. After all appellant-school caters to nursery classes, while the higher classes are provided in Francis Girls Higher Secondary School. Thus, the link between the two cannot be ruled out. In the facts and circumstances of the case, we hold that the view taken by the Provident Fund Commissioner as affirmed by the High Court in this regard is correct.

FOOD CORPORATION OF INDIA v. PROVIDENT FUND COMMISSIONER & ANR [1989] INSC 327

Online Judgement at: http://www.commonlii.org/in/cases/INSC/1989/327.html

Provident Fund Commissioner called upon the appellant--Food Corporation of India to deposit contribution payable by it under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 and the scheme thereunder, in respect of workers employed by the contractors appointed by the appellant for handling storing and transporting food grains and other articles in its depots in Rajasthan. On appellant's non-compliance, Respondent No. 1 made an order under Section 7A of the Act determining the amount payable by the appellant. Against the aforesaid order, the appellant filed writ petition before the High Court, which dismissed the same. Hence the appeal, by special leave, by the appellant--Corporation.

It was contended that the appellant was denied a reasonable opportunity to produce actual proof of identification of workers in respect of whom contribution was payable inasmuch as Respondent No. 1 neither gave notice to contractors, who were in possession of the relevant lists of workers, nor made them parties to the proceedings, despite its repeated requests.

HELD: The Commissioner, while conducting an inquiry under Section 7A of the Employees, Provident Fund and Miscellaneous Provisions Act, 1952 has the same powers as are vested in a court under the Code of Civil Procedure for trying a suit. Thus, the Commissioner is authorised to enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the 756 workmen. The Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. That is the legal duty of the Commissioner. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person.

F-H] In the instant case, the appellant--Corporation had some problems in collating the lists of all workers engaged in depots scattered at different places. It requested the respondent--Commissioner to summon the contractors to pro- duce the respective lists of workers engaged by them. However, the appellant--Commissioner did not summon the contractors, nor the lists maintained by them. The matter is, therefore, remitted to the Commissioner for fresh disposal.

ANDHRA UNIVERSITY v. REGIONAL PROVIDENT FUND COMMISSIONER OF ANDHRA PRADESH

Online Judgement at: http://www.commonlii.org/in/cases/INSC/1985/226.html

The Employees' Provident Funds and Miscellaneous Provisions Act applies to every establishment which is a "factory" engaged in and "industry" specified in Schedule I and in which 20 or more persons are employed. The expressions "manufacture" and "factory" are defined in section 2(1-C) and 2(g) of the Act. The establishments namely, the Departments of Publications and Press of the two Universities each employing 100 persons, run printing presses, where the work of printing of text books, journals and magazines for the various constituent and affiliated colleges as well as of various items of stationery such as admission forms to colleges, hostels and examinations, forms of memo of parks, hall' tickets, answer books, syllabi for various colleges and departments, registers, receipt books for colleges and hostels and letter heads for Universities carried out.

The Regional Provident Fund Commissioner called upon the two Universities to submit their monthly returns and remit the amounts of contribution as required by the provisions of the scheme covered under the Employees' Provident Funds and Miscellaneous Provisions Act. Two writ petitions were therefore, filed by the appellants separately challenging the legality and validity of the notices issued to them by the Regional Provident Fund Commissioner, contending (i) that the Universities are purely educational institutions having a Dumber of departments, the main object of which is to impart education to the youth of the country in various branches of Students, and therefore, the Department of Publications and Press which is intended only to cater the needs and requirement of the students cannot be regarded either as a "factory" or as an "industry" attracting the provisions of the Act; ant (11) that the two Universities had their own provident 583 fund schemes for their employees and therefore, there was justification for subjecting them to the provisions of the Act. The High Court DB held that the Department of Publications and Press of each of the two Universities is an "establishment" which is a factory engaged in an industry specified in Schedule I, in which more than 20 persons were employed and hence the provisions of the Act ant the Scheme were applicable in respect of these Departments. University Depts held covered by Act.

(2) Penalties / Criminal Cases

Section 14. Penalties.

(1) Whoever, for the purpose of avoiding any payment to be made by himself under this Act, the Scheme , the Family Pension Scheme or the Insurance Scheme or of enabling any other person to avoid such payment, knowingly makes or causes to be made any false statement or false representation shall be punishable with imprisonment for a term which may extend to one year, or with fine of five thousand rupees, or with both.

(1A) An employer who contravenes, or makes default in complying with, the provisions of section 6 or clause (a) of sub- section (3) of section in so far as it relates to the payment of inspection charges, or paragraph 38 of the Scheme in so far as it relates to the payment of administrative charges, shall be punishable with imprisonment for a term which may extend to 1*[three years] but-

(a) which shall not be less than 9*[one year and a fine of ten thousand rupees" in case of default in payment of the employees' contribution which has been deducted by the employer from the employees' wages;

(b) which shall not be less than six months and a fine of five thousand rupees, in any other case;

Provided that the court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term .....

(1B) An employer who contravenes, or makes default in complying with, the provisions of section 6C, or clause (a) of sub- section (3A) of section 17 in so far as it relates to the payment of inspection charges, shall be punishable with imprisonment for a term which may extend to one year but which shall not be less than six months and shall also be liable to fine which may extend to five thousand rupees:

Provided that the court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term.

(2) Subject to the provisions of this Act, the Scheme, the Family Pension Scheme or the Insurance Scheme] may provide that any person who contravenes, or makes default in complying with, any of the provisions thereof shall be punishable with imprisonment for a term which may extend one year, or with fine which may extend to four thousand rupees, or with both.

(2A) Whoever contravenes or makes default in complying with any provision of this Act or of any condition subject to which exemption was granted under section 17 shall, if no other penalty is elsewhere provided by or under this Act for such contravention or non-compliance, be punishable with imprisonment which may extend to six months, but which shall not be less than one month, and shall also be liable to fine which may extend to five thousand rupees.

14A. Cognizance and trial of offences.

(1) No court shall take cognizance of any offence punishable under this Act, the Scheme or the Family Pension Scheme or the Insurance Scheme except on a report in writing of the facts constituting such offence made with the previous sanction of the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf, by an Inspector appointed under section 13.

(2) No court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act or the Scheme or the Family Pension Scheme or the Insurance Scheme.

Provident Fund Inspector v. Abdul Shukoor

Online report at: http://www.judis.nic.in/chennai/qrydisp.asp?tfnm=1217

The prosecution was initiated at the instance of the appellant herein, alleging that the first respondent firm (A1), the Managing Partner of the first respondent firm (A2) and the Manager of the first respondent firm (A3) avoided payment to be on behalf of the first respondent firm towards the employees provident fund contribution, as contemplated under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the 'Act') and the Schemes framed thereunde r, after getting previous sanction as contemplated under Section 14AC of the Act. Accordingly, they were charged for the offence punishable under Section 14(1A) and 14A in C.C.Nos.58, 59, 61, 62, 64, 65, 67 and 68 of 1999, under Section 14(1B) in C.C.N o.60 of 1999 and under Section 14(1B) and 14A in C.C.Nos.63, 66 and 69 of 1999.

In all the cases, independent charges were framed against the respondents herein, viz. A1 and A3 as well as the Managing Partner of the first respondent firm, viz. A2.

During the trial, it was conceded on behalf of the accused that there was a default in the payment of contribution towards the Provident Fund to be made by the first respondent firm, as charged against them.

The learned District Munsif cum Judicial Magistrate, Vaniyambadi, by judgments dated 12.3.2002, holding that the first respondent partnership firm is not a legal person or a separate entity in the eye of law and the third respondent was only a ger, acquitted the first respondent firm (A1) and the Manager of the first respondent firm (A3) under Section 248(1), Cr.P.C. and convicted the Managing Partner of the first respondent partnership firm (A2) for the respective offence punishable under Sec tion 14(1A), 14(1B) and 14A of the Act, as the case may be and sentenced till the rising of the Court and imposed a fine of Rs.1,500/-, in default, to undergo nine months rigorous imprisonment.

The Managing Partner of the first respondent partnership firm (A2), did not preferred any appeal against the conviction and sentence imposed on him by judgments dated 12.3.2002 in C.C.Nos.58 to 69 of 1999.

For the purpose of deciding the above issue, it is relevant to refer Section 14A of the Act, which reads as under.

“Section 14A: Offences by companies. - (1) If the person committing an offence under this Act, the Scheme or the Family Pension Scheme or the Insurance Scheme is a company, every person, who at the time the offence was committed was in charge of, and was responsible t o, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such off .

(2) Notwithstanding anything contained in sub-section (1) where an offence under this Act, the Scheme or the Family Pension Scheme or the Insurance Scheme has been committed by a company and it is proved that the offence has been committed with the intent or connivance of, or is attributable to, any neglect on the part of, any director or manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.- For the purposes of this section, - (a) "Company" means any body corporate and includes a firm and other association of individuals; and (b) "director" in relation to a firm, means a partner in the firm."

Explanation to Section 14A of the Act makes it clear that Company includes a partnership firm and the Director in relation to a firm means a partner of the firm. Thus, wherever the word Company is used in Section 14A(1) and 14A(2) of the Act, firm has to be read into the 'Company'.

Therefore, the reason that the partnership firm is not a legal person or a separate entity under the Partnership Act and hence, they cannot be held guilty of the offence under the provisions of the Act, as weighed by the learned District Munsif cum Judicial Magistrate, Vaniyambadi, was considered to be contrary to law, illegal and illogical. Appeal was allowed.

(3) Writs / Others

Section 72 of the Employees' Provident Funds Scheme, 1992

Payment of provident fund:

(1) When the amount standing to the credit of a member becomes payable, it shall be the duty of the Commissioner to make prompt payment as provided in this Scheme ...

...

...

(7) The claims, complete in all respects submitted along with the requisite documents shall be settled and benefit amount paid to the beneficiaries within 30 days from the date of receipt of such application. In case the Commissioner fails without sufficient cause to settle the claim complete in all respects within 30 days, the Commissioner shall be liable for the delay beyond the said period and penal interest at the rate of 12% per annum may be charged on the benefit amount and the same may be deducted from the salary of the Commissioner.

Gowri Shankar Theatre v. Asst. Provident Fund Commr.

Online report at: http://www.judis.nic.in/chennai/qrydisp.asp?tfnm=18683

The case of the appellant/writ petitioner is that the appellant has been running a theatre in Vaniyambadi and the number of employees employed in the said theatre was only 4. By mistake the appellant writ petitioner has been making contribution towards Employees Provident Fund. By order dated 18.4.2007 passed by the second respondent which is impugned in the writ petition, the second respondent has directed the contribution by the appellant saying that when originally the contribution was made under the Employees Provident Funds and Miscellaneous Provisions Act, 1952(19 of 1952) even if the number of employees has fallen below, the appellant theatre is bound to contribute under the Employees Provident Funds and Miscellaneous Provisions Act, 1952.

The appellant would contend that inasmuch as the appellant writ petitioner is bound by the provisions of the Cine Workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981 (50 of 1981) which contemplates an obligation on the part of the employer to make contribution under the Employees Provident Funds and Miscellaneous Provisions Act, 1952(19 of 1952) only if the number of workmen employed is 5 or more and if the petitioner by mistake has contributed payment of Employees Provident Fund, that would not be taken as a contribution under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952(19 of 1952) and his submission is when the number of workers has come down to 4, necessarily the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952) should not be made applicable. He would further contend that Section 1 (5) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952(19 of 1952) which contemplates that when an establishment was originally covered under the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952) and subsequently if the number of persons comes down below 20, nevertheless the Employees Provident Funds and Miscellaneous Provisions Act, 1952(19 of 1952) would continue to apply and that provision is not applicable to the facts of the present case. The Cine Workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981(50 of 1981)has not contained such clause.

Under the Cine Workers and Cinema Theatre Workers (Regulation of Employment)Act, 1981 (50 of 1981) which is applicable to the petitioners case, Section 24 of the said Act makes it clear that the provisions of the Employees Provident fund and Miscellaneous Provisions Act (19 of 1952) is applicable to every Cinema Theatres covered under the Cine Workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981 (50 of 1981). Section 24 of the Cine Workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981 is extracted hereunder:

The provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952, as in force for the time being, shall apply to every cinema theatre in which five or more workers are employed on any day, as if such cinema theatre were an establishment to which the aforesaid Act had been applied by a notification of the Central Government under the proviso to sub-section (3) of Section 1 thereof, and as if each such worker were an employee within the meaning of that Act.

On the facts of the case, it is not in dispute that at the time when the writ petitioner has been making contribution under the Employees Provident Fund and Miscellaneous Provisions Act, 1952, the number of employees was more than 5. The grievance of the appellant is that the theatre was closed for some time and thereafter, it was reopened with four new employees and therefore, there is reconstitution and in such view of the matter the question of applicability of Section 24 does not arise.

As per Section 1(5) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 which is extracted hereunder

"(5)An establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below twenty"

Therefore, the Writ Appeal failed, and the same was dismissed.

References:

Madras High Court decisions cited from: http://www.hcmadras.tn.nic.in/judqry.asp

Supreme Court of India decisions cited from: http://www.commonlii.org/in/cases/INSC/

Central Acts cited from: http://indiacode.nic.in/

Employees' State Insurance Corporation's Web Site: http://esic.nic.in/

Employees' Provident Fund Web Site: http://www.epfindia.com/