

ESI and contract labour

by

Probal Kumar Dutt

The question of coverage under the Employees' State Insurance Act, 1948, of those employed by contractors of an establishment to which the Act applies is very often a most vexing one. The Corporation, behaving as a purely revenue earning authority and totally overlooking the sole purpose for which it was set up, is ever on the look out for bringing in more and more employees within its scope without even providing such facilities as are available in rural primary health centres. In this it has been emboldened by the judgements of the Courts which interpret the provisions of the Act in favour of the Corporation on the ground that the ESI Act is a social welfare legislation without considering the extent and quality of the social welfare activities undertaken and pursued by the ESI Corporation. The recently reported ruling by a Division Bench of the Calcutta High Court in **Subhash Chandra Bose and others versus ESI Corporation and others, (1990) 1 LLN 361** is a welcome and refreshing departure from the general trend of judgments on this Act.

In this case, the employees whom the ESI Corporation had brought under the purview of the Act were the employees of duly licensed contractors engaged by the Calcutta Electric Supply Corporation (India) Ltd. for the work of erection of overhead electric lines or the laying of underground cables under public roads and the maintenance of the aforesaid. Admittedly these contractors do not own or run any factory or establishment and they engage workmen on temporary job basis. All their work was carried out

beyond the precincts of the factory and establishments of their principal, the CESC, and the latter had no control of the work being done by the employees of the contractors save for checking the same on completion for the purposes of accepting or rejecting such work and accordingly making payments therefor to the contractors. Under the contracts, the contractors were to carry out the allotted works in accordance with the provisions of the Indian Electricity Rules, 1956 and "to provide competent supervision" in this regard. The contractors were also required "to insure against theft and pilferage of all materials while held in your (the contractors') site godown."

Following correspondence with the ESIC authorities, the principal employer, CESC, wrote to the members of the Association of Electrical Contractors of Eastern India, including the appellants in the above case, to get themselves covered under the Act immediately or else a lumpsum deduction of seven per cent would be made from their bills. The contractors resisted the move, but from 1984 the CESC started making deductions from the bills of the contractors on account of contributions under the Act, first at the rate of seven per cent and subsequently from 1985 at the rate of ten per cent.

In the writ petition filed by the contractors against the above deductions a single judge hearing it upheld the contentions of the ESI Corporation as he held that the employees of the contractors were to be deemed to be employees of CESC. It was against this decision

that the present appeal was filed by the contractors.

The term employee for the purposes of the ESI Act has been defined in Section 2(9) of that Act and consists of two types of persons; first, those "directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of the factory, whether such work is done by the employee in the factory or establishment or elsewhere; second, those "employed by or through an immediate employer (contractor) on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment."

The appellants (the contractors) did not dispute that the works carried out by them were preliminary to the work carried on or incidental to the purposes of the work carried on by their principal, CESC, namely the generation and transmission of electricity and that such works were ultimately checked by the CESC. It was, however, contented that the work done by the contractors were done entirely outside the factory or premises of the CESC and the checking done by it was only for the passing of and payment of the bills of the appellants.

In Nagpur Electric Light and Power Co. Ltd. and another versus The Regional Director, ESI

Corporation and another, 1967 (14) FLR 370 = (1967) 2 LLJ 40 = 1967 S.C. 1364, a three Judge Full Bench of the Supreme Court rejected the view of the High Court that the manufacturing process of the Nagpur Electric Light and Power Co. Ltd., which was similar to that of CESC, was carried out "not only in the building called the workshop or the receiving station but over the whole area over which the process of transmission is carried on including the sub-stations where electricity is stored and supplied to the consumers by further transmission lines." Thus, according to the High Court judgment which was being appealed against in the Supreme Court, "every part over which this process is carried on will be a factory within the meaning of the Employees' State Insurance Act". The Supreme Court, however, did not agree. "We cannot accept this line of reasoning", the Full Bench of this Court said and added that "it seems to us a startling proposition that every inch of the wide area over which the transmission lines are spread is a factory within the meaning of section 2(12)".

In *ESI Corporation versus Poopally Foods*, (1984) 2 LLN 800, a Division Bench of the Kerala High Court held that the labourers of contractors engaged for peeling and grading fish outside the premises of the firm could not be deemed to be employees within the meaning of the ESI Act as they were not working within the premises of the firm and there was no evidence to show that the work of grading and peeling fish was supervised by the firm.

The Division Bench of the

Calcutta High Court found that there were no records before it to show that the work of the employees of the contractor was carried out under the supervision of CESC or its agents. "In our view", the Division Bench said, "checking of a work after the same is completed and supervision of the same while the same is being performed are entirely different.....After the work is completed, a further checking cannot mean or imply any or any further supervision". The Division Bench thus negated the contention raised by the ESI Corporation that CESC was supervising the work of the employees of the contractors and held that "it stands established from the records before us that the employees of the appellants (contractors) while carrying out the aforesaid work do so under the supervision of the appellants or the supervisors engaged by the appellants and not under the supervision of respondent 4 (CESC) or its agents."

The Division Bench also rejected the contention of the ESI Corporation that the ESI Act being a beneficial legislation promulgated for the protection and benefit of the workers should be interpreted liberally and, therefore, the question whether the employees of the appellants work within the factory or the premises of CESC or elsewhere is irrelevant. The Bench said that Section 2(9)(ii) of the Act specifically says that only when the employees of the immediate employer, the contractor, work within the factory or premises of the principal employer will they come within the purview of the ESI Act. "It is not open to the Courts," the Bench very clearly laid down, "to stretch interpretation of statutory

sections to that extent (as submitted on behalf of the Corporation) to afford benefit or protection to the workers which the Legislature did not provide".

Thus the contractors' employees were working outside the premises of CESC and their work in progress was not being supervised by CESC or its agents. Consequently the Division Bench held that the employees of the appellant-contractors could not be brought within the purview of the ESI Act. The Bench also ordered the refund of the amounts already deducted by CESC from the bills submitted by the contractors.

This case and the two other judgements cited above should be carefully studied in conjunction with sections 2(9) of the ESI Act which defines the term 'employee' and 2(12) which defines the term 'factory', particularly by those who employ contract labour or issue work contracts. Principal employers must not meekly submit to every direction of the Corporation for though in the first instance they shall be passing the burden on to the contractors, in the ultimate analysis the contractors are certainly going to recover these amounts from their principals.

Time has also come for employees to place concrete facts before the court to show how far in actuality the social welfare legislations are benefiting the people for whom these laws have been enacted. This is becoming all the more important as the contributions under these laws are rapidly rising both on account of sharply escalating wages and the extension of the limits for coverage.

Relevant extract from the report of the Tripartite Working Group on Building and Construction Industry constituted by the Govt. of India in the Ministry of Labour, is reproduced on the next page for information of the members and to enable them to meet any enquiry for compliance of the ESI Act.

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V. Employees' State Insurance Scheme

2.20 The E.S.I. Act provides social security protection to the wage earners in the covered undertakings in the event of sickness, maternity, disability and death due to employment accident and occupational diseases. The Act is applicable to the factories as defined in the Act. However, the appropriate Government can extend the provisions of the Act to other classes of establishments - industrial, commercial, agricultural or otherwise.

2.21 To begin with, it was decided by the E.S.I. Corporation that the scheme should be extended to the construction workers who remain employed within the metropolitan towns and cities where the scheme was already in force on the presumption that it would be possible to provide medical and other facilities to these workers under the existing arrangements or by suitably amending them as long as they continue to work within the implemented areas where the provisions of the E.S.I. Act were already in force. It was also considered appropriate to extend the provisions of this Act to the workers who are covered by the provisions of the Contract Labour (Regulation & Abolition) Act, 1970 so that contractors' establishments employing 20 or more persons come under the purview of this Act. However, the E.S.I.C. authorities and the State Governments encountered several difficulties in this regard. First, the provisions of the E.S.I. Act were brought into force area-wise after

setting up necessary infrastructure for providing medical facilities and cash benefits. Construction workers falling within the area could be covered also but on migration out of the "Area" they go out of insurable employment, thus rendering the established infrastructure superfluous. Two, the covered workers may be employed intermittently on construction projects situated both within and outside the 'covered' areas. This situation creates lack of continuity in payment of contributions which will adversely affect their eligibility to benefits. Third, difficulties are likely to arise in determining the Principal Employer due to the contracting system and transferring of workers within and outside the covered areas. Four, due to the seasonality of work and labour migration, a contractor in the covered areas may 'Register' the workers under the Act but they may not return to him next season. Even the contractor might also shift out of the 'covered' area. Thus the very purpose of the Scheme would be lost. These and similar other difficulties were anticipated by the State Governments and they were discouraged from going ahead with their plans to extend the Scheme to construction industry. In view of the inadequate response from the State Governments who were to extend the provisions of the Act to this sector, the scheme was not implemented. At present, the Act has not been implemented by any State/ Union Territory for the Building & Construction Industry.

Democracy is based upon the conviction that there are extraordinary possibilities in ordinary people.

-- Harry Emerson Fosdick

Against the assault of laughter nothing can stand.

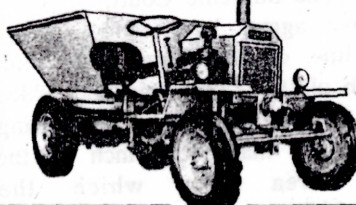
--Mark Twain.


When a man's willing and eager, the Gods join in.

-- Aeschylus.

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