CHAPTER-5

AN ANALYSIS OF THE TERM ‘EMPLOYEE’ WITH THE DECISIONS OF HIGH COURTS AND SUPREME COURT

5.1. Path of Transformation

Jawaharlal Nehru, the first Prime Minister of India, said in his famous ‘tryst with destiny’ speech in the Constituent Assembly, on the eve of Independence towards midnight on 14 August, 1947.

“The service of India means the service of the Millions who suffer. It means the ending of poverty and ignorance and diseases and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us but as long as there is tears and suffering, so long our work will not be over.”

Since the end of First World War, two revolutions had been running parallel in India. One was the national revolution for ‘Swaraj’, the political freedom, and other, Social Revolution for ‘Purna Swaraj’, freedom from hunger, poverty, disease, unemployment and squalor, which were then the legacies of British colonialism. With Independence, the dream of ‘Swaraj’ became a reality and national revolution was completed. But the dream of ‘Purna Swaraj’, the mission of social revolution, remained ‘a vision’ to be realised.

When the Constituent Assembly was constituted to draft the Constitution for ‘free India’, Nehru said:

“The task of this Assembly is to free India through a new Constitution, to feed the starving people, and clothe the naked masses and to give every Indian

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1 Granville Austin, *The Indian Constitution- Cornerstone of a nation* (Oxford University Press, New Delhi, 2000) 26
fullest opportunity to develop himself according to his capacity.”

Dr. Radhakrishnan wished India to have ‘a socio-economic revolution’ to bring about a fundamental change in the structure of Indian society. Dr. Rajendra Prasad assured the people that ‘the Assembly’s aim was to end poverty and squalor to abolish distinction and exploitation’.

Such views were held by many more in the Assembly. The reason was that most of the members were socialists by themselves but of distinct varieties such as Fabian socialists, Gandhian socialists, Marxists, Humanists, Democratic socialists and Radicals, each one with his own definition of ‘socialism’.

On the eve of Independence, India was infested with mass poverty, drain of her wealth and ruin of her agriculture and industries. Nehru then said,-

“I see no way of ending the poverty, the vast unemployment, the degradation and the subjection of the Indian people except through socialism….It means bringing a new civilization radically different from the present capitalist.”

It was the time when the clarion calls of the philosophers of the Russian and French revolutions, preaching ‘socio-economic-political justice’ and ‘equality and liberty’, respectively, reverberated in the international arena. Labour and trade unionism were making a swift entry into Indian industrial sector. The British-pampered industrial

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7 Constituent Assembly Debates II 3,316
8 K. Santhanam, The Hindustan Times, 8 September, 1946, New Delhi p 4
9 Sarvapalli Radhakrishnan (Dr.S.Radhakrishnan) was the first Vice-President of India (1952-1962) and subsequently the second President of India (1962-1967)
5 Constituent Assembly Debates II 1,269-1,273
6 Dr. Rejendra Prasad served as the President of the Constituent Assembly that drafted the first Constitution of the Republic, which lasted from 1948 to 1950. Two and a half years after Independence, on January 26, 1950, the Constitution of Independent India was ratified and Dr. Rajendra Prasad was elected as the nation’s first President.
7 Constituent Assembly Debates V, 1-2
8 A member or supporter of the Fabian Society, an organization of socialists aiming to achieve socialism by gradual rather than revolutionary means.
9 Jagdish P. Sharma, Nehru & the People’s Movement (Manak Publications, New Delhi, 1997) 21
capitalism was raising its head having the potentiality of class conflict, in terms of Marxist analysis. The global socialist movements like Fabianism\textsuperscript{10}, Syndicalism,\textsuperscript{11} Communism\textsuperscript{12} and radicalism were also emerging simultaneously.

In the background of such an intellectual and emotional commitment to socialism, the Constituent Assembly’s first task was to draft a Constitution that would serve the ultimate goal of social revolution. Thus, the Constitutional vision of socialism emanated from the urge to have a social revolution or socio-economic revolution both, in the present context, means nearly the same and are in harmony.

The Constituent Assembly in the ‘Objective Revolution’ and the debate on it, established that the Constitution must be dedicated to some form of socialism and to the social regeneration of India. But streaming the social revolution was felt as more complicated task than the simple drafting of the Constitution. When the framing of the Constitution was in progress, the contemporaneous events\textsuperscript{13} made the Assembly to believe that economic progress, or social revolution, could not be fulfilled unless there was central planning, which involved a major role for the State to control the means of production and distribution and to place the public sector in the commanding heights of the economy. Another question before the Assembly was what form of political institution would foster or at least permit the social revolution. Everyone concurred with the preference for democratic political institutions of the parliamentary form.

Thus, the Constitutional vision of socialism in economic and industrial context is founded on the principles of democracy and planned development. Democracy requires guarantee to the individuals, protected to the maximum possible extent and planned development involves planning for common good. These two founding principles put together, gave rise to the concept of Mixed economy, in which private sector is allowed to operate along with public sector but channelized to public welfare.

\textsuperscript{10} Socialism to be established by gradual reforms within the law
\textsuperscript{11} A movement for transferring the ownership and control of the means of production and distribution to workers’ unions. Influenced by the French social philosopher Georges Sorel (1847–1922), syndicalism developed in French trade unions during the late 19th century and was at its most vigorous between 1900 and 1914, particularly in France, Italy, Spain, and the US.
\textsuperscript{12} A theory or system of social organization in which all property is owned by the community and each person contributes and receives according to their ability and needs.
\textsuperscript{13} Communal riots, famine, scarcity of food and internal security problems from Communists, Telanganas and Princely States.
through planning. Thus constitutional vision of socialism was designated as democratic socialism.\textsuperscript{14}

The majority of the provisions of the Constitution either directly or indirectly foster the goals of the socio-economic justice, the essence of Indian socialism. The core of the commitment lies in the Preamble, Fundamental Rights and Part IV of the Constitution. In Directive Principles of State Policy, one finds a clear statement of socialism and there it is said,-

“The Directive Principles were a declaration of economic independence, a declaration that the privilege of the colonial era had ended, and a declaration that the Indian capitalists should not inherit the empire of British colonialists.”\textsuperscript{15}

Nehru, as the Chairman of First Planning Commission of Free India, did not prefer immediate adoption of socialist development of industries but adopted ‘Socialistic patterned’ development which was not socialism in its pure form, but which he believed would lead the country in the direction of socialism.\textsuperscript{16} Through the concept of mixed economy with public sector bias Nehru evolved the first two Industrial Policy Resolutions of 1948 and 1956 to achieve Socialism Pattern of Society which aimed to have greater industrial production with an equitable distribution of national wealth. It formed the hard core of the Industrial Policy Resolutions. The socialistic pattern of society took the form of ‘socialism’ during Mrs. Indira Gandhi’s initial period of Prime Minister ship with full nationalization of industries and the Constitution came to be reckoned expressly as ‘socialist’ through the Constitution (42\textsuperscript{nd} Amendment) Act, 1976.

In the light of the above views by the Constituent Assembly Members and the basic concepts of preamble of the Constitution the study focuses on analysis of the term ‘Employee’ under the Employee’s State Insurance Act, 1948 (ESI Act).

\textsuperscript{14} The adjective ‘Democratic’ sharply distinguishes it from socialism practiced in totalitarian economies.
\textsuperscript{15} Granville Austin, \textit{The Indian Constitution-Corner Stone of a Nation} (Oxford University Press, New Delhi, 2000) 61
The Employee’s State Insurance Act, 1948 (Henceforth, the Act) is a social security legislation and was enacted to revolutionize various risks and contingencies sustained by workers while serving in a factory or establishment. It is thus entitled to promote the general welfare of the worker. Hence, the enactment demands a liberal interpretation in order to achieve the legislative purpose and object.\(^{17}\)

The Act is designed in the interest of ‘employees’ and its dependents to provide cash benefit in the case of sickness, maternity and employment injury, payment in the form of pension to the dependent of workers who died of employment injury and medical benefit to workers. It introduces the contributory principle against such contingencies, provides protection against sickness, replaces lump sum payments by pension in the case of dependents benefit and places the liability for claims on a statutory organisation. However, because of the vastness of the country and the considerable preparatory work involved, such as provision of building, equipment and personal, the scheme could not be implemented throughout the country simultaneously. Plan for its phased extension to different places was drawn up. The Act also envisages transitory provisions requiring payment of special contribution by all employees in order to meet the objection of employees in covered areas that the ESI levy would affect their competitive position adversely. The contribution of employers in the implemented areas was fixed at a rate higher than that of employers in non-implemented areas. The scheme came into operation in Kanpur and Delhi on 24\(^{th}\) February, 1952.\(^{18}\)

Section 1(4) of the Act provides that the Act shall apply in the first instance to all factories including factories belonging to Government other than seasonal factories. Initially the definition of ‘factory’ in the Act was as per the Factories Act. Although the definition of ‘factory’ was amended in the Factories Act in 1948, similar amendment was not made in the ESI Act till 1989 in spite of the fact that the ESIS Review Committee had recommended such an amendment as early as in 1966. It is however now at par with the definition in the Factories Act. Thus, the Act is now applicable to all factories using power or without power employing 10 or more employees. It is however not applicable to a factory or establishment belonging to or under the control of the Government whose employees are otherwise in receipt of

\(^{17}\) **ESI Corporation, Hyderabad v J.C. and Co. Products Ltd** 1980 Lab IC 1078 (Andhra Pradesh)

benefits substantially similar or superior to the benefits provided under the Act. The ESIS Review Committee 1966 had recommended that smaller factories not using power and employing 10 or more persons as well as all factories employing five or more persons should be brought under cover of the ESI Act in stages. This recommendation has not yet been implemented. Seasonal factories are excluded from coverage under the Act. A series of recommendations have been made to amend the Act, so as to cover seasonal factories also, but the amendment has not been carried out so far. Proposals have also been made for evolving appropriate schemes for the seasonal factories. A modified scheme of contribution and benefits called ESI (Cashew Workers) Scheme 1989 was introduced for cashew workers in 1989 under Section 1(5) of the Act on an experimental basis. The working of the ESI (Cashew Workers) Scheme, 1989 was reviewed by a Sub-Committee of the Corporation and based on recommendations of the Committee. The Scheme was not extended beyond 30.09.1997. The Scheme ceased to exist since 30.03.1997. Thus the question of extending the Act to seasonal factories is still pending consideration.

In the first instance, the Act applies to all factories including those belonging to the Government except seasonal factories. The appropriate Government is given power to extend the different provisions of the Act to any other establishment or class of establishments, industrial, commercial or otherwise after consulting the Employees’ State Insurance Corporation. However, if the appropriate Government is a State Government, such application must be with the approval of the Central Government. In all cases six months’ notice of the intention to such application must be given through notification in the official Gazette. Thus, the Act applies in the following manner.

Section 1(4) of the Act postulates different treatment between perennial and seasonal factories; seasonal factories are excluded from the purview of the Act. This may be on the ground of administrative exigency of convenience. Thus, all factories within the implemented areas are brought within the purview of the Act. If the establishment in a factory as defined under the Act, it applies to such establishment automatically and

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19 Section 1(4), However, as per the proviso added by the 1989 amendment, it will not be applicable to factories or establishments under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.
20 Section 1 (5) of the Act
21 ESI Corporation Hyderabad v Jayalakshmi Products 1980 Lab IC 100 (Bombay)
that it does not require any action on the part of the Corporation or of the Government to apply the provisions of the Act to the factory. Hence, the question of giving a reasonable opportunity to the employer of the factory or establishment does not arise and that there is no denial of natural justice because the Corporation has not informed such employer before applying the provisions of the Act to such factory or establishment.22

After the enforcement of the provisions of the ESI Amendment Act, 1989, the Act is now applicable, in the first instance, to non-seasonal factories whether using power or not and employing 10 or more persons and shops and establishments employing 20 or more persons. As of now, by notification No S-38025/04/2010-SS-1 dated 20th April, 2010 effective from 1st May, 2010, the employees of the factories and establishments covered under the Act earning wages up to Rs.15, 000 per month come under the purview of the Act and the Scheme.

5.2. Definition of the term ‘Employee’ under the Act

Section 2(9) of the Act, defines “Employee” which means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and —

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere ; or

(ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

22 ibid
(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; 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 an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), and includes such person engaged as apprentice whose training period is extended to any length of time

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:

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.

5.3. An analysis of the term ‘employee’.

In the light of the above mentioned definition of ‘employee’ the researcher would now analyse its different aspects.

The original bill was called the Workmen’s State Insurance Bill. It was applicable to workers in factories only. The Select Committee to which the bill was referred made certain modifications. One of the important modifications was that the benefits provided by the Act should not be confined to workmen only but should be extended
to other employees in factories. The term ‘workmen’ was therefore replaced by the term ‘employees’ wherever it occurred. The Select Committee also made provision for extending the Act to other establishments, or classes of establishments, industrial, commercial, agricultural or otherwise. The Select Committee further provided for extension of the medical benefit to the families of insured persons.

The definition of an employee as given in Section 2(9) the Act is very comprehensive; the following are the ingredients of the definition of an ‘employee’ under the Act:

1. The employment of the person must be for wages and should be (a) in an establishment; (b) in a factory; (c) in connection with the work of the factory including any work connected with:
   i) Administration of the factory or establishment or any part, department or branch therefore; or
   ii) Purchase of raw materials for the factory or establishment; or
   iii) Distribution or sale of the product of a factory or establishment

2. The employee also includes any person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961, or under the standing order of the establishment.

3. The employee must be employed in any factory or establishment to which the Act applies. The employment may be:
   a) directly with the principal employer; or
   b) by or through an immediate employer; or
   c) lent or let on hire by the principal employer.

4. In case of an employee directly employed by the principal employer, the employment must be on any work of the factory or establishment or any work:
   a) which is incidental or preliminary to; or
   b) connected with the work of the factory or establishment. It is immaterial that the work of the factory or establishment or elsewhere.
(5) In case of an employee, employed by or through an immediate employer, the employment must be:
   a) in the premises of the factory or establishment; or
   b) under the supervision of the principal employer or his agent on work which is:
      i. ordinarily part of the work of the factory or establishment; or
      ii. preliminary to the work carried on in the factory or establishment; or
      iii. incidental to the purpose of the factory or establishment.

(6) In case of an employee whose services are lent or let on hire to the principal employer, the letting on hire must be by the person who has entered into a contract of service with the person whose services are so lent or let on hire. The employment of such person by the principal employer must be or in connection with the work of a factory or establishment to which this Act applies.

(7) The following are not employees:
   a) any member of the Indian Naval, Military or Air Force; or
   b) any person so employed whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government.

Overtime pay shall not be included in wages. In the term ‘remuneration’ employer’s contribution to Provident Fund is not included.\(^{23}\)

There is an exception to the above rule: namely an employee whose wages exceed such wages as may be prescribed by the Central Government at any time after (and not before) they beginning of the contribution period shall continue to be an employee until the end of the period.

The definition of an employee under the Act has a wider meaning and it covers persons who work outside the business premises but whose duties are connected with the business. It also covers employees who are paid daily wages or employed on part time wages.

\(^{23}\) *Manager Harrisons and Crosfield Ltd. Quilon v Manager* AIR 1970 Kerala 194.
5.4. Wages

One of the most important aspects of a job for most workers is the wage it pays. Wages allow workers to make a living from their labour. They also provide incentives to be productive and loyal to an employer.

Wages is defined under Section 2(22) of the ESI Act, which mean:-

(1) all remunerations paid or payable in cash to an employee if the terms of the employment are fulfilled;
(2) any payment to an employment in respect of:
   (a) any period of authorised leave;
   (b) lock-out or strike which is not illegal;
   (c) lay-off; and
   (d) any other additional remuneration, if any, paid at intervals not exceeding two months.

However, the following will not be wages

(1) Any contribution paid by the employer to any pension fund or provident fund;

(2) Any contribution paid under this Act;
   (a) any travelling allowance or value of travelling concession;
   (b) any sum to the person employed to defray special expenses entitled on him by the nature of his employment;
   (c) any gratuity payable on discharge.

5.4.1. Inam or incentive is wages

If the payment is one sided offer made by the management and is not among the terms of contract of employment it will not be treated as Wages. However, any additional
remuneration paid otherwise than the terms of the contract can be treated as wages for the purpose of the Act provided that payment is made by way of remuneration.\textsuperscript{24}

5.4.2. Overtime Remuneration

Remuneration for overtime work will not be included in the definition of Wages. An employee has a right to his wages but cannot claim as a matter of right additional remuneration for the work beyond the scheduled hours of work. The remuneration for such overtime work will not be included in the definition of Wages.\textsuperscript{25}

Present position with an example:

Whether ESI contributions will be payable if an employee is covered under the ESI Act and his wages are Rs.14,500 per month, however, with overtime working he gets around Rs.18,000 per month. Can one liable to pay ESI contributions on Rs.14,500 or Rs.18,000?

The ESI contributions will be payable on Rs.18,000 and not on Rs.14,500 per month. In a case the salary/wages of the employee employed by you is Rs.15,000 or less (excluding overtime). The employee is covered under the provisions of the ESI Act and contribution is required to be paid on the overtime paid such employee. The element of overtime is not included in salary/wages for the purpose of coverage of employee. Overtime payment made to an independent person by an employer will come within the definition of wages for deduction and deposit of ESI contributions; hence the High Court will not interfere in the appeal as filed against the Employee’s State Insurance Court.\textsuperscript{26}

5.4.3. Incentive bonus is included in the definition of wages.\textsuperscript{27}

The Calcutta High Court differs from the Andhra Pradesh full bench decision to hold that where an employee has a right to his wages there is no such right to incentive contributions.

\textsuperscript{24} Brait waite & Co. v E.S.I. Corporation AIR 1968 SC 413; N.C.E.F. Ltd v Deputy Regl Director, E.S.I. Corporation, Bangalore 1980 Lab IC 431 (Kerala)

\textsuperscript{25} Hindustan Motors Ltd. v E.S.I. Corporation 1979 lab IC 852 (Cal); Brait waite and Co v E.S.I. Corporation AIR 1968 SC 413

\textsuperscript{26} Raj Mechanical Industries v Employee’s State Insurance Corporation 2009 (121) FLR 717 (Punjab & Haryana)

bonus. For incentive bonus, it depends upon performance of a minimum percentage of normal work allowed and gradual increase in such performance of work. Further, an incentive bonus scheme can be withdrawn or modified on the happening of the events mentioned in the scheme and that it may be withdrawn totally or modified at the option of the employer. It may be noted the decision of the Calcutta Division Bench appears to be sound in this respect.

5.5. Factory

Factory is redefined under Section 2(12) of the Act by the 2010 Amendment as below:-

“Factory” means any premises including the precincts thereof whereon ten or more persons are employed or were employed on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on or is ordinarily so carried on, but does not include a mine subject to the operation of the Mines Act, 1952 or a railway running shed.

5.6. Seasonal factory

Seasonal factories are excluded from the purview of the Act. The essential conditions required for a factory to be called as seasonal factory are:-

(1) The factory must be engaged exclusively in one or more of the manufacturing process, namely:

(a) cotton ginning;
(b) cotton or jute processing;
(c) any manufacturing process which is incidental to or connected with any of the aforesaid processes.
This includes a factory which is engaged for a period not exceeding seven months in a year in any process of blending, packing or re-packing of tea or coffee or any such other manufacturing process as the Central Government may specify by notification in the official Gazette.

The exclusion of seasonal factories from the purview of the Act has resulted the denial of the various benefits under the Act to a number of employees in the country. The employees in seasonal factories need as such care and protection against risk as those in factories now within purview of the Act. It is high time to widen the scope of the act to extend its operation to seasonal factories also. In respect of seasonal factories the rate of contribution may be proportionally fixed depending upon the duration for which they function in a year.\(^{28}\)

(2) The appropriate governments are given power under Section 1(5) of the Act to extend provisions of the Act to certain class of establishments other than factories if such establishments were industrial, commercial, agricultural or otherwise. The term ‘establishment’ is not defined in the Act and, therefore, it must carry the ordinary meaning of the term. It means an organised staff of employees or servants including or occupationally limited to building in which they are located.\(^{29}\)

The ESI Act, being a social welfare legislation, intended to benefit as far as possible workers belonging to all categories, and has to be liberal in interpreting the words occurring therein. In construction, as to suppress the mischief and advance the remedy.\(^{30}\) A country organising sale of products of another company for commission carried on commercial activity and so it is a shop attracting the provisions of the Act within the meaning of Section 1(5).\(^{31}\) Shop is a place where any kind of industry is pursued or a place of employment or activity. Generally, a shop is a place where commercial activities like buying and selling takes place. It may be a servicing nature

\(^{28}\) E.S.I. Corporation, Hyderabad v J.C.& Co.Products Ltd 1980 Lab IC 1078 at P. 1081 (Andhra Pradesh)

\(^{29}\) Shorter Oxford English Dictionary

\(^{30}\) Cochin Shipping Corporation. v ESI Corporation., AIR 1993SC 252; Brooke Bond India v Regl, Director, ESI Corporation., Trichur 1980 Lab IC 74 (Kerala)

\(^{31}\) Darast Ltd v ESI Corp., 1980 Lab IC 72 (Kerala)
like radio repairing shop, shoe repairing shop or cycle repairing shop, clearing and forwarding operations of carrier.  

The Persons employed in the shops of establishments must be embraced within the meaning of the Act and that they must be employed for wages in order to avail of the benefit under the Act. Therefore, apprentices or self-employed persons like cabaret artists and orchestra players are not entitled to the benefits because they are not persons employed for wages.  

However, persons employed by contractors are entitled to the benefit of the Act if such contractors are immediate employers under a principal employer and such principal employer will be liable to pay the contribution under the Act.  

The power given under Section 1(5) is to extend the provisions of the Act having regards to the nature of the operations carried out in the establishments and not having regards to their geographical location.

5.7. Manufacturing Process

The phrase manufacturing process is given the same meaning assigned to it under Section 2(K) of the Factories Act. Manufacturing process is defined thus: “manufacturing process means any process for making, packing, oiling, washing, cleaning, breaking up, demolishing or otherwise treating or adopting any article or substance with a ‘view to its use, sale, transport, delivery or disposal’”. Under this definition, a variety of actions like preparation of food, using electrical appliances, transmitting electrical energy from high to low potential and the process

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32 Cochin Shipping Co. v ESI, Corporation, AIR 1993 SC 252; I.T. Commr. A.P. v Taj Mahal Hotel, AIR 1972 SC 168; Also see Dattaram Advertising Pvt. Ltd. v Regl Director Maharastra E.S.I. Corporation., (1987) I LLJ 9 (Bombay)

33 E.S.I. Corporation. Hyderabad v Maharaj Bombay and Restaurant, 1979 Lab IC 1147 (Andhra Pradesh)

34 Fariyas Hotel v Maharast, 1983, I LLJ 24 (Bombay)

35 Royal Talkies, secunderabad v E.S.I. Corporation., AIR 1978 SC 1478.

36 Section 2(14AA), inserted by the 1989 Amendment

37 Cricket Club, India v E.S.I. Corporation 1992 Lab IC 2029 (Bombay); Poona Indus. Hotel v I.C. Sarin 1980 Lab IC 100 (Bombay)

38 ESI Corporation v Spencer &CO 1978 Lab IC 1759 (Madras); Poona Lakshman Rao & Son v Addl. Inspector of Factories AIR 1959 Andhra Pradesh 142
to transmitting the energy through supply line, etc. will come within the comprehensive of manufacturing process. Printing of text-books, journals, stationery items amount to manufacturing process and so such printing and press dept is factory. Toddy shops run by contractors on an annual auction basis comes under the definition of ‘shop’.

The term ‘manufacturing process’ is not restricted to an activity which may result into outcome of processed product or manufacturing any item hence, a petrol pump will be covered under the ESI Act.

In a radical judgment - The Assistant Director, ESIC v M/S. Western Outdoor Interactive Pvt Ltd and Others that is expected to have a significant impact on all the computer and software industries in India, the Bombay High Court has held that information technology and the software industries are liable to pay a contribution under the Employees’ State Insurance Act, 1948 (“ESI Act”) for the benefit of its employees. The High Court disposed of 2 appeals by its common order dated July 11, 2012, against orders passed by the Employees’ Insurance Court, Mumbai. One of appeals had been filed against Western Outdoor Interactive Pvt. Ltd. (“Western Outdoor”) and the other appeal was filed by Reliable Software Systems Pvt. Ltd. (“Reliable Software”), both being in the business of software development in Mumbai. Both the appeals involved Employees’ State Insurance Corporation (“ESIC”) as the common contesting party. Vide this judgment passed by Justice Mridula Bhatkar, the Bombay High Court for the time being has put to rest the very pertinent issues of “whether creation of software or development of software itself is a manufacturing process or not?” and “whether the premises where computers are involved in manufacturing process is a factory under the ESI Act?” by answering both these questions in the affirmative.

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39 Nagpur Electric Light and Power Co. v Regl, Director, ESI Corporation AIR 1967 SC 1364
40 Osmania University v Regl, Director, ESI Corporation 1986 I LLJ 136 SC
41 Qazi Noorul Hasan Husain Petrol Pump v Dy. Director, Employee’s State Insurance Corporation, Kanpur 2003 LLR 476 (Allahabad)
In rendering its judgment, the Court inter alia relied upon the decision in the case of *Quzi Noorul, H.H.H. Petrol Pump and Anr. v Deputy Director, ESIC*, wherein it was held that “the words ‘manufacturing process’ in different statutes have different meanings and we cannot apply the definition of ‘manufacturing process’ in one statute to another statute”. The present appeals were under the ESI Act, and hence the interpretation of “manufacturing process” and the term “factory” were to be understood for the purpose of ESI Act and not under the Factories Act.

The Court also observed that Explanation II of Section 2(m) of the Factories Act is inserted in the Factories Act and not in the ESI Act. It marks the difference in its interpretation and application. The meaning of the term “factory” for the purpose of the ESI Act is broader than the definition under the Factories Act.

The Court also relied upon a letter dated December 9, 2003 issued by the Joint Director, ESIC, New Delhi to the Regional Director, where it was communicated that vide letters dated March 9, 2003 and September 22, 2003 issued by the Ministry of Labour, it has been clarified that the term “software development” falls within the meaning of “manufacturing process” under section 2(k) the Factories Act. Adopting this clarification, the Court held that software development is a “manufacturing process”.

In the course of delivering this judgment, Justice Bhatkar disagreed with a contrary view taken by the Madras High Court in the case of *Seelan Raj and Others v P.O., I Addl. Labour Court and Others*, where it was held that any use of the computer or any work carried out with the help of the computer is taken out of the purview of labour laws, and observed that this issue is still res-integra (i.e. a point of law which is still under consideration and has not yet been decided) since the Supreme Court has referred the case to a larger bench.

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43 2003 (96) FLR 1090
44 (1997) II LLJ 972 (Madras)
5.8. Principal Employer

Section 1(17) defines principal employer in relation to factory or establishment as:

(i) the owner or occupier of the factory including managing agent of such owner or occupier;
(ii) the legal representative of the deceased owner or occupier;
(iii) the manager of the factory so named in the Factories Act.

Principal employer in relation to an establishment under the control of any department of Government means—

(a) Head of the department where no authority is appointed by the Government; or
(b) The authority so appointed by the Government to administer the affairs of the department.

Under Section 40, the principal employer is primarily responsible to pay the employer’s contribution and the contribution of employees who were directly employed by him or through an immediate employer.

In a case where the respondent company is engaged in the manufacture of paper and allied products, manufacturing process is required materials like burned lime, lime kilns owned by the respondent company were leased out and the lessee entered into an agreement for supply of burned lime to the respondent. The lessee obtained a separate factory licence in his name to run the lime kiln factory. The respondent supplied the raw materials for converting lime stone into burned lime, deputed its own security staff. The lessee employed workers for operating and running the lime kilns. The entire responsibility regarding quality control of the finished products was with the respondent. In these circumstances it was held that the respondent company was the principal employer and the lessee was the immediate employer and that workers employed in the lime kilns were employees within Section 2(9) of the Act. The
respondent company was, therefore, liable to pay contribution in respect of the employees employed in the lime kilns leased out to the immediate employer.45

In *Royal Talkies v Hyderabad Corporation*,46 a canteen and a cycle stand situated in the premises of a theatre were leased out to contractors under an agreement of lease and the contractors employed their own servants to run the canteen and the cycle stand. Question arose whether the owner of the theatre can be said to be principal employer with reference to the persons employed by the contractors in the canteen and cycle stand attached to the theatre. The Supreme Court found that the two portions, viz., keeping a cycle stand and running a canteen are incidental or adjunct to the primary purpose of the theatre and, therefore, the theatre owners were the principal employers.

*The Supreme Court formulated the test that the owner of premises where the work is carried on will be the principal employer if there is proximity and functional unity.*47

An officer or the manager or the person responsible for the control of the establishment is ‘principal employer’, not necessarily an ‘occupier’ of the factory defined under the Factories Act.48

### 5.9. Immediate Employer

Section 2(13) of the ESI Act defines immediate employer:-

(i) a person who has undertaken to execute the work in the premises of a factory or establishment to which this Act applies; or

(ii) a person who has undertaken to execute some work under the supervision of principal employer or his agent; or

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45 Regl. Director, ESI Corporation. v Andhra Paper Mills Ltd 1980 Lab IC 604 (Andhra Pradesh)
46 AIR 1978 SC 1478
47 Lakshmana Murthy v ESI Corporation AIR 1974 SC 756
48 Regional Director, ESIC v Fact Engineering Works 2003 LLR 619 (Kerala)
(iii) the work undertaken by such person being ordinarily a part of the work of the factory or establishment of the principal employer which is preliminary or incidental to the work carried on in the factory or establishment.

5.10. Insurable Employment and Insured Person

Insurable employment means an employment in a factory or establishment to which this Act applies. Insured person means a person who is or was an employee in respect of whom contributions are or were payable under this Act and who is entitled to any benefit provided by this Act.

After the 1966 amendment to Section 2(9) an employee will cover a person employed for wages on any work connected with administration of the factory or establishment or any part, department or branch there to or with the purpose of the distribution or the sale of products of the factory or establishment. It applies to those categories of employees even outside the factory if their work was of the nature mentioned above.

5.11. Casual Employee

A person casually employed in a factory or establishment is within the ambit of the definition under Section 2(9). The consideration whether the worker is permanent, temporary or casual is not relevant to the definition of employee. Casual employees are as such within the scope of the Act as regular employees. But self-employed persons like cabaret artists and orchestra players will not be employees. They perform their special skills and place their service at the disposal of the restaurant for the limited purpose of entertaining the customers during the fixed times. What they

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49 Section 2(13-A)
50 Section 2(14)
51 Employees, N.T. Corporation, Bangalore v Regional Directors, ESI, Bangalore 1992 Lab IC 1825 (Karnataka); D.E.E.S.I. Corporation v Scientific Instrument Co 1995 Lab IC 651 (Allahabad)
52 Heavy Engg. v ESI Corpn 1979 Lab IC 771 (Patna); Hyderabad Asbestos Cement Products v Employees Insurance Corporation AIR 1978 SC 356; Boehringer Knoll Ltd v Regl. Director, ESI Corporation 1977 Lab IC 116 (Bombay); Nagpur Electric Light and Power Co. v Regl. Director ESI Corporation AIR 1967 SC 1364
53 ESI Corporation Chandigarh v Oswal Wollen Mills 1980 Lab IC 1064 (Punjab and Haryana)
perform is purely artistic in nature and the management or the proprietor cannot give any direction regarding the manner of performance by such artists and players.\textsuperscript{54} Similarly, an apprentice is not an employee within the meaning of Section 2(9). An apprentice remains learner and there is no element of employment as such in a trade or industry.\textsuperscript{55} The shareholders employed in a registered co-operative society are employee and the ESI Act is applicable in that case.\textsuperscript{56}

5.12. Exempted Employee

Exempted employee means an employee who is not liable under this Act to pay employees' contribution.\textsuperscript{57}

5.13. Judicial Approach (Supreme Court Cases)

In the face of this situation of legislative and executive inadequacies, it is the judiciary, which has played a major role in the development of “Jurisprudence of Employee”. The following are some of the landmark judgments pronounced by the Supreme Court.

In \textit{Hyderabad Asbestos v Employees Insurance Court}, \textsuperscript{58} the question was whether person employed in Zonal Office and Branch Offices of a factory and concerned with establishment administrative work and the work of canvassing sale would be covered by the provisions of the Act. It was held that an employee may be working within the factory or outside the factory or may be employed for administrative purposes or for the purchase of raw materials or for the sale of the finished goods, all such employees

\textsuperscript{54} AP State Electricity Board \textit{v ESI Corp} 1977 Lab IC 316 (Andhra Pradesh); Regional Director, ESI Corporation \textit{v Devanagri Cotton Mills} 1977 Lab IC 747; \textit{ESI Corporation Trichur v Ayurvedic Industrial Co} 1980 Lab IC 557 (Kerala)

\textsuperscript{55} ESI Corp. \textit{v Tata Engg. Co} AIR 1976 SC 66; \textit{ESI Corporation Hyderabad v Maharaja Bar & Restaurant} 1979 Lab IC; Regl; Director \textit{ESI Corporation v Fiber Mangalore} (1986) I LLJ 216 (Karnataka)

\textsuperscript{56} Pondicherry State Weavers Co-operative Society \textit{v Regional Director, ESI Corporation Madras} (1983) I LLJ 17 (Madras)

\textsuperscript{57} Section 2(10) of the Act

\textsuperscript{58} AIR 1968 SC 356
are included within the definition of ‘employees’ in Section 2(9) of the Act. It is not essential that one must be working in a factory.

*Branch Manager, State Bank of Hyderabad v Abdul Raheem and another*,\(^{59}\) in the present case the appellant had asked the loanee to post a watchman to look after the goods kept in the godowns. Though it may be at the instance of the bank, the loanee had appointed the respondent and requested the bank to debit its accounts towards his emoluments. It was held that the first respondent was not the employee of the bank as he was appointed by the owner (loanee) of goods, which were hypothecated to the bank. The respondent was neither appointed by the bank nor worked under the guidance of the Branch Manager concerned. Therefore respondent workman was not an employee of the bank.

In *Saraswath Films v Regional Director, ESI Corporation, Trichur*,\(^{60}\) security guards in cinema hall were employed through another agency which used to send the guards by rotation. The appellant pleaded that these security guards were not their employees. The Supreme Court held that the definition of ‘employee’ in the Act is wide and comprehensive. The appellant was the principal employer of the security guards and they were employees under Section 2(9) of the Employees’ State Insurance Act, 1948 as they were working under the control and guidance of the appellant.

In *Regional Director ESI Corporation, Madras v South India Flour Mills*,\(^{61}\) the Company which was engaged in milling wheat products employed workers on daily wage for construction of additional buildings in the compounds of existing factory as part of its expansion of the existing factory buildings. The Company was called upon to pay the contribution in respect of such daily wages workers. It was held that the definition of the term “employee” includes within its ambit any person employed on any work incidental or preliminary to or connected with the factory or establishment. It is difficult to enumerate types of work which may be said to be incidental or preliminary to or connected with the work of the factory or establishment. Any work that is conducive with the work of the factory or establishment. In this view the work

\(^{59}\) (2001) I LLJ 3 (SC)  
\(^{60}\) (2002) III LLJ 169 (SC)  
\(^{61}\) (1986) II LLJ 304 (SC)
of construction of additional buildings has a link of employees within the meaning of Section 2(9) of the Act. The contribution is payable in respect of such employees.

In *C.E.S.C. Ltd, etc. v Subhash Chandra Bose and others*, the respondents were carrying on business of electrical installations as independent contractors holding licences from the Government of West Bengal. They were engaged to lay underground cable and correct overhead lines in public roads by Calcutta Electric Supply Corporation (India) Limited. The Employees State Insurance authorities informed C.E.S.C. that the employees whose wages are paid through contractors would fall within the scope of Section 2(9). The contractors contended for carrying out their contracts they were not supervised by the C.S.E.C., the principal employer and they were carrying out works allotted to them at sites outside the factory establishment and as such the workers engaged by them were not covered by the definition of employee under Section 2(9) of the Act. It was held that when the employee is put to work under the eye and gaze of the principal employer, or his agent, where he can be watched secretly, accidentally or occasionally while the work is in progress, so as to scrutinise the quality there of and to detect faults therein, as also put to timely remedial measures by directions given, finally leading to the satisfactory completion and acceptance of the work., that would be supervision for the purposes of Section 2(9). This function can be delegated by the principal employer to his agent. Therefore the employees of the contractor are covered by the definition under Section 2(9) of the Act.

*Royal Talkies, Hyderabad v. E.S.I. Corporation*, is a significant decision of the Supreme Court explaining the meaning of the term 'employee' under the Act. In this case a cinema theatre manager, who had no statutory obligation to run a canteen or provide a cycle stand but, for the better amenities of his customers and improvement of his business, entered into an arrangement with another to maintain a canteen and a cycle stand and that other employed, on his own, workers in connection with the canteen and cycle stand. It was held the persons so employed are employees of the cinema theatre. They were covered by the definition of employee because under Section 2(9) anyone who is employed in “connection with the work of an

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62 (1992) I LLJ 475 (SC)
63 AIR 1978 SC 1478; II LLJ 390 (SC)
"establishment" is an employee provided that such an employee works on the premises of establishment, or under the supervision of the principal employer or his agent “on work which is ordinarily part of the work of the establishment or which is preliminary to the work carried on or incidental to the purpose of the establishment. However, some nexus must exist between the establishment and the work of the employee, although it may be a loose connection. Such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either. Here the two operations namely, keeping a cycle-stand and running a canteen are incidental or adjuncts to the primary purpose of the theatre. An establishment like a cinema theatre is not bound to run a canteen or keep a cycle-stand nevertheless such activities have connection with the cinema theatre and even further the revenue.

Sri Naraksaritrakshan Ltd., and others v ESI Corporation, in this case the question was whether employees working in administrative and editorial section of newspaper factory could be regarded as employees within the meaning of the Employees’ State Insurance Act. The Supreme Court held them to be employees under the Act because they are directly employed by the management on work incidental or preliminary or connected with the work of the factory. A printing press established for the publication of a newspaper cannot effectively function at all without the service of the members of the editorial staff being made available almost till the newspaper comes out of the printing machines and the words “includes any person employed for wages on any work connected with the administration of the factory” in Section 2(9) covers the administrative staff also.

The position of a partner in the firm was examined by the Supreme Court. It was held that the status of a partner in the firm is different from employees working under the firm. A partner is not an employee notwithstanding the fact that he is being paid some remuneration for any special attention which he devotes to the firm.

Establishment includes factory also — Establishment is a wide term which is capable of embracing even a factory. The use of the words “any other” preceding “establishment” in Section 1(5) of the Act supports the view that a factory is also an

64 (1985) I LLJ 1 (SC)
65 ESIC Trichur v Ramanuj Math Industries, (1985) I LLJ 69 (SC)
“establishment” and an establishment which is not a factory in view of the definition can be brought within the fold of the power to extend the application of the statute.\(^{66}\)

By adoption of the mischief rule of interpretation the term establishment will comprehend hostels\(^{67}\) and shops.\(^{68}\)

5.13.1. Judicial Approach (High Court cases)

In *Tara Chand Mohan Lal v ESI Corporation*,\(^{69}\) 37 labourers were working for considerable period in a factory, dealing in production of mustard oil and dal. These labourers were employed through Sardars who were the immediate employer and the firm Mohan Lal was the employer. They were working under the supervision of the principal employer even if they were supplied by the Sardars. These labourers were held to be employees within the meaning of Section 2(9) (1) of the Act as they were directly employed for wages by the principal employer in connection with the normal work of the factory.

In *Sen Raleigh v ESI Corporation*,\(^{70}\) the factory was situated at Asanaol and the head office was situated at Calcutta. It was held that in spite of the fact that the head office and factory were situated at different places the employees in the head office who are engaged in any type of work specified in Section 2(9) are employees within the meaning of this Act because the head office is at Calcutta where the provisions of the Act are applicable.

In *Director General ESI Corporation & another v The Scientific Instrument Co. Ltd.*,\(^{71}\) the company with its head office at Allahabad has branch sales offices at Delhi, Bombay, Calcutta and Madras. The Employees were engaged in the sale and distribution of the products of the Indian and Foreign companies and the sale of the company’s own products at the branch sales office which is only marginal. It was held that the expression ‘employed for wages in or in connection with the work of a

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\(^{66}\) *Sunder Paper Co v State of Orissa* 1977 Lab IC 1213 Orissa; *Christian Medical College v E.S.I. Corporation* (2001) I SCC 256

\(^{67}\) *East west Hotels v Regl. Director ESIC* 1986 I LLJ 172 (Karnataka); *All India ITDC Employees Union v Hotel Asoka*, (1984) I LLJ 99 (Karnataka)

\(^{68}\) *Brook Bond Tea Ltd. v Regional Director, E.S.I. Corpn* 1980 Lab IC 74 Kerala; *George Mathew v. Regl. Director, E.S.I. Corporation* AIR 1978 Kerala 660

\(^{69}\) AIR 1971 Andaman and Nicobar 65

\(^{70}\) AIR 1977 Calcutta 165

\(^{71}\) (1995) II LLJ 122 (Allahabad)
factory or establishment’ is of very wide amplitude and its generality is not in any way prejudiced by the expression ‘and includes any person employed for wages of any work connected with the administration of the factory or establishment or in connection with sale or distribution of the products of the factory or establishment’. The provisions of the Act have to be constructed liberally. If the employment is in connection with the work of factory or establishment, the employees would come within the definition of Section 2(9) of the Act because what is important is whether the business of sale or distribution, either principally or marginally of the products of the foreign company is being done on behalf of the respondent company.

It was held in *ESI Corporation v Raj kamal Transport & others*, the driver employed by the transport corporation to drive the truck on payment of remuneration for each trip is employed in connection with its business and he comes within the definition of employee under the Act.

In *Mohd Ismail Ansari v ESI Corporation Bombay*, the appellant claimed disablement benefit which was dismissed by the Insurance Court on two grounds: first that his wages exceeded Rs.500 and secondly, that he could not claim to be an employee under Section 2(9). It was held that the word “wages” as defined in Section 2(22) means all remuneration paid or payable in cash to an employee if the terms of the contract of employment express or implied were fulfilled. Therefore, an employee who was paid only for 21 days in a month due to an accident so that the actual amount of wages paid to him less than Rs.500 would be an ‘employee’ as defined in Section 2(9) as cash is to be determined by reference to the quantum of wages actually paid to the employee.

In *K. Venkateswara Rao v State of A.P.*, it was held that if a theatre manager who has no statutory obligation to run a canteen or provide cycle stand but for the better amenities of his customers and improvement of his business enters into an arrangement with another person to maintain a canteen or cycle stand, the manager of the cinema theatre is liable for contribution as the principal employer. Although they are engaged independently by the owner of the canteen or the cycle stand.

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72 (1995) I LLJ 94 (Andhra Pradesh)  
73 (1979) II LLJ 168 (Bombay)  
74 (1980) I LLJ 79 (Andhra Pradesh)
Whether a person is a casual labour or an employee would depend upon the fact whether there was a contract of service resulting in the relationship of master and servant whether the person employed was under the disciplinary control of the other person or not. It is neither the length of service nor the manner in which parties choose to refer to such service that would be relevant.\textsuperscript{75}

In \textit{Jodhpur Vidyut Vitran Nigam Ltd. v Karmchari Rajya Beema Nigam and another},\textsuperscript{76} the Central Government by a notification extended the provisions of the Employees State Insurance Act to Hanumangadh Town and therefore the Insurance Scheme was applicable in this area also. The appellant contended before the High Court that it was not a factory and as such its employees were not covered by the Employees State Insurance Scheme. It was held by the High Court that the term ‘employees’ in Section 2(9) of the Act was not confined to those employed in a factory but extended as well to those engaged in work incidental to preliminary work of establishment. In this case it was not disputed that the sub-station of the appellant was engaged in distribution of energy and hence it was in connection with the work of generation of electricity of factory. Hence the appellant was held liable under the Act.

In \textit{Bata India Limited v Employees’ State Insurance Corporation and others},\textsuperscript{77} the Head office is situated at one place and its sales organisation at different place in Calcutta. The two are completely distinct and separate organisations of the company. Bata India has their factories at Batanagar and Faridabad respectively. All these have their separate administration and are separately registered under the Factories Act, 1948. The petitioner factory is situated at Batanagar a non-implemented area. It has two other branch factories at Batanagar and Faridabad and the administrative offices of these two are situated at Calcutta. They have their sales organisation in Calcutta. The question is whether these sales offices of Bata factory are covered by the Employees’ State Insurance Act, 1948. Liability for contribution under the Employees’ State Insurance Act was questioned in respect of employees working in sales department at Calcutta. It was held that notwithstanding the fact the main factory was not covered by the Employees’ State Insurance Act, 1948 its employees working

\textsuperscript{75} \textit{E.S.I.Corporation v Ayurvedic Indust. Co-op. Pharmacy Pathur} (1980) II LLJ 66 (Kerala)
\textsuperscript{76} (2003) I LLJ 104 (Rajasthan)
\textsuperscript{77} (2003) III LLJ 716 (Calcutta)
at Calcutta (a place covered by the Act) would be treated as employees under the inclusive definition of Section 2(9) of the Act.

It was held in *Bharat Commerce and Industries Ltd., Birlagram Nagda v Regional Director, Employees’ State Insurance Corporation, Indore and others*,\(^{78}\) that an apprentice could not be held to be an employee within the meaning of Section 2(9) of the Employees’ State Insurance Act, 1948.

In *Employees’ State Insurance Corporation Hyderabad v Prakash Paper Mart, Hyderabad*,\(^{79}\) the respondent firm was carrying on business in notebooks and registers etc. It entrusted the job of book binding to binders piece-rate basis and the binder in his turn got the books bound with workers of his choice. The firm was asked to pay Employees’ State Insurance contribution in respect of payments called ‘conversion charges’ made to such binders. The demand was resisted on the ground that the workers who did the binding work were not its employees. It was held by the High Court that there was no evidence that the workers employed by the binders worked on the premises of the respondent and hence Section 2(9) (ii) of the Employees’ State Insurance Act was not attracted so as to make the respondent liable as a principal employer and as such the respondent was not liable to pay contribution under the Act.

*Employees’ State Corporation, Hyderabad and Others v Chirala Co-operative Spinning Mills Ltd, Chirala Prakasam*,\(^{80}\) certain persons who were sent by Polytechnic Institute as trainees in the respondent spinning mill. The corporation sent demand notice under the Act regarding these trainees. The respondent pleaded that these persons were only trainees from polytechnic Institute sent for training under a scheme introduced by the Ministry of Human Resources and Development and as such were not employees. They were paid only conveyance charges and no wages of any kind was paid to them. The appellant corporation treated the said amount of conveyance charges as wages and on that basic sought of justify the levy of contribution. It was held by the High Court that basically the payment of wages was the important factor to decide whether a person was an ‘employee’ or not. In this case it was not even alleged that the respondent paid any wages to the persons concerned. Further

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\(^{78}\) (2005) I LLJ 482 (Madhya Pradesh)
\(^{79}\) (2003) III LLJ 1117 (Andhra Pradesh)
\(^{80}\) (2005) I LLJ 910 (Andhra Pradesh)
travelling allowance paid to them could not be treated as wages under the Act and the persons who were trainees were not employees of the respondent. Hence spinning mills were not liable to contribute in respect of these trainees. The appeal was dismissed.

The expression ‘employed’ suggests two meanings: (i) engaged or occupied, (ii) a contract of service between the workers and the owner of a factory, i.e., a relationship of master and servant. But the relationship of master and servant is not always necessary and there is no relationship of master and servant and yet such person would be an employee.

The principal requirement of a control of service is the right of the master in some reasonable sense to control the method of doing work; the nature and extent of the control must necessarily vary from business to business. Where, therefore, in a handloom as well as power loom factory the master had a voice in the selection of the goods to be manufactured as well as in its quality and had also provided that the work should be done in his own premises by the workers, it was held that there was a contract of service even though they might be paid at a piece rate basis.

In *ESI Corporation Trichur v Poopally Foods, Alleppy*, the Kerala High Court was asked to determine whether an export firm dealing in prawns is liable to pay contribution under Act for charges paid to an independent contractor for peeling and grading prawns. It was held that the answer to this question will depend on whether there was a ‘contract of service’ or a ‘contract for service’. Since the firm had no supervision in the peeling and grading work done, therefore, there was no contract of employment. Workers were not the employees of the firm and hence the firm was not liable to pay any contribution under the Act in respect of the peeling and grading charges paid to them.

In *Bombay Wires Manufacturing Company, Bombay v ESI Corporation*, the company was an ancillary unit engaged in manufacture of Wires in factory premises. The factory used to give these wires for threading and bundling to house-wives at

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81 Kandaswami Weaving Factory v Regional Director E.S.I.C. Madras 1969 Lab IC 362 (Madras)
82 ibid
83 (1985) I LLJ 10 (Kerala)
84 (1986) II LLJ 121 (Bombay)
their own houses. It was held that the house-wives who do the work at their own premises are not employees of the factory and hence the company is not liable to pay contribution under the Act in respect of them.

5.14. Continuous Applicability of the Act

Will the ESI Act continue to be applicable when the total number of employees, as prescribed for coverage, falls below the said limit?

By an amendment of the ESI Act in 1989, it has been provided that a factory or an establishment shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below the limits specified by or under this Act or the manufacturing process therein ceases to be carried on with the aid of power.

5.15. Contributions on Company Becoming Economically Sick

Can a company be exonerated from payment of ESI contributions on becoming sick?

The answer is no. Timely payment of ESI’s contribution is the responsibility of the employer and does not depend upon actual disbursement of wages and, as such, an employer cannot escape its obligation by taking the plea that the company has become sick and the scheme of rehabilitation has been sanctioned by BIFR.85

5.16. Continuation of Employment

How long an employee as member of ESI will remain covered when his wages increase and are above the coverable ceiling?

85 ESI Corporation, Sub-Regional Office, Hubli v A.P.S. Star Industries Ltd., Dharwad 2003 LLR 972: (2003) III LLJ 411: 2003 (98) FLR 1207 (Karnataka) (Board of Industrial and Financial Reconstruction-An agency deals and manages with companies and public sector undertakings in poor financial and commercial condition)
Any employee who crosses the salary limit within the currency of contribution period will remain covered till the end of contribution period. The contribution periods are as follows:

*April to September and October to March i.e., an employee covered at the beginning of contribution period will remain covered till the end of contribution period.*

### 5.17. Loaders and Unloaders—Whether Liable to be covered

*Are the loaders and unloaders, engaged casually or by the transporters, be covered under the ESI Act?*

Merely because the loaders and unloaders have been able to get benefit, it will not be a ground for non-coverage under the ESI Act. The definition of an ‘employee’ make it abundantly clear that the persons engaged through an immediate employer are also employees for the purpose of the Act and, therefore, the liability for payment of contribution on the wages paid to such employees is on the employer. That definition is in wide terms and includes persons who are engaged in doing any work which is even preliminary to the work carried or incidental to the performance of the factory or establishment.86

However, the loaders and unloaders are engaged by the contractors only make a casual entry on the premises of the appellant-Corporation’s depots for the purpose of loading and they are answerable only to the contractor for due performance of the said work and not to the appellant-Corporation as held by Andhra Pradesh High Court. The Court also held that the Petroleum Corporation is not to pay ESI contributions for loaders and unloaders by transporters.87

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86 E.K. Haj Mohammadmeera Sahib and sons v Regional Director, ‘Employees’ State Insurance Corporation, 2003 LLR 308; 2003 (96) FLR 1174 (Madras)
87 Hindustan Petroleum Corporation Ltd v Employee’s State Insurance Corporation (represented by its Regional Director) 2008 LLR 490 (Andhra Pradesh)
5.18. Clubbing of Branches for Coverage

The question arose before the Courts, will different branches be taken into consideration in calculating the number of employees for coverage under the ESI Act?

The ESI ACT will apply on all branches of an establishment when total number exceeds 20. Different sales and service outlets will be clubbed for applicability of ESI Act even when number of employees 10 or more.

For instance two petrol pumps owned by the same owner, through located at different locations but having functional integrity, will be treated as single entity to be clubbed together for coverage under ESI Act. Hence, the findings of the Employees’ Insurance Court excluding one petrol pump to be covered for want of 20 employees is liable to be set aside. However, when father allows his son to use the premises for different types of business, their establishments cannot be clubbed for coverage under ESI Act. But the employees of two establishments can be clubbed for coverage under ESI when there is functional integrity.

5.19. Coverage of Fabricator’s Workers for Exporter

Whether the employees engaged through the fabricators for an export house are covered under the ESI Act?

In case the fabricators are doing the job exclusively for a covered establishment, the workers engaged by fabricators will be covered under the scheme and the fabricator will be the immediate employer and as such the principal employer, will be responsible for the payment of contributions. But in case the fabricator is doing job work for other also i.e., other exporters, in such event the workers employed by

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88 Southern Agencies v Andhra Pradesh E.S.I. Corporation 2001 LLR 191 (SC)
89 Bata India Ltd., Calcutta v ESI Corporation 2003 LLR 1018; 2003 (III) LLJ 716 (Calcutta)
90 Assistant Regional Director, Employees’ State Insurance Corporation v Kolhapur Motor Malak Sangh Ltd 2007 LLR 1242 (Bombay)
91 ESIC v Ved Prakash Gupta 2008 LLR 881 (Delhi)
92 M/s. Sumangali v Regional Director, ESI Corporation 2008 LLR 941 (SC); AIR 2009 SC 1298
fabricators are not coverable and there is no responsibility for the payment of contribution.

The ESI Corporation has issued Notification No.T-11/13/53/3-2000-Ins-IV dated 6-3-2000 clarifying that the workers engaged through the fabricators, doing work for others also, would not be liable to be covered under the ESI Act. However, by Internal Instructions bearing No.P-12/11/51/9/2004-Rev.II dated 26-8-2005, the Corporation has superseded its earlier instruction. In addition to above, further clarifications have been given in the Instructions bearing No. P-12/11/51/9/2000-Rev.II dated 17-8-2006 and as such in view of the present position, the ESI contributions will be payable. However, some of the employers have challenged the instructions as issued but no judgement has been given by the High Court or the Supreme Court.

5.20. Partner of a Firm - Not an ‘Employee’

Whether a partner of a firm, being an establishment under the ESI Act, would be covered under the Act?

The Supreme Court has held that a partner, engaged for the work of the factory or establishment and being paid monthly, will not come within the purview of an ‘employee’ as defined in section2(9) of the ESI Act.93 The Kerala High Court has observed that unlike the Managing Director of the Company, a partner of a firm is different entity being in the capacity of employer, hence not liable to be covered under the ESI Act.94

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93 E.S.I. Corporation v Apex Engineering (P) Ltd 1997 LLR 1097 (SC)
94 Regional Director, ESI Corporation v Arun Granites 2007 LLR 1045 (Kerala)
5.21. Managing Director Liable to be covered

A Managing Director of a Company will be covered under the Act if his salary is below prescribed ceiling. The Delhi High Court has also taken the same view.

5.22. Apprentice-Is he an employee?

Only those apprentices who are engaged under the Apprentices Act, 1961 for a particular period are not employees under section 2(9) of the ESI Act. The apprentices as engaged under the Industrial Employment (Standing Orders) Act, will no longer be exempted from the ESI Act. However, the apprentices/trainees other than those engaged under the Apprentices Act, 1961 will be covered under the Act.

In order to determine the question as to whether an individual designated as apprentices is an employee or not, the test is whether he is actually engaged as an apprentices or he is given regular duties and paid normal wages. The Madras High Court has clarified that for determination about the status of an apprentice to exclude from the purview of the ESI Act the nomenclature used by the employer will not have any relevancy. The legal position about non-coverage of apprentices under the Apprentice Act, 1961 is very clear as when the question about the apprentices as to whether they are apprentices under the Apprentices Act and/or to be covered or not under the ESI does not involve question of law, the appeal under the Employee’s Insurance Court will not be tenable.

In *ESI Corp. v Tata Engg. & Co.*, it was held that apprentices are not employees. They are engaged by a Company merely as trainees for a particular period for a distinct purpose and the Company is not bound to employ them in their work after the

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95 ESI Corporation v Apex Engineering (p) Ltd. 1997 LLR 1097 (SC)
96 Employee’s State Insurance Corporation v Navchetan Press 2004 LLR 1047 (Delhi)
97 T.V. Punj v Regional Director, Employees’ State Insurance Corporation 1982 Lab IC (Karnataka) 102
98 Andhra Prabha (p) Ltd., Hyderabad v Employees’ State Insurance Corporation, Hyderabad 1996 LLR 827 (Andhra Pradesh)
99 Employee’s State Insurance Corporation v Arvind Mills Ltd. 2009 Lab IC 1885 (Gujarat)
100 AIR 1976 SC 66: (1976) I LLJ 81 (SC); See also Regional Director, E.S.I. Corporation v M/s. Fire Manglore (p) Ltd. (1986) I LLJ 216 (Karnataka)
training period is over. The object of apprenticeship is learning under certain agreed terms. Simply because certain payment is made to him and he has to be under certain rules of discipline do not convert him to a regular employee. They are not said to be employed in or in connection with the work of the Company. They are also not given wages within the meaning of that word in Section 2(2).

It was held in *Regional Director ESI Corporation v M/s. Arudyog & other*,\(^{101}\) that the apprentices under any scheme are exempted from the operation of law relating to labour by virtue of clause (b) of Section 18 of the Apprentices Act. Hence apprentices are not employees for the purpose of determining the coverage of the Act.

In *Regional Director, Employees’ State Insurance Corporation, Mumbai v Golden Gate Restaurant*,\(^{102}\) the respondent restaurant was catering to the needs of the customers to serve them food. At the time of checking by the vigilance officer 71 persons were found working in restaurant including its kitchen. They also found a list of workers on the roll. It was found that no contribution was being paid in respect of 37 persons who were also found working. The explanation of the respondent about these 37 persons was that they were relatives of the employees of the restaurant taking training there. They were allowed to learn the work and they were given free food and residential accommodation and were not paid any wages in cash. The demand for contribution in respect of these persons was contested by the respondent and it was held by the High Court that though no cash payment was made to these persons, they were getting remuneration in the form of free lodging and boarding for their work and as such were employees under Section 2(9) of the Employees’ State Insurance Act, 1948. It was pointed out that amended definition included trainees and apprentices as well.

\(^{101}\) (1987) 1 LLJ 292 (Bombay)
\(^{102}\) (2002) 1 LLJ 972 (Bombay)
5.23. Work incidental or preliminary to the work of factory

The Supreme Court has enlarged the meaning of an ‘employee’ under section 2(9) of the ESI Act and has held that the employees engaged for the construction of additional building required for expansion of a factory will fall within the definition of an ‘employee’. Hence, they are covered under the Act.103

Ensuing Asian Games the hotels were to be completed and partial operations were to be commenced that means that the remaining construction work was akin to the expansion of work of an establishment work the demand for ESI contributions was quashed.104

*The Employee’s State Insurance Corporation in its memorandum No.P-12(11)-11/27/99-Employees’ State Insurance Corporation IV dated 31-3-2000, has clarified that if the additional building is constructed either directly or through contractor within the premises/precincts of already covered factory, the workers will be covered either engaged through contractors or directly. However, if the additional building is constructed for residential purpose, the workers will not be covered. Also if another building of the factory/establishment including residential accommodation is constructed away from the factory, the workers will not be covered.*

The Bombay High Court has held that even if an employee is working outside the premises of the establishment but if his duty is connected with the work of the establishment, he will be treated as an employee to be covered under the ESI Act. The members of the Society who have been taking yarn beams prepared on the binding machines by the Society and supplying finished goods will be coverable under the ESI Act.105

If within the same premises or compound a number of departments are situated and all such departments are engaged in any work in connection with or incidental to manufacturing process of the factory, all of them would *prima facie* from part of the

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103 *Employee’s State Insurance Corporation, Madras v South India Flour Mills (p) Ltd. 1986 Lab IC 1193 (SC): AIR 1986 SC 1686: Employees’ State Insurance Corporation v. Vijayamohini Mills 1990 LLR 447 (Kerala)*  
104 *Employees’ State Insurance Corporation v Hotel Corporation of Delhi 2008 LLR 640 (Delhi)*  
105 *Employee’s State Insurance Corporation v Apex Engineering (p) Ltd. 1997 LLR 1097 (SC); (1998)1 SCC 86*
factory. If a person is neither employed on any work of the factory, nor any work incidental or preliminary to or connected with the manufacturing process, he will not be an employee within the meaning of the Act.

It was held in Regional Director, ESI Corp. v Suresh Trading Company, that casual employees engaged by the immediate employer in connection with incidental or preliminary work of principal establishment or in connection with work of the principal establishment will be employees of the principal establishment.

Similarly in Regional Director, ESI Corp. v Ramlal Textiles, yarn was supplied by manufacturers to master weavers who carried by the yarn to their work place and weave cloth either by themselves or other persons engaged by them. The manufactured cloth is sold to the manufacturers’ establishment. It was held that the right of rejection of sub-standard cloth spells out effective degree of supervision and control. Identical work as is done by workers is done in the premises of the factory. In view of all this the out workers who are paid wages through contractors are employees as defined in Section 2(9) of the Act.

5.24. Managing Partner of a firm may be an employee

Where a manager employed by the firm to manage the affairs of the firm and the managing partners have not been taking active part in the running of the business of the firm, the burden of proof is on the firm to prove that the managing partner is rendering services to the firm within its premises and should, therefore, be treated as an employee. Unless it is proved, the managing partner cannot be said to be an employee of the factory.

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106 Employee’s State Insurance Corporation v Sriamula Naidu AIR 1960 Madras 248
107 Hindustan Corporation Co. Ltd. v ESI Corporation 1969 Lab IC 67 (Assam)
108 (1990) I LLJ 348 (Kerala)
109 (1990) II LLJ 568 (Kerala)
110 E.S.I.C. v Pioneer Laundry (1966) II LLJ 527
5.25. Consumer Protection Act Application

Does Consumer Protection apply for making claim under ESI?

The medical service rendered in an ESI hospital/dispensary to an insured employee falls within the ambit of section 2(1)(o) of the Consumer Protection Act, and, therefore, the Consumer Forums have jurisdiction to adjudicate upon a dispute arising between the insured and the Employer’s State Insurance Corporation.\[111\]

5.26. Availability of Benefits

Non-payment of contributions won’t affect for availing of ESI benefits by an employee.\[112\]

5.27. Non-Availability of Funds

Can non-availability of funds be an excuse for non-payment of ESI contributions?

There is no provision to waive off the amount due on account of contribution, interest and damages as payable by an employer of a covered establishment. However, the damages can be waived off in relation to a factory or establishment which is declared as sick industrial company and in respect of which a rehabilitation scheme has been sanctioned by the Board for Industrial and Financial Reconstruction. The quantum of relief is mentioned in Regulation 31C of ESIC (General) Regulations, 1950.

5.28. Advantages of ESI to an Employer

(a) Exemption from the Maternity Benefit Act, 1961

\[111\] Kishore Lal v Chairman, Employee’s State Insurance Corporation 2007 LLR 740 (SC)
Section 50 of the ESI Act read with rule 56 of the ESI Rules and also Regulations 87 to 95 provide that the insured person will be entitled to maternity benefit from the Employee’s State Insurance Act Corporation. Hence, the employer is exempted from the applicability of the maternity Benefit Act, 1961

(b) *Exemption from the Workmen’s Compensation Act, 1923*

Section 53 of the ESI Act provides that an insured person or his dependents shall not be entitled to receive or recover, whether from the employer of the insured person or from any other person, any compensation or damages under the Workmen’s Compensation Act, 1923 (8 of 1923) or any other law for time being in force or otherwise, in respect of an employment injury sustained by the insured person as an employee under this Act. Thus, the employer concerned under the ESI Act will not be liable to pay compensation or accident.

The Division Bench of the Bombay High Court has held that the bar created under section 53 of the ESI Act is not limited only to contractual obligation to pay compensation or damages under any law including the Workmen’s Compensation Act. It was further held that section 61 of the ESI Act, therefore, specifically provides that when a person is entitled to any of the benefits provided by the Act, then shall not be entitled to recover any similar benefits admissible under the provisions of any other enactments.  

(c) *Miscellaneous*

An employer is exempted from provisions of medical care (in kind), medical allowance (in cash) or reimbursement of medical expenses in respect of employees and their dependents who are covered under the ESI Scheme.

An employer can be represented on the Employers’ State Insurance Corporation, its Standing Committee and the Medical Benefit Council and any other sub-committee of

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[113] *Associate Electrical industries v Commissioner for workmen’s Compensation* 1994 LLR 860 (Bombay)
the Corporation appointed for any specific reasons concerning policy-making and decision-making.

Employers are authorised to recover from their covered/coverable employees and their contractors, etc., any cash contribution payable on their part. The employers have the right to go in for appeal to Employees’ State Insurance Courts or the Special Tribunal against excess demand of contribution made by the Corporation.

An employer can seek exemption from applicability of the ESI Act in case the social security benefits provided to the employees are superior to those available under the ESI Scheme.

“The question of extension of the ESI Scheme to plantations came up recently before Justice M.P. Menon Commission of Enquiry. The ESIC proposed the coverage of plantations but neither the employers nor the workers of the plantations were in favour of the Extension of the ESI Scheme to the plantation sector. Although the sickness and other benefits provided under the scheme are more than those provided under the Plantations Labour Act the plantation workers were unanimously of the view that the medical benefits now enjoyed by them under the Plantation Labour Rules without paying any contribution were in no way inferior to those under the ESI Scheme. They alleged that the workers covered by the ESI Scheme have a lot of complaints about the implementation of the Scheme; Service in ESI dispensaries and hospitals is not quite satisfactory; the qualifying conditions for getting sickness benefit are a disincentive; that contributions have to be paid during the periods; whether the worker is claiming benefits relating to that period or not. It is also alleged that the employers apprehend that the liberal grant of sickness benefits under the ESI Scheme only encourages absenteeism among workers. Many workers have been approaching the High Court to prevent the extension of the ESI Scheme to their employments.” The Conference of State Labour Ministers held on 7th and 8th of July 1993 is stated to have come to the conclusion that it is not advisable to extend the ESI Scheme to the plantation sector. In taking such decisions it does not seem that the
feasibility of extending the ESI Scheme to mines and plantations for cash benefits, and not for medical benefit, was considered.\textsuperscript{114}

\section*{5.29. Jurisdiction of Civil Courts and High Court}

Can civil courts determine whether ESI Act is applicable to an establishment or not?

No. Section 75(3) of the ESI Act imposes express and complete bar of jurisdiction of a civil court in such matter. The ESI Act creates a special right or a liability and further lays down those questions about the said right/liability shall be determined by the Employee’s State Insurance Court constituted under Section 74 of the Act. The Employees’ Insurance Court has exclusive jurisdiction to determine the disputes as to whether a particular establishment comes within the purview of the ESI Act or not.\textsuperscript{115} The Punjab and Haryana Court has also held that the disputes between employers and the employees have to be decided by the Employees’ State Insurance Court and Civil Courts will have no jurisdiction to decide such disputes.\textsuperscript{116}

When an employer is aggrieved with the findings of the ESI Authorities based on the factual position at the time of inspection since there were 11 and not 9 employees as rebutted by the employer, the appropriate remedy is provided for filing an appeal before the Insurance Court and also further appeal by any of the parties before the High Court but not the writ petition in the High Court, which will frustrate the statutory condition in depositing 50\% of the determined amount, hence the writ petition filed by the employer is liable to be dismissed.\textsuperscript{117}

An appropriate National Policy on Safety, Health and Environment at workplace, is not only to eliminate the incidence of work related injuries, diseases, fatalities, disaster and loss of national assets and also ensuring a high level of occupational

\textsuperscript{114} Available at <http://indialabourarchives.org/usr/local/gsdl/cgi-bin/library?e=d-000-00---0ncl-ncl-01-0-0-0prompt-14-Document---0-11--1-en-50---20-preferences---001-001-1-0isoZc-8859Zc-1-\&a=d&cl=CL2.16&d=HASH445101261de83f8e1210bb.403> accessed on 20 December 2013
\textsuperscript{115} Ram Parshad v ESI Corporation 1988 (57) FLR 139 (Delhi)
\textsuperscript{116} Employees’ State Insurance Corporation v Jaladharg Gymkhana Club 1992 LLR 733 (Punjab & Haryana)
\textsuperscript{117} M/s. Dhanbad Cold Storage Pvt. Ltd. v Employees’ State Insurance Corporation 2009 LLR 404 (Jharkhand)
safety, health and environment performance through proactive approaches along with enhancement of *well-being of the employee and society, at large*. With this the researcher shall move to the next chapter to analyse the aspect of ‘Employment Injury’.