2025:KER:62281

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE M.A.ABDUL HAKHIM

WEDNESDAY, THE 20TH DAY OF AUGUST 2025 / 29TH SRAVANA, 1947

INS.APP NO. 3 OF 2014

AGAINST THE JUDGMENT DATED 30.08.2013 IN IC NO.67 OF 2011 OF EMPLOYEES' INSURANCE COURT, ALAPPUZHA

APPELLANTS/1ST & 2ND RESPONDENTS:

1 THE REGIONAL DIRECTOR, ESI CORPORATION
PANCHADEEP BHAVAN, N.S.ROUND, THRISSUR -20.

2 THE DEPUTY DIRECTOR
ESI CORPORATION, MALU'S COMPLEX, ST.FRANCIS CHURCH ROAD, KALOOR, KOCHI-17.

BY ADVS.
SHRI.T.V.AJAYAKUMAR
KUM.RIMJU P.H.

RESPONDENTS/APPLICANT/3RD RESPONDENT:

1 M/S. L & T TECH PARK LTD
INFOPARK SPECIAL ECONOMIC ZONE,IST FLOOR, REJOMAYA, KUSUMAGIRI PO, KAKKANAD, KOCHI-30.

2 MS.TATA CONSULTANCY SERVICE LIMITED
VISMAYA BUILDING, INFO PARK, KUSUMAGIRI PO, KAKKANAD,
KOCHI-30.

BY ADVS.
SRI.V.ABRAHAM MARKOS
SHRI.ABRAHAM JOSEPH MARKOS
SHRI.BENNY P. THOMAS (SR.)
SRI.BINU MATHEW
SRI.D.PREM KAMATH
SHRI.TERRY V.JAMES
SRI.TOM THOMAS (KAKKUZHIYIL)

THIS INSURANCE APPEAL HAVING COME UP FOR ADMISSION ON 20.08.2025, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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JUDGMENT

1. Appellants are the Respondents Nos.1 and 2 before the E.I. Court, Alappuzha in I.C. No.67/2011 filed under Sections 75 and 77 of the Employees' State Insurance Act, 1948 (E.S.I. Act, for short). They are the Regional Director and the Deputy Director of E.S.I. Corporation. The Respondents are the Applicant and the Respondent No.3 before the E.I. Court. The Appellants are challenging the Order by which the refund of the ESI contribution was ordered by the E.I. Court.

2. This Court formulated the following substantial question of law in this Appeal as per the Order dated 20.11.2024:

> "Whether Section 2(9) of the E.S.I. Act covers the workers engaged for pre-operative fit-out works by the employer requiring contribution to be paid as per the aforesaid Act?"

3. The parties are referred to according to their status before the E.I. Court.

4. The Corporate office of the Respondent No.3 at Mumbai was an establishment covered under the ESI Act during the relevant period. The Applicant was not an establishment covered under the ESI Act. The Applicant owns a building by the name, *Thejomaya,* constructed for I.T. business, I.T. enabled services and other related services and amenities pursuant to Sanction Order dated 05.04.2007 issued by the Development Commissioner, Infopark Special Economic Zone, Kochi. The building was constructed within the Special Economic Zone at Infopark, Kakkanad. The Respondent No.3 took lease of the 7th, 8th & 9th floors of the said building from the Applicant for starting a new unit as per Ext.D1 Lease Deed dated 21.10.2007. As per Ext.D1 Lease Deed, the lease commencement date is 21.10.2007 or the date of actual handover of the premises by

the Lessor to the Lessee to start the fit-out works. Even before the execution of the Ext.D1 Lease Deed, the Respondent No.3 awarded a contract in favour of the Applicant to do the interior fit-out works in the premises as per Exhibit A1 Contract/Work Order dated 08.10.2007. For the purpose of executing the pre-operative fit-out works, 90 days rent-free period was allowed to the Respondent No.3 by the Applicant. The interior fit-out works were completed on 11.01.2008, and the premises were entrusted to the Respondent No.3 on 11.03.2008. The Respondent No.3 started its operations of the new unit in the leased premises on 02.04.2008 by issuing Ext.A4 Letter of Intimation to the Development Commissioner (Sez-IT & ITES), Thiruvananthapuram. Since the burden to meet the ESI contribution was on the Applicant as per Ext.A1 Contract, the Respondent No.3 deducted an amount of Rs.23,68,366/- from the value of the contract payable to the Applicant and remitted

the same to the E.S.I. Corporation on 29.03.2008. Ext.A1 Contract contained a clause that it is the Applicant who has to comply with all the labour laws such as E.S.I., P.F. and Contract Labour Act. The Applicant submitted Exhibit A5 Request dated 12.01.2010 to the Respondent No.1 seeking a refund of the amount remitted by the Respondent No.3 on the ground that, as per Exhibit A9 Instruction No.4/99 dated 14.06.1999 of the E.S.I. Corporation, New Delhi, the workers engaged in construction sites are exempted from the provisions of the ESI Act and that the contribution was paid by mistake and hence the Applicant is eligible to get a refund of the amounts paid by the Respondent No.3 with respect to Exhibits A1 & A2 Contracts. The Respondent No.3 also submitted Exhibit A8 Letter dated 11.03.2010 to the Respondent No.1 stating that since construction activity is exempted, the payment of contribution was made by mistake, and the Respondent No.3 had no

objection to refunding the amount to the Applicant. Since the Respondent No.1 did not consider Ext.A5 Request, the Applicant approached this Court by filing W.P.(C) No.20763/2010, and this Court, as per Exhibit A10 judgment dated 26.07.2010, directed the Respondent No.1 to pass orders on Ext.A5 Request within a period of three months. The Respondent No.2 obtained Exhibits A11, A12 & A13 Reports dated 29.10.2010, 02.11.2010 & 06.12.2010 from its Social Security Officer and passed Ext.A14 Order dated 16.03.2011 rejecting Ext.A5 Request for refund submitted by the Applicant. After issuing Ext.A14 Order, the Respondent No.2 issued a Communication dated 17.03.2011 to the Respondent No.3 demanding the balance contribution of Rs.2,76,354/-. The Respondent No.3 paid the said additional contribution demanded on 19.05.2011 as per Ext.A15 Challan. Thereafter, the Applicant filed the present I.C. before the E.I. Court seeking

a declaration that the work executed by the Applicant for the Respondent No.3 pursuant to Ext.A1 for interior fit-out works to set up a new facility at the Infopark is exempted from contribution under the E.S.I. Act, to set aside Ext.A14 Order of the Respondent No.2 and Notice dated 17.03.2011 and to declare that the Applicant is eligible for refund of Rs.23,68,366/- and Rs.2,76,354/- with interest at the rate of 12% per annum and to direct the Respondent Nos.1 & 2 to grant the same.

5. The Respondent Nos.1 & 2 filed an Objection in the I.C. contending, *inter alia*, that the Respondent No.3 is a covered establishment. The Respondent No.3 took lease of three floors in the building belonging to the Applicant for expanding their business at Kochi on 21.10.2007. The Respondent No.3 is the principal employer defined under Section 2(17) and the Applicant is the immediate employer defined under Section 2(13) of the ESI Act with respect to the contract works awarded

as per Exts.A1 and A2. The Respondent No.3 remitted E.S.I. contribution on the wage element involved in the contract work after deducting the same from the amount due to the Applicant. As the leased premises had been occupied by the Respondent No.3 from 21.10.2007 onwards, any work executed for and on behalf of the Respondent No.3 in its premises would form part of the activities carried out in the establishment and is coverable under the ESI Act. Ext.A9 Instruction dated 14.06.1999 issued to exclude certain classes of workers engaged by construction agencies who belonged to the unorganised sector due to the peculiar characteristics of the construction industry and the peculiar nature of the employment of workers engaged in it is not applicable to the present case. As per Clause No.3 of Ext.A9, construction workers who are engaged directly in a covered factory by the principal employer or through an immediate employer are covered under Section 2(9) of the

E.S.I. Act. All the employees employed by the Applicant are their own employees and those employees are not employed for the construction or building construction of the establishment, and hence, exemption as per Ext.A9 will not be available in the present case. The works carried out are preliminary to the works carried on in the establishment. The Applicant carried out the works as per the specification, supervision and control of the Respondent No.3, which is the principal employer. The terms and conditions, such as the scope of work, acceptance/rejection clause incorporated in Ext.A1 Work Contract, will support the case of the ESI Corporation. The new premises are only an expansion of the existing business of the Respondent No.3. The construction activities carried out on the premises are after the occupation of the premises by the Respondent No.3, who is already covered under the Act. The question of exemption of pre-operative construction activity from

ESI coverage does not arise in the matter of expansion of an existing covered establishment. It applies only when a new shop or factory is started. Respondent No.3, who is the principal employer, did not submit any Application for refund, and hence the application for refund submitted by the Applicant is not maintainable. The Application for refund is not filed within the period specified under Regulation 40 of the E.S.I. (General) Regulations, 1950. Thus, in any view of the matter, the request for the refund of the contribution is not sustainable. The claim for refund is liable to be rejected. The EI Court illegally ordered the refund of the contribution as per the impugned order and it is liable to be set aside.

6. The Respondent No.3 supported the case of the Applicant by contending that Respondent No.3 is engaged in the software development and related activities. The fit-out works carried on by the Applicant in its own premises before the commencement

of operation by Respondent No.3 cannot be treated as preliminary or incidental to the ordinary part of the works of the establishment of Respondent No.3. The Respondent No.3 will not come within the purview of the principal employer.

7. On the side of the Applicant, its Project in Charge was examined as PW1 and Exts.A1 to A16 were marked in evidence. On the side of the Respondent Nos.1 & 2, its former Deputy Director (Legal) was examined as DW1 and Exts.D1 to D4 were marked.

8. The E.I. Court passed the impugned order declaring that the workers employed by the Applicant for executing pre-operative fit-out works of the Respondent No.3 are not employees under S.2(9) of the Act and hence no contribution is payable on their behalf; directing E.S.I. Corporation to refund Rs.23,68,366/- remitted on 29.03.2008 and Rs.2,76,354/- remitted on 16.05.2011 to the Applicant within one month from the date of the judgment and directing that thereafter, the above amounts

will carry interest at the rate of 12% per annum from the date of Ext.A14 Order and setting aside Ext.A14 Order to the contrary.

9. I heard the learned counsel for the Appellants, Sri. T.V. Ajayakumar, learned counsel for the Respondent No.1, Sri. Terry V. James and the learned Senior Counsel for the Respondent No.2, Sri. Benny P. Thomas, instructed by Adv. Sri. Prem Kanth.

10. The learned counsel for the Appellants contended that the Respondent No.3 is the principal employer of the establishment as defined under Section 2(17) of the E.S.I. Act and the Applicant is the immediate employer as defined under Section 2(13) of the E.S.I. Act. Admittedly, the Respondent No.3 took possession of the leased premises from the Applicant on 21.10.2007. Admittedly, the Respondent No.3 is an establishment covered under the E.S.I. Act. In such a case, workers employed by the Applicant to do the fit-out works in the

establishment of the Respondent No.3 will come under the definition of employees defined under Section 2(9)(ii) of the ESI Act. Exts.A1 & A2 would reveal that the works were done under the supervision of the Respondent No.3. The Respondent No.3 correctly understood the legal status of the parties and the law on the point and hence collected the E.S.I. contribution from the Applicant with respect to the wage element involved in the contract and remitted the same to the E.S.I. Corporation. Ext.A9 Instruction of the E.S.I. Corporation is not applicable to the facts and circumstances of the present case. It is meant for avoiding coverage of workers engaged in construction work, as they belonged to the unorganised sector and could not be identified, and hence no benefit under the ESI Act could be extended to them. In Ext.A9, the peculiar nature of the construction workers is specifically referred to as mobile and migratory in nature. In the case on hand, the employees of the Applicant are identified

persons. They are not construction workers. They are employed for the purpose of doing the fit-out works in order to make the premises ready for occupation of the Respondent No.3. The said fit-out works are preliminary to the ordinary work of the Respondent No.3 and incidental to the same. Clause 3 of Ext.A9 specifically provides that construction workers who are engaged directly in a covered factory by the principal employer or through an immediate employer are to be taken into consideration for coverage under Section 2(9) of the E.S.I. Act. The learned counsel cited the decisions of the Hon'ble Supreme Court in the ***Associated Cement Companies Ltd., Chaibassa Cement Works, Jhinkpani v. Workmen [AIR 1960 SC 56], Royal Talkies, Hyderabad v. Employees State Insurance Corporation [AIR 1978 SC 1478], Regional Director, E.S.I. Corporation, Madras v. South India Flour Mills Pvt. Ltd. [AIR 1986 SC 1686], Employee's State Insurance Corporation v. Harrison Malayalam Pvt. Ltd. [AIR 1993 SC 2655],***

Regional Provident Fund Commissioner, Jaipur v. Naraini Udyog and Others [(1996) 5 SCC 522], Transport Corporation of India v. Employees' State Insurance Corporation and Another [AIR 2000 SC 238], Saraswathi Films v. Regional Director, E.S.I. Corporation [2003 (1) KLT 886], Sumangali v. Regional Director, E.S.I. Corporation [(2008) 9 SCC 106], Bombay Anand Bhavan Restaurant v. Deputy Director, E.S.I. Corporation [2009 9 SCC 61], Torino Laboratories Pvt. Ltd. v. Union of India & Ors. [2025 Supreme (SC) 1067] and the decisions of this Court in the ***Regl. Director, E.S.I. Corporation v. Kerala Wheat Flour Roller Mill [1997 2 ILR (Ker.) 771]*** and the ***Director, E.S.I. Corporation v. M/s. Western Marine Engineering [2019 (3) KHC 593]*** in support of his contentions.

11. On the other hand, the learned Senior Counsel for the Respondent No.3 contended that the ESI Act covers only factories under Section 1(4) and establishments notified under Section 1(5) of the ESI Act. The registration under Section 2-A of the ESI Act is with reference to the factory and establishment.

It does not require the entity which owns the establishment to be registered. Respondent No.3 is a limited company. It cannot be treated as an establishment. Different establishments owned by the Respondent No.3 could not be treated as a single establishment only for the reason that they belong to the Respondent No.3. The existing coverage of the establishment is the establishment that belonged to the Respondent No.3 in Mumbai. The establishment established by the Respondent No.3 in Infopark, Kochi, could not be treated as an extension of the already existing establishment. The establishment of the Respondent No.3 at Kochi is a new establishment. It started only on 02.04.2008. Respondent No.3 is engaged in providing I.T. services. It does not have any technical know-how to supervise the construction works. Any work done prior to 02.04.2008 for making the leased premises ready for the occupation of the Respondent No.3 could not be treated as an

ordinary part of the work of the establishment or preliminary to the work or incidental to the purpose of the establishment. That apart, construction work is clearly excluded from coverage as per Ext.A9 Instruction of the E.S.I. Corporation itself. The establishments of the Respondent No.3 in *Thejomaya* building and in the neighbouring building, *Vismaya,* are distinct and separate. They are registered under different schemes. One could not be said to be an extension or a part of the other. Even in the Report of the Inspector of the E.S.I. Corporation, it is stated that the establishment in the *Thejomaya* building is not an addition or modification of the existing covered unit of *Vismaya*. Hence, the Respondent No.3 is not liable to pay E.S.I. contribution in the capacity of principal employer with respect to the fit-out works done by it through the employees of the Applicant. The payment made by the Respondent No.3 towards the contribution after deducting the same from the contract

value due to the Applicant is not an erroneous payment. It is an illegal collection of contribution by the E.S.I. Corporation and hence Regulation 40 of the E.S.I. (General) Regulations, 1950, is not applicable to the present case. The issue is covered by the decision of this Court in ***Deputy Director v. B.P.L. Cellular Ltd. [2005 (2) KLT 775].*** Hence, the E.I. Court correctly understood the law on the point and correctly decided the matter in favour of the Applicant. No substantial question of law arises in the matter to entertain the appeal at the instance of the E.S.I. Corporation.

12. The learned counsel for the Respondent No.1 also advanced contentions substantially the same as those raised by the Senior Counsel for Respondent No.2.

13. I have considered the rival contentions.

14. Section 2(9)(ii) of the ESI Act covers employees employed for wages 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 a part of the work of the factory or establishment which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment. The workers engaged by the contractor of the principal employer for doing works preliminary and incidental to the purpose of the establishment are covered by the definition. Here, the Respondent No.3 has employed workers through the Applicant in the premises of the establishment to do the fit-out works. Whether such fit-out work is a work preliminary or incidental to the purpose of the establishment of the Respondent No.3 or not is the question to be answered in this case.

15. The learned Counsel for the Appellants cited several decisions of the Hon'ble Supreme Court and this Court to enlighten the law on the point. Let me examine the decisions cited by the

learned Counsel for the Appellants in order to have the correct understanding of the law on the point.

16. The learned Counsel for the Appellants cited the decision of the Hon'ble Supreme Court in ***Associated Cement Companies Ltd. (supra)*** to explain the term establishment. The Hon'ble Supreme Court interpreted the term 'establishment' with reference to the Mines Act, 1952, and the Factories Act, 1948. In the E.S.I. Act, the term 'establishment' is not defined. The Hon'ble Supreme Court held that the real purpose is to find out the true relation between the parts, branches, units etc.; that if in their true relation they constitute one integrated whole, the establishment is one and on the contrary they do not constitute one integrated whole, each unit is then a separate unit; that the relation between units will be judged and must depend on the facts proved, having regard to the scheme and object of the statute; that in one case the unity of ownership, management and

control may be the important test, in another case, functional integrality or general unity may be the important test and still in another case the important test may be the unity of employment; that in large number of cases several tests may fall for consideration at the same time; that the difficulty of applying these tests arises because of the complexity of modern industrial organisation; many enterprises may have functional integrality between the factories which are separately owned; some may be integrated in part with units or factories having the same ownership and in part with factories or plants which are independently owned. The learned counsel cited this decision to substantiate the point that the new unit of the Respondent No.3 in Kochi is a part of the Corporate Office of the Respondent No.3 at Mumbai which is a covered establishment.

17. The decision of the Hon'ble Supreme Court in ***Royal Talkies (supra)*** is one rendered under the ESI Act. In the said decision,

the Hon'ble Supreme Court considered the scope of the definition of 'employee' under Section 2(9) of the ESI Act. It is specifically held that the expression ‘in connection with the work of an establishment’ ropes in a wide variety of workmen who may not be employed in the establishment but may be engaged only in connection with the work of the establishment; that it is enough if the employee does some work which is ancillary, incidental or has relevance to or link with the object of the establishment. It is further held that the language used in Section 2(9)(ii) is extensive and diffusive imaginatively embracing all possible alternatives of employment by or through an independent employer; that in such cases the principal employer has no direct employment relationship since the immediate employer of the employee concerned is someone else; that even so, such an employee, if he works on the premises of the establishment or under the supervision of the

principal employer or his agent on work which is ordinary part of the work of the establishment or which is preliminary to the work carried on in or incidental to the purpose of the establishment qualifies under Section 2(9)(ii); that the plurality of persons engaged in various activities who are brought into the definitional net is wide and considerable and all that is necessary is that employee be on the premises or be under the supervision of the employer or his agent; that all that the Statute requires is that the work should not be irrelevant for the purpose of establishment; that it is sufficient if it is incidental to it. In the said case, it is held that keeping a cycle stand and running a canteen are incidental or adjuncts to the primary purpose of the theatre. In the said decision, the Hon'ble Supreme Court considered the activities which were started after commencing the operation of the establishment. Even though the general principles laid down in the said decision give some guidance, it

does not specifically deal with the construction works which were done prior to the commencement of the establishment.

18. In ***South India Flour Mills (supra),*** the Hon'ble Supreme Court considered the question whether the employment of workers for the purpose of putting up additional buildings for the purpose of commencing the manufacturing process would come within the scope of work incidental or preliminary to or connected with the work of the factory. The Division Bench of the Madras High Court was of the view that such employees are not employees within the meaning of Section 2(9) of the ESI Act. The Hon'ble Supreme Court understood the question as whether the workers employed for the purpose of additional buildings for the expansion of the factories are employees within the meaning of Section 2(9) of the Act. The Hon'ble Supreme Court found that the definition of employee seems to be very wide and brings within the purview of various types of employees; that as soon

as the conditions under the definition of employee are fulfilled, one becomes an employee within the meaning of the definition. The Hon'ble Supreme Court specifically held that work of construction of additional buildings required for the expansion of the factory must be held to be ancillary, incidental or having some relevance to or link with the object of the factory; that the expression ‘work of the factory’ should also be understood in the sense of any work necessary for the expansion of the factory or establishment or for augmenting or increasing the work of the factory or establishment, that such work is incidental or preliminary to or connected with the factory or establishment. The said decision answers the issue involved in this case to a great extent. If the Respondent No.3 was having an already existing establishment during the relevant time, the employees engaged in the fit-out works through the Applicant in a new premises for expanding the business in the existing

establishment are covered under the ESI Act and an ESI contribution is liable to be paid with respect to the wage element in Exts.A1 and A2 contracts. It takes me to the next question of whether the Corporate Office of the Respondent No.3, which is a covered establishment, could be treated as an existing establishment and the new unit is only an extension of the existing unit. If the new unit of the Respondent No.3 at Infopark, Kochi, is an independent unit, the employees engaged in the fit-out works done before commencing operation of the unit could not be treated as employees covered under Section 2(9) of the ESI Act.

19. The learned counsel for the appellants cited the decision of the Hon'ble Supreme Court in ***Naraini Udyog (supra)*** to contend that even two units located at a distance of 3 KM from the establishment therein were treated as one single unit, finding functional unity and integrity between the two units.

20. The learned Counsel cited the decision of the Hon'ble Supreme Court in ***Transport Corporation of India (supra)*** to substantiate the point that when the Head Office or registered office is covered under the ESI Act, employees working in different branches anywhere in India would get covered by the sweep of the Act. In the said case, the Hon'ble Supreme Court found that the employees of the Bombay branch of the principal employer, which is stationed in Secunderabad in Andhra Pradesh, are the employees of the principal employer. It is held by the Hon'ble Supreme Court that the Bombay branch of the principal employer facilitating and directly connected with the principal office and working under its complete control and supervision cannot be treated to be beyond the sweep of the Act once the employees at Bombay branch are held to be employees of the principal employer; that it could not be held on the facts of the said case that Bombay branch was functioning as a separate

and independent entity not being controlled or supervised by the Secunderabad Principal Office so as to enable the employer to contend that its Bombay branch was not its limb and was an independent establishment by itself as if it was run by some independent transport company. The learned counsel cited the decision of the Hon'ble Supreme Court in ***Sumangali (supra)*** in which the Hon'ble Supreme Court relied on the factual findings of the EI Court and the High Court that there was unity in management, supervision and control, geographical proximity, financial unity, general unity of purpose and functional integrality between the different units and held that for the sake of ESI coverage, the different units could be treated as one establishment. In view of these two decisions, the employees of the new unit of the Respondent No. 3 at Infopark, Kochi, are to be treated as the employees of the Corporate office of the Respondent No.3, which is a covered establishment, provided

there is functional unity and integrity between the Corporate Office and the new unit at Kochi.

21. The Hon'ble Supreme Court specifically observed in Paragraph No.25 of the decision in ***Transport Corporation of India (supra)*** that it is necessary to keep in view the salient fact that the Act is a beneficial piece of legislation intended to provide benefits to employees in case of sickness, maternity, employment injury and for certain other matters in relation thereto; that it is enacted with a view to ensuring social welfare and for providing safe insurance cover to employees who were likely to suffer from various physical illnesses during the course of their employment; that such a beneficial piece of legislation has to be construed in its correct perspective so as to fructify the legislative intention underlying its enactment; that when two views are possible on its applicability to a given set of employees, that view which furthers the legislative intention

should be preferred to the one which would frustrate it. The learned counsel cited the decision of the Hon'ble Supreme Court in ***Bombay Anand Bhavan Restaurant (supra)***, which deals with the interpretation of the ESI Act. In the said decision it is held that the ESI Act is a social security legislation and the canons of interpreting a social legislation are different from interpretation of taxation law; that the court must not countenance any subterfuge which would defeat the provisions of social legislation and the courts must even, if necessary, strain the language of the Act in order to achieve the purpose for which the legislature had in placing this legislation on the statute book; that the Act, therefore, must receive a liberal construction so as to promote its objects. Of course, the Courts are to prefer the view which furthers the legislative intention when two views are possible on interpretation. But when the language of the provision is plain and clear and admits only one

view, or there are well-considered precedents accepting one view, there is no question of preferring another view.

22. The learned counsel cited the decision of the Hon'ble Supreme Court in ***Torino Laboratories Pvt. Ltd. (supra)***, in which the Hon'ble Supreme Court considered a question of clubbing of two units of an establishment. The Hon'ble Supreme Court held that the contention that once there are two separate juristic entities, the theory of clubbing cannot be invoked is completely untenable and it is stated to be rejected; that it is common knowledge that artificial devices, subterfuges and facades are commonly resorted to, to create a smokescreen of separate entities for a variety of purposes; that the Court of law faced with such a scenario has a duty to lift the veil and see behind applying the well-established tests to determine whether the entities are really separate entities or they are really a single entity; that myriad fact situations may arise; that the contention that Section

2A of the Act cannot be applied if ostensibly two separately registered entities under the Companies Act are involved, has only to be rejected. The learned counsel for the appellants, on the strength of the decision, contended that even two entities can be treated as one single establishment in light of the said decision of the Hon'ble Supreme Court.

23. The learned counsel cited the decision of the Hon'ble Supreme Court in ***Saraswathi Films (supra)*** in which the aforesaid two decisions of the Hon'ble Supreme Court in ***Royal Talkies*** and ***Transport Corporation of India*** are followed. The Division Bench decision of this Court in ***Kerala Wheat Flour Roller Mill (supra)*** is cited to point out that the construction of an office building or the maintenance or repair of an existing building is a work incidental to the purpose of the establishment. The Division Bench Decision of this Court in ***M/s. Western Marine Engineering (supra)*** is cited to contend that the employees who were appointed by the

sub-contractor will also come under the definition of Employee under Section 2(9) of the Act. The decision of the Hon'ble Supreme Court in ***Harrison Malayalam Pvt. Ltd. (supra)*** is cited to substantiate the point that it is the duty of the principal employer to get the necessary details of the workmen employed by the contractor at the commencement of the contract since the primary responsibility of payment of the contribution is on the principal employer and that such obligation ceases only when the Act ceases to apply to the establishment.

24. On analysing the facts of the present case, the Respondent No.3 is engaged in I.T. related services. It does not undertake construction activities. It has no technical know-how to supervise construction works. The checking and verification of the work after completion of the work for processing the bill could not be termed as an element of supervision. The right of the principal employer to reject or accept the work after

completion of the work cannot be treated as supervision of the work. There could not be any implied supervision on account of the approval by the Respondent No.3 with respect to the work done after completion of the work. It is evident from Ext.A13 Report of the Social Security officer of the ESI Corporation that the Applicant gave the work to its different sub-contractors and the Applicant had only monitored the quality of work rendered by its sub-contractors. Hence, whatever interior fit-out works are done in the leased premises by the Applicant, it is done under the supervision of the Applicant itself, and it is not done under the supervision of the Respondent No.3.

25. The Corporate Office of the Respondent No.3 is a covered establishment. Respondent No.3 obtained lease of the premises from the Applicant for expanding their business in Kochi on 21.10.2007. As per Ext.D1 Lease Deed, the lease commencement date is 21.10.2007 or the date of actual

handover of the premises by the Lessor to the Lessee to start the fit-out works. Even before the execution of Ext.D1 Lease Deed, the Respondent No.3 awarded a contract in favour of the Applicant to do the interior fit-out works in the premises as per Ext.A1 Contract/Work Order dated 08.10.2007. So the commencement of the lease is from 08.10.2007. The interior fit-out works were completed on 11.01.2008 and the premises were entrusted to the Respondent No.3 on 11.03.2008. Respondent No.3 started its operations of the new unit in the leased premises on 02.04.2008. Even though Ext.A2 Amended Work Order is dated subsequent to the date of starting operations by the Respondent No.3, it is clear from it that it relates to the additional works done on the basis of Ext.A1, before starting operations by the Respondent No.3. Thus, the fit-out works as per Exts.A1 and A2 were done before starting business operations in the leased premises by the Respondent

No.3. While doing the fit-out works in the premises, the establishment was not existing and hence the fit-out construction works cannot be termed as a preliminary or an incidental one for the purpose of the establishment of the Respondent No.3 at Kochi. In relation to the Corporate office of the Respondent No.3 at Mumbai, which was a covered establishment at the time of executing the fit-out works, the works are outside the premises of such establishment. Only if there is functional unity and integrity between the Corporate Office and the new unit at Kochi, the ESI Corporation can rope in the fit-out construction works in the new unit under ESI coverage. The functional unity and integrity between two units can be assessed only if both the units are existing. The functional unity and integrity between two units of an establishment could not be decided with reference to the pre-operative fit-out construction works in a unit which is yet to be

started. Since construction works are not the business of the Respondent No.3, there could not be functional unity and integrity between the two units of the Respondent No.3 with reference to the construction fit-out works.

26. There is a covered establishment of the Respondent No.3 in the neighbouring building by the name '*Vismaya*'. The Respondents Nos.1 and 2 contended that the new unit is an extension of the said existing unit of the Respondent No.3. It is clear from the said contention that separate coverage is for the *Vismaya* unit and the Corporate office of the Respondent No.3, and both are different establishments under the ESI Act. The EI Court relied on Exts.A11 and A12 Reports of the Social Security officer of the ESI Corporation to hold that the *Thejomaya* unit and the Vismaya unit of the Respondent No.3 are independent and separate entities and that the *Thejomaya* unit is not an extension of the *Vismaya* unit. In Ext.A11, it is reported that the

Vismaya unit and the *Thejomaya* unit are functioning under different schemes of the Government of India and their operations are independent of each other and that they are situated in separate and distinct premises having no connection with each other. This would also support the finding that there is no functional unity and integrity between the Corporate Office and the new unit in *Thejomaya*.

27. Another contention raised by the Applicant before the EI Court was that construction workers are exempted from ESI coverage during the relevant time as per Ext.A9 Instruction and hence the ESI Corporation has no authority to collect contribution for them. The EI Court found in favour of the Applicant. Ext.A9 Instruction of the Head Office of the ESI Corporation is dated 14.06.1999 exempting construction site workers on the ground that they belonged to the unorganised sector due to the peculiar characteristics of the construction industry and the peculiar

nature of the employment of workers engaged in it could not be identified and that no benefit under the ESI Act could be extended to them. Later, Ext.A9 Instruction was revisited, and another Circular dated 03.01.2011 was issued by the ESI Corporation extending the coverage and benefits to construction site workers. The said Circular is extracted in the impugned order.

28. Learned counsel for the Appellants invited my attention to Clause 3 in Ext.A9, which acts as an exception to the exemption of construction site workers. It reads as follows.

> "Such construction workers are to be taken into consideration for coverage under Section 2(9) as 'employee' who are engaged directly in a covered factory by the principal employer or through an immediate employer."

29. The premises of the Respondent No.3 are not a factory to attract the said exception clause. Hence, the workers engaged by the

Respondent No.3 through the Applicant to execute the interior fit-out construction works are not liable to be covered as they are exempted as per Ext.A9 Instruction during the relevant time.

30. Lastly, it is contended by the Counsel for the Appellant that the Refund Application was not made before the commencement of the benefit period corresponding to the contribution period in which the contribution was paid as required under Regulation 40 of the ESI (General) Regulations, 1950. The contribution was remitted by the Respondent No.3 on 29.03.2008, and the additionally demanded contribution was remitted on 16.05.2011. It is the Respondent No.3 who had remitted the contribution using the amount belonging to the Applicant. The Applicant had no control over the payment of the contribution made by the Respondent No.3 to the ESI Corporation, as it is the liability of the Applicant to meet the burden to pay ESI Corporation as per the contract. If it were the Applicant who had to pay the

contribution, the Applicant could have refused to pay the contribution, disputing the liability, and could have instituted litigation with respect to the same. The only remedy available to the Applicant is to claim return of the amount to it after effecting payment of the same by the Respondent No.3 as per the contract. The refund is claimed by the Applicant and not the Respondent No.3, who had remitted the contribution. In case the Applicant proves that there is no liability to pay the contribution under the provisions of the ESI Act, the Applicant is entitled to get the said amount from the ESI Corporation. Regulation 40 deals with the refund of the contribution to the person who has made the contribution and does not deal with the return of the remitted contribution to any person other than who remitted the contribution. An Application for refund by a person other than who has made the contribution does not come under Regulation 40. Hence, the time limit prescribed

under Regulation 40 is not applicable to the Application for refund by a person other than who has made the contribution. In ***B.P.L. Cellular Ltd. (supra)***, this Court held that the Act or the Rules or the Regulation does not expect or intend that the ESI Corporation should be benefited out of a mistaken payment made by the employer or the employee; that if the Corporation wants to gain or make money out of such mistakes committed by the employer or the employee it will amount to unjust enrichment and that therefore Regulation 40 need not be liberally construed if it results in undue advantage or benefit to the Corporation. In this case also, if the ESI Corporation is allowed to keep the money belonging to the Applicant, which is remitted by the Respondent No.3, it is an undue enrichment to the ESI Corporation. ESI Corporation is liable to restore the benefit of such undue enrichment back to the person eligible for the said benefit.

31. The substantial question of law is answered in the negative and against the appellants.

32. In view of the answer to the substantial question of law, the Appeal is dismissed without costs.

Sd/-

M.A.ABDUL HAKHIM

JUDGE

Shg/