CNR No.MHIC120007062015

IN THE EMPLOYEES STATE INSURANCE COURT, MAHARASHTRA AT PUNE

APPLICATION (ESI) NO. 04 OF 2016

Samarth Gauges & Tools .... **Applicant**

… **V/s** …

Employees State Insurance Corporation .... **Opponent**

-: ORDER BELOW EXH. C-4 :-
(Dated 13.12.2019)

In the instant application, the applicant has prayed for relaxation of the condition of the deposit of 50% amount as contemplated under Section 75(2B) of the ESI Act.

2. The Ld. Counsel Shri. Joshi for the Applicant submitted that the applicant has an establishment at the address located in the cause title. It is engaged in the manufacture of tools and gauges. It has obtained a ESI Code and is duly complying with all the provisions of the ESI Act 1948 from time to time. The Applicant is carrying out the work of assembly of gauges and tools. It has numerous other small suppliers and outside contractors. The Applicant gets work done from these outside labour contractors by providing them with material. These outside labour contractors work on the said material, do the concerned job and sent the same back to the Applicant. The Applicant has absolutely no control over the work which is done by these outside contractors. Once the material is supplied to them the outside labour contractors carry out work in their own establishment with their own workers by using their

skill, knowledge and technology, if any. After completing the job, as per the specifications they send the material back to the Applicant in the form of finished or semi-finished jobs. The Applicant pays these outsider vendors as per the work done by them and the said amount is recorded in the books of accounts of the applicant as outside labour charges. The concerned vendors are not exclusive suppliers of the applicant. These are small establishment which carry out work for different establishments. The work is carried out by these outside vendors with the help of their own workmen. The work of these workmen is supervised by the concerned outside vendors and it is the outside vendors who pay wages and decide upon on the terms and conditions of service of these workmen. The said workmen cannot be treated as the employees of the applicant and no ESI contribution can be claimed on the amount paid to these contractors as outside labour charges. The Opponent Corporation only with a view to harass the applicant has been conducting inspections from time to time and booking the said outside charges as omitted wages. It is claiming contributions on this amount. Based on the said inspections, Opponent Corporation has issued recovery certificates directly in some cases without passing any order under Section 45A. The Recovery Officer has passed totally illegal, untenable and false order on 18.1.2016 claiming recovery of Rs. 4,79,219/- based recovery certificates dated 18.12.2008, 1.10.2009, 12.1.2010, 28.9.2010, 9.3.2012, 23.4.2013, 24.7.2013, 30.8.2013, 10.10.2013, 11.2.2014, 17.11.2014, 12.2.2015 and 2.11.2015. In furtherance of the said prohibitory order, the Opponent issued letters to the Andhra Bank and KJSB Bank. The Bank Accounts of the Applicant in these banks were attached by the Opponent Corporation.

3. The Ld. Counsel Shri. Joshi for the Applicant further submitted that the Applicant has disputed said order and prayed for

interim relief. There is a fair case for the applicant and hence the condition of deposit of 50% amount be waived.

4. To support his contention, he placed reliance on the decision of Hon'ble Apex Court in the case of **C.E.S.C. Limited and Ors Vs. Subhash Chandra Bose and Ors MANU/SC/0466/1992;** wherein it has been observed in para 14 as under :-

> *"14. .....In the textual sense 'supervision' of the principal employer or his agent is on 'work' at the places envisaged and the word 'work' can neither he construed so broadly to be the final act of acceptance or rejection of work, nor so narrowly so as to be supervision at all limes and at each and every step of the work. A harmonious construction alone would help carry out the purpose of the Act, which would mean moderating the two extremes. 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 thereof 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 in our view be supervision for the purposes of Section 2(9) of the Act.*
> *It is the consistency of vigil, the proverbial a stitch in time saves nine'. The standards of vigil would of course depend on the facts of each case. Now this function, the principal employer, no doubt can delegate to his agent who in the eye of law is his second self, i.e., a substitute of the principal employer. The immediate employer, instantly, the electrical contractors, can by statutorily compulsion never be the agent of the principal employer. If such a relationship is permitted to be established it would not only obliterate the distinction between the two, but would violate the provisions of the Act as well as the contractual principle that a contractor and a contracted cannot be the same person. The E.S.I.C. claims establishment of such agency on the terms of the contract, a relationship express or implied. But, as is evident, the creation or deduction of such relationship throws one towards the statutory scheme of keeping distinct the concept of the principle and immediate employer, because of diverse and distinct roles."*

5. In The Managing Director, ***Hassan Co-operative Milk Producer's Society Union Limited vs. The Assistant Regional Director Employees State Insurance Corporation , MANU/SC/0293/2010;*** *the*

Hon'ble Supreme Court observed in para 18 as under :-

> *"18. Therefore, we move down to Section 2(9)(ii). Here again, the language used is extensive and diffusive imaginatively embracing all possible alternatives of employment by or through an independent employer. In such cases, the 'principal employer' has no direct employment relationship since the 'immediate employer' of the employee concerned is some one else. Even so, such an employee, if he works (a) on the premises of the establishment, or (b) 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 in or incidental to the purpose of the establishment", qualifies under Section 2(9)(ii). 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 the employee be on the premises or be under the supervision of the principal employer or his agent. Assuming that the last part of Section 2(9)(ii) qualifies both these categories, all that is needed to satisfy that requirement is that the work done by the employee must be (a) such as is ordinarily (not necessarily nor statutorily) part of the work of the establishment, or (b) which is merely preliminary to the work carried on in the establishment, or (c) is just incidental to the purpose of the establishment. No one can seriously say that a canteen or cycle stand or cinema magazine booth is not even incidental to the purpose of the theatre. The cinema goers ordinarily find such work an advantage, a facility, an amenity and some times a necessity. All that the statute requires is that the work should not be irrelevant to the purpose of the establishment. It is sufficient if it is incidental to it. A thing is incidental to another if it merely appertains to something else as primary. Surely, such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either. Much depends on time and place, habits and appetites, ordinary expectations and social circumstances. In our view, clearly the two operations in the present case, namely, keeping a cycle stand and running a canteen are incidental or adjuncts to the primary purpose of the theatre."*

6. Per contra, Ld. Counsel Smt. Chopra for the Opponent submitted that the Applicant's unit is covered under the ESI Act w.e.f. 01.01.2007 and carried out the work of manufacturing tools and gauges. The Social Security Officer of the Opponent Corporation visited the unit for inspection on 30.07.2013, 23.09.2013, and 28.09.2013 and pointed out some omitted wages. Accordingly, the contribution was claimed by issuing C-18 ad-hoc followed by 45-A orders dated 25.08.2014 and 18.5.2015 for Rs. 1,09,517/- for the period from 04/09 to 03/10,

1,46,134/- for 04/10 to 03/11 and Rs. 8,988/- for 04/10 to 03/11 (in respect of S.S. Industries) respectively. The Applicant had filed an appeal before the Appellate Authority. The said application be dismissed. The Applicant deposited amount of Rs. 27,380/-. He failed to pay rest of the amount. The Applicant did not produce the record in respect of various contractors at the time of inspection on 30.07.2013, 23.09.2013 and 28.09.2013 and then on various personal hearings dated 25.06.2014, 11.07.2014, 28.07.2014 13.10.2014 wherein opportunities to the applicant to produce documentary evidence were given. However, no documentary evidence was produced by the Applicant on these dates. Hence, there was no other alternative than to determine the contribution due u/s 45-A at 6.5% of the total amount, which claimed as per the provisions of the ESI Act. The applicant has made an appeal u/s 45-AA for which personal hearing was offered to the applicant on 24.11.2014 but the applicant failed to attend the same. Hence, order under Section 45-AA was issued on 14.01.2015 by the Appellant Authority considering the facts and record available. As per the order, the Applicant is liable to pay the amount of Rs. 4,79,2019/-. No case is made out for relaxation of the condition of deposit of 50% amount. Hence, she prayed to reject the application.

7. To support her contention, the Ld. Counsel Smt. Chopra placed her reliance on the decision of ***Hon'ble Madras High Court in the case of Hotel Peacock Vs. Presiding Officer, I Additional City Civil Judge and Ors., MANU/TN/0577/2000***; wherein it has been observed in para 8 and 9 as under :-

> *"8. So far as the wording and language of the section is concerned, deposit of 50 per cent of the amount due from the principal employer as claimed by the Corporation is mandatory whatever be the dispute between the principal employer and the Corporation that is raised. In short, without the deposit of 50 per cent amount due from the*

principal employer, no matter shall be raised. This part of the section is not only mandatory, but also negative in disallowing rather prohibiting the employer from raising any dispute between himself and the Corporation, without making the deposit of 50 per cent of the amount due from him as claimed by the Corporation. Hence, it could be said that without the 50 per cent of the payment effected, no dispute could be raised by the, employer thus making the 50 per cent deposit a pre-condition for raising any dispute on the part of the employer between himself and the Corporation.

9. The second part of the section is a proviso and would give power to the Court either to waive or to reduce the said 50 per cent deposit to be made from the amount due from the principal employer and the Court in such event, waives or reduces the amount to be deposited, shall record the reasons in writing. Therefore, the scope for allowing such applications under Section 75(2-B) in either waiving or reducing the amount deposited in the Court is very much limited and narrow and unless a very strong case is made out, normally, the Courts would not allow such a plea put forth on the part of the principal employer for waiver or reduction of the amount to be deposited from out of the 50 per cent of the amount due from the employer to the Corporation."

8. Relying on the ratio laid down in aforesaid case, the Ld. Counsel Smt. Chopra for the Opponent submitted that this is not a fit case to grant waiver of the condition imposed by Section 75(2-B) of the ESI Act. However, the Applicant is coming with the case that it had availed the services of the outside contractors. He was not having control and supervision over the employees of the contractor. The list of the contractor / vendors has been given to the Opponent.

9. In view of the ratio laid down in the case of Subhash Chandra Bose case (Supra.) the Court has to deal with the aspect of the capacity of the Applicant was in the nature of supervisor or not ? Said fact is seriously disputed by the Applicant. Ratio laid down in the case of Hotel Peacock (Supra.) is not helpful to support the contention of the Opponent. Therefore, this Court is of the view that the Applicant has

raised the serious question about the fact and law. Hence, this Court thinks it proper to allow the application.

In the result, this Court passes following order :-

ORDER

1. The Application is allowed.
2. Condition of deposit of 50% amount is contemplated under Section 75(2-B) prior to deciding the interim relief is hereby waived.

Sd/-

Date :- 13.12.2019 (S. R. Tamboli)
Judge,
Place :- Pune Employees Insurance Court, Pune.
nsp