

*** THE HONOURABLE SRI JUSTICE RAVI NATH TILHARI**
***THE HONOURABLE SRI JUSTICE CHALLA GUNARANJAN**

CIVIL MISCELLANEOUS APPEAL No. 801 of 2008

% 24.03.2025

The Regional Director, ESI Corporation

.....Petitioner

And:

\$1. M/s. Sri Ramakrishna Rice Mill &
4 others

....Respondents.

!Counsel for the petitioner

: Sri Venna Kalyan Chakravarhi
rep. Sri U.R.P.Srinivas

^Counsel for the respondent

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<Gist:

>Head Note:

? Cases referred:

1. 2004 AIR SCW 4326
2. AIR Online 2023 SC 52
3. FAO No.1112 of 1988 and batch decided on 06.11.2024
By High Court of Punjab and Haryana at Chandigarh.

HIGH COURT OF ANDHRA PRADESH AT AMARAVATI

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CIVIL MISCELLANEOUS APPEAL No. 801 of 2008

DATE OF JUDGMENT PRONOUNCED: 24.03.2025

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE RAVI NATH TILHARI

&

THE HONOURABLE SRI JUSTICE CHALLA GUNARANJAN

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| 1. Whether Reporters of Local newspapers may be allowed to see the Judgments? | Yes/No |
| 2. Whether the copies of judgment may be marked to Law Reporters/Journals | Yes/No |
| 3. Whether Your Lordships wish to see the fair copy of the Judgment? | Yes/No |

RAVI NATH TILHARI,J

CHALLA GUNARANJAN,J

THE HONOURABLE SRI JUSTICE RAVI NATH TILHARI
THE HONOURABLE SRI JUSTICE CHALLA GUNARANJAN
CIVIL MISCELLANEOUS APPEAL NO: 801/2008

JUDGMENT:- *(per Hon'ble Sri Justice Ravi Nath Tilhari)*

Heard Sri Venna kalyan Chakravarthi, learned counsel representing Sri U.R.P.Srinivas, learned Standing Counsel for the appellant-ESI Corporation.

2. No representation for the respondents.
3. This appeal under Section 82 of the Employees' State Insurance Act, 1948 (in short 'ESI Act') has been filed by the Regional Director of ESI Corporation challenging the order dated 30.03.2007 in ESI O.P.No.75 of 2005 passed by the Principal Senior Civil Judge, Nellore.
4. The respondent No.1 – M/s.Sri Ramakrishna Rice Mill filed petition being ESI O.P.No.75 of 2005 under Section 75 of ESI Act with the prayer to declare that the said rice mill was not liable for coverage under the provisions of the ESI Act and to set aside the orders dated 02.01.2003 under Section 45A; dated 06.01.2003 and dated 24.03.2005 under Section 45G of the ESI Act, with further directions to the respondents therein (the present appellants) to refund the amounts together with interest at 6.69% per day.
5. The Respondent No.1 was a registered partnership firm which commenced doing milling of paddy by converting into rice and broken rice, bran and husk in the year 1980. It was its case that since beginning in the rice mill less than 9 employees were employed, including coolies on daily wages and contract labour.

At any point of time, the employed/workers did not exceed 9. They were also not on permanent basis. The rice mill was regularly and periodically being inspected and visited by Labour Officer, Inspector of Factories and Assistant Labour officer and occasionally, for three times, by the ESI Inspector. Those authorities used to sign in Attendance register, Wages register, Inspection register, Accident Register and Over-time Register being maintained by rice mill. Since the number of employees did not exceed 9, the rice mill was not covered under the ESI Act. However on 25.04.1998, the Insurance Inspector, ESI Corporation, Nellore visited the rice mill and after such visit, it received order dated 06.01.2003, on 10.01.2003 directing the District Manager to transfer Rs.75,381/- to ESI Corporation. The respondent No.1 was not liable to pay that amount which was illegally imposed, without giving due opportunity of hearing. The amount was recovered by the District Manager on 31.03.2003 and paid to ESI Corporation.

6. The Regional Director, ESI Corporation filed counter denying the averments of the petition and contending that the respondent No.1 was engaged in milling of raw rice with the aid of power and employed 12 persons for wages on 25.04.1998. So the provisions of Section 2(12) of ESI Act were attracted. The respondent No.1 was liable to make contributions. There was no illegality in issuing notice, passing the order and taking action under the ESI Act.

7. The District Manager, FCI, Nellore, filed counter. He denied the allegations made in the petition and submitted that he was in no way concerned with the dispute, but had acted only on the request made by ESI authorities being duty bound under the ESI Act to deduct and pay the amount.

8. The learned Principal Senior Civil Judge, Nellore framed the following point for consideration:

“Whether the petitioner is entitled for the relief as prayed for?”

9. On behalf of petitioner in ESI OP (respondent No.1 herein), Kanumuru Venkata Ramaiah @ Venkata Rama Naidu was examined as PW1 and on behalf of respondents therein (appellant herein), RW1 - P.L.N.Murthy was examined. The parties also filed their respective documentary evidences.

10. The learned Court recorded the finding that the respondent No.1 never employed more than 9 persons at any point of time. It was not covered under the ESI Act. ESI OP was allowed. The orders impugned were set aside, with the direction to the ESI Corporation to refund the amount of Rs.88,657/-, without interest.

11. Learned counsel for the appellant raised the only submission that, after the amendment in ESI Act, in 1989 vide Act 29 of 1989, with effect from 29.10.1989, under Section 1(6), the number of persons employed, is of no relevance. Even if the number of persons employed is less than 10, the ESI Act shall be applicable. He submitted that prior to the amendment of 1989, the number of employed person was relevant to consider the applicability of ESI Act but not after the 1989 amendment. He placed reliance in ***Employees State Insurance Corporation v. Hyderabad Race Club***¹ and ***ESI Corporation v. M/s.Radhika Theatre***².

¹ 2004 AIR SCW 4326

² AIR Online 2023 SC 52

12. We have considered the aforesaid submissions of learned counsel for the appellants and perused the material on record.

13. We record that, the finding of the learned Court that, there were less than 10 employed persons and that at any point of time the number of such persons did not exceed 9, was not challenged before us and no argument contrary to the said finding was advanced on that aspect. So, we proceed to consider the submission taking the finding on number of employed persons as 9 i.e., less than 10, as correct.

14. The main point for consideration therefore is whether in view of the amendment vide Act No. 29 of 1989, i.e., Section 1(6) of ESI Act, the number of employed persons is not relevant to determine the applicability of the ESI Act and depending on the answer to the aforesaid point, we would consider the legality or otherwise of the impugned order.

15. Section 1 of the ESI Act reads as under.

1. Short title, extent, commencement and application - (1) This Act may be called the Employees' State Insurance Act, 1948.

(2) It extends to the whole of India [].***

(3) It shall come into force on such date or dates as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and [for different States or for different parts thereof].

(4) It shall apply, in the first instance, to all factories (including factories belonging to the government) other than seasonal factories:

[PROVIDED that nothing contained in this sub-section shall apply to a factory or establishment belonging to or 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.]

(5) The appropriate Government may, in consultation with the Corporation and [where the appropriate Government is a State Government, with the approval of the Central Government], after giving one months' notice of its intention of so doing by notification in the Official Gazette, extend the provisions of this Act or any of them, to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise:

[PROVIDED that where the provisions of this Act have been brought into force in any part of a State, the said provisions shall stand extended to any such establishment or class of establishments within that part if the provisions have already been extended to similar establishment or class of establishments in another part of that State.]

(6) A factory or an establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under this Act or the manufacturing process therein ceases to be carried on with the aid of power.]

16. Section 1(4) of ESI Act, makes the ESI Act applicable in the first instance, to all factories (including factories belonging to the Government) other than seasonal factories. Further, as per the proviso, sub-section (4) shall not apply to a factory or establishment, belonging to or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under the ESI Act.

17. The expression 'factory' is defined in Section 2(12) of ESI Act, which reads as under:

"12. "factory" means any premises including the precincts thereof whereon ten or more persons are employed or were employed on any day of 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 Mines Act, 1952 (35 of 1952) or a railway running shed”

18. Section 2(12) provides that the ‘factory’ means any premises including the precincts thereof whereon ten or more persons are employed or were employed on any day of preceding twelve months, and in any part of which a manufacturing process is being carried on or is ordinarily so carried on, but it does not include a mine subject to the operation of Mines Act, 1952 or a railway running shed. So, as per the definition of the ‘factory’ to be a ‘factory’, there should be employed 10 or more persons i.e., in present, or 10 or more persons were employed previously on a date preceding 12 months. We are confining to the aspect of number of the persons employed, in view of the limited argument raised, and are not dealing with the other part i.e., manufacturing process. Consequently, if at present or on any date preceding 12 months, 10 or more persons are/were employed in any premises including the precincts thereof, it would be a ‘factory’ and covered by the ESI Act, subject however to the fulfilment of the other statutory requirements. The finding recorded in the present case is that there are less than 10 persons employed. So, we are of the view that the respondent No.1 would not be a ‘factory’ and therefore the ESI Act would not be applicable.

19. The submission of the appellant’s counsel that under Sub section (6) of Section 1, the number of the persons employed becomes irrelevant and therefore even if the number is less than 10, ESI Act will be applicable, is misconceived.

20. Sub-Section (6) of Section 1, starts, “a factory or an establishment to which this Act applies shall continue to be governed by this Act”. So, it provides for continuation of the applicability of ESI Act i.e., if the Act was already applicable,

then even after the reduction of number of persons employed it is reduced below 10, the Act shall continue to apply. The provision is clear that if the ESI Act was applicable to a 'factory' considering the number of the persons employed being not less than 10, then if there was reduction in the number of its employed persons below 10, still such factory would continue to be governed by the ESI Act. The reduction in number of employees below 10, would not bring out the factory from the purview of the ESI Act, after the amendment, is the correct reading and interpretation of Section 1(6) of the ESI Act.

21. It is not the case of the appellant that the respondent NO.1 was previously covered by ESI Act. It was for the first time, respondent No.1 was sought to be covered under the ESI Act vide the proceedings impugned before EI Court. In our view, for the applicability of ESI Act, for the first time, what is relevant is that, it should be a 'factory' as defined under Section 2(12). If the number of persons employed is less than 10, it would not be a 'factory' under Section 2(12) for the purposes of Section 1(4). Sub-section (6) of Section 1, is not relevant at all in the present case. Sub-Section (6) applies to a 'factory' which was under the purview of the ESI Act and there was reduction in the number of the persons employed below 10, which is not the case at hand.

22. In ***M/s. Radhika Theatre*** (supra) the Radhika Theatre was running since 1981 and it paid ESI contributions up to September, 1989. Thereafter, as its employees were less than 20, it did not pay the contributions. The demand notices issued by ESI Corporation were challenged before the EI Court on the ground inter-alia that prior to the insertion of Sub-section (6) of

Section 1 w.e.f. 20.10.1989, the Radhika Theatre employed less than 20 persons, and therefore, it was not liable under the provisions of the ESI Act. The EI Court dismissed the case. Further, the High Court allowed the appeal taking the view that, sub-Section (6) of Section 1 came to be inserted w.e.f. 20.10.1989, and the same shall not be applicable retrospectively to an establishment, established prior to 20.10.1989/31.03.1989. The matter reached the Hon'ble Apex Court. Hon'ble Apex Court held that prior to the insertion of Sub-section (6) of Section 1 of the ESI Act, only those establishments/factories engaging more than 20 employees were governed by the ESI Act. However, after 20.10.1989 i.e., after the amendment, there was a radical change. Under the amended provision a factory or establishment to which ESI Act applied would be governed by the ESI Act notwithstanding that the number of persons employed therein at any time fell below the limit specified by or under the ESI Act. Therefore, on and after 20.10.1989, irrespective of number of persons employed, a factory or an establishment shall be governed by the ESI Act.

23. Para 7 of ***M/s. Radhika Theatre (supra)*** reads as under:

"7. Prior to insertion of Sub-section (6) of Section 1 of the ESI Act, only those establishments/factories engaging more than 20 employees were governed by the ESI Act. However, thereafter, Sub-section (6) of Section 1 of the ESI Act has been inserted on 20.10.1989, and after 20.10.1989 there is a radical change and under the amended provision a factory or establishment to which ESI Act applies would be governed by the ESI Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under the ESI Act. Therefore, on and after 20.10.1989, irrespective of number of persons employed a factory or an establishment shall be governed by the ESI Act. Therefore, for the

demand notices for the period after 20.10.1989, there shall be liability of every factory or establishment irrespective of the number of persons employed therein. With respect to such a notice it cannot be said that amended Section 1 inserting Sub-section (6) is applied retrospectively as observed and held by the High Court. Only in case of demand notice for the period prior to inserting Sub-section (6) of Section 1 of the Act, it can be said that the same provision has been applied retrospectively. Therefore, the High Court has committed a very serious error in observing and holding that even for the demand notices for the period subsequent 20.10.1989 i.e., subsequent to inserting Sub-section (6) of Section 1 the said provision is applied retrospectively and the High Court has erred in allowing the appeal and setting aside the demand notices even for the period subsequent to 20.10.1989. Sub-section (6) of Section 1 therefore, shall be applicable even with respect to those establishments, established prior to 31.03.1989/20.10.1989 and the ESI Act shall be applicable irrespective of the number of persons employed or notwithstanding that the number of persons employed at any time falls below the limit specified by or under the ESI Act.”

24. At this stage, we may mention that Section 2(12) which defines ‘factory’, prior to its substitution by Act 29 of 1989, Section 3(v) w.e.f. 20.10.1989, in the definition of the ‘factory’ Clause (b) used the expression “20 or more persons”. After the amendment, the expression used is “10 or more persons were employed”.

25. Learned counsel for the appellant emphasised that in ***M/s. Radhika Theatre***, it has been held that, even if the number of employees was less than 10 in view of the amendment in 1989, the ESI Act was applicable. So, the demand notice issued was justified and the order passed by EI Court was unsustainable. The submission that the Hon’ble Apex Court has held that after the amendment, irrespective of number of persons employed, a factory or an establishment, would be governed by the ESI Act, is not the correct reading of the judgment in ***M/s. Radhika Theatre*** (supra). The judgment clearly shows

that Radhika Theatre was covered under ESI Act, even before the amendment of the year 1989. Thereafter, employees were less than 20 in number when Sub-section (6) of Section 1 was incorporated. The Hon'ble Apex Court observed in para-7 as quoted above that ".....and under the amended provision **a factory or establishment to which ESI Act applies would be governed by the ESI Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under the ESI Act.**" So it is very clear from the judgment that, for the applicability of Sub-section (6) of Section 1, the first and foremost condition is that the Act was applicable to the 'factory' or the 'establishment'; which shall continue to be applied even if the number falls below 10. Section 1(6) makes the continuity, of the applicability of the Act, irrespective of reduction in the number of persons employed below specified limit under or by the Act.

26. The aforesaid view of ours though follows on plain reading of the judgment, it also finds support in the recent judgment in ***Employees State Insurance Corporation v. Punjab State Electricity Board and batch***³, wherein the High Court of Punjab and Haryana at Chandigarh, on consideration of ***M/s.Radhika Theatre*** (supra) has taken the view that Sub-section (6) of Section 1 governs those premises which were covered under the ESI Act prior to Amending Act of 1989. Para Nos.16 to 19 in ***Punjab State Electricity Board*** (supra) read as under:

³ FAO No.1112 of 1988 and batch decided on 06.11.2024 by High Court of Punjab and Haryana at Chandigarh.

"16. In terms of Section 1(4), the Act is applicable at the first instance to all factories including factories belonging to the government other than seasonal factories subject to notification in the official gazette under Section 1(3). 'Factory' is defined under Section 2(12). Prior to amendment of 1989, Section 2(12) read as under :

"Section 2(12)" 'factory means any premises including the precincts thereof where on twenty or more persons are working or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on but does not include a mine subject to the operation of the Indian Mines Act, 1923 or a railway running shed:"

17. The provision came for consideration before the Supreme Court in the case of Employees State Insurance Corporation vs. Radhika Theatre, 2023 AIR (SC) 673, wherein the Supreme Court held as under :

"7. Prior to insertion of Sub-section (6) of Section 1 of the ESI Act, only those establishments/factories engaging more than 20 employees were governed by the ESI Act. However, thereafter, Sub-section (6) of Section 1 of the ESI Act has been inserted on 20.10.1989, and after 20.10.1989 there is a radical change and under the amended provision a factory or establishment to which ESI Act applies would be governed by the ESI Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under the ESI Act. Therefore, on and after 20.10.1989, irrespective of number of persons employed a factory or an establishment shall be governed by the ESI Act."

(emphasis supplied)

18. Finding of fact recorded by the Commissioner regarding number of workmen employed with the respondent cannot be faulted as it has been proved that the maximum sanctioned strength was 15. In terms of provision prior to 1989, the determinating factor for any premises to come within the purview of 'factory' for the purpose of ESI Act, was not only the manufacturing purpose but also the number of persons employed. Prior to Amending Act of 1989, the mandate of the statute was that the factory means any premises including the precincts employing 20 or more persons. In the present case, number of persons employed being less than 20, the premises of the respondent would not fall within the ambit of 'factory' as adumbrated under Section 2(12) prior to Amending Act of 1989. The plea raised by counsel representing the appellant invoking Section 1(6) is also misplaced. Bare reading of Section 1(6) leads to the inference that the same governs those premises which were covered under

the ESI Act prior to Amending Act of 1989. The same is clear from the following observations made by Apex Court in the Radhika Theatre's case (supra) :

"7.Therefore, for the demand notices for the period after 20.10.1989, there shall be liability of every factory or establishment irrespective of the number of persons employed therein. With respect to such a notice it cannot be said that amended Section 1 inserting Subsection (6) is applied retrospectively as observed and held by the High Court. Only in case of demand notice for the period prior to inserting Sub-section (6) of Section 1 of the Act, it can be said that the same provision has been applied retrospectively. Therefore, the High Court has committed a very serious error in observing and holding that even for the demand notices for the period subsequent 20.10.1989 i.e., subsequent to inserting Sub-section (6) of Section 1 the said provision is applied retrospectively and the High Court has erred in allowing the appeal and setting aside the demand notices even for the period subsequent to 20.10.1989. Sub-section (6) of Section 1 therefore, shall be applicable even with respect to those establishments, established prior to 31.03.1989/ 20.10.1989 and the ESI Act shall be applicable irrespective of the number of persons employed or notwithstanding that the number of persons employed at any time falls below the limit specified by or under the ESI Act."

19. Since there is nothing on record to prove that the respondent employed 20 or more than 20 persons prior to Amending Act of 1989, ESI Court rightly held that respondent was not covered under the ESI Act prior to 1989-the period for which demand was raised. Finding no merit in the instant appeal(s), the same are dismissed."

27. The **Hyderabad Race Club** (supra) is not on the point. The question therein was, whether the Hyderabad Race Club was an establishment under the ESI Act. There, the question was not with respect to the applicability or interpretation of Section 1(6) of the ESI Act.

28. We are of the considered view that Section 1(6) of ESI Act is not attracted to the present case. The number of employed person, if there is reduction below the specified number, with respect to a 'factory' as covered under Section 2(12) of the Act, after the amendment of 1989, then only the number of employed persons would not have the effect of bringing out the factory out of the purview of the ESI Act which Act would continue to apply. But, as in the present case, the ESI Act was previously not applicable at all and for the first time it was being

brought under ESI Act, the number of employed person would be relevant. As it is below 10, the ESI Act could not apply. We accordingly, answer the point framed by us.

29. There is no illegality in the order under challenge.

30. The appeal does not involve any substantial question of law and is dismissed.

As a sequel thereto, miscellaneous petitions, if any pending, shall also stand closed.

RAVI NATH TILHARI,J

CHALLA GUNARANJAN,J

Dated:
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THE HONOURABLE SRI JUSTICE RAVI NATH TILHARI
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