

**HIGH COURT OF GUJARAT (D.B.)****GUJARAT NARMADA VALLEY FERTILIZERS CO LTD****Versus****C V JOSEPH, JT DIRECTOR, SUB-REGIONAL OFFICE, EMPLOYEES STA & 1  
OTHER(S)****Date of Decision:** 24 January 2024**Citation:** 2024 LawSuit(Guj) 328**Hon'ble Judges:** [Sunita Agarwal](#), [Aniruddha P Mayee](#)**Case Type:** Special Civil Application**Case No:** 7824 of 2008; 5329 of 2010**Subject:** Constitution, Insurance**Acts Referred:**[Constitution Of India Art 21, Art 14](#)[Employees State Insurance Act, 1948 Sec 90, Sec 41, Sec 40\(1\), Sec 2\(9\), Sec 2\(13\),  
Sec 40, Sec 2\(17\), Sec 45\(1\)](#)**Final Decision:** Petition disposed**Advocates:** [Kunal Nanavati](#), [Kaustubh Shrivastava](#), [Nanavati Associates](#), [D S  
Vasavada](#), [Hemant S Shah](#)**Sunita Agarwal, C.J.****[1] Order IN SPECIAL CIVIL APPLICATION NO. 7824 OF 2008**

1. This is a wholly misconceived petition filed by the Gujarat Narmada Valley Fertilizers Company Limited (in short as "GNVFCL"), seeking to challenge the notice dated 23.01.2008 issued by the Employees' State Insurance Corporation (in short as "ESI Corporation"), asking the petitioner company to comply with the provisions of the Employees' State Insurance Act, 1948 ("ESI Act" in short), with respect to the contract workers engaged by the petitioner through the labour contractors.

**[2]** A bare perusal of the notice itself indicates that there is a reference of a Government of India Notification dated 23.12.1993, whereunder it was provided that "Areas within the Municipal limits of City Bharuch, Taluka and District Bharuch and

within the revenue and Panchayat limits of villages Bholav, Zadeshwar, Vadadla, Nandelav including Industrial Estate and GIDC Estate Bholav, Taluka and District Bharuch", came under the ESI Scheme with effect from 16.01.1994 and the said Notification clearly covers "Industrial Estates" and as such ESI Notified Areas are inclusive of Notified Centers of State Government of Gujarat.

**[3]** The notice further states that ESI Scheme is applicable to the area in which the petitioner company, namely GNVFCL and M/s. Narmada Chematur Petrochemicals Limited (in short as "NCPL") are situated. It further clarifies that the exemption granted by the State Government is applicable only to regular employees of the petitioner company and the said exemption is not applicable to a large number of contract labourers engaged by the petitioner company. There is a reference of Section 40(1) of the ESI Act to assert that the Principal Employer is liable to pay contributions in respect of all contract employees. It was advised that in order to avoid any liability afterwards, the petitioner company shall take the following steps:-

"1. Please ascertain whether the labour contractors engaged by you are independently covered under the ESI Act or not? If contractors are independently ESI covered, ensure to verify register of wages in Form-6 and payment challans, returns etc. before releasing the payment of such contractors. 2. If the contractors are not independently covered under ESI Act, ensure to deduct contribution @ 6.5% of the bill amount from such contractors and remit to ESI Fund A/c. No.1 under your Code No. i.e. 38-18839."

**[4]** The notice further states that office of the ESI Corporation has received number of complaints regarding non-extending of ESI benefits to the contract labourers engaged by the Company and that the contract labourers are entitled for benefits like ESI. It was further directed that as Principal Employer, the petitioner company is duty bound to ensure that:-

"a.All your contractors' labours are registered under ESI Scheme.

b. All such contract workers are issued with ESI identity cards."

**[5]** The notice further requires the petitioner company to regulate the payments to all the contractors only after confirming/insisting the compliance under the ESI Act by the contractors and that the petitioner company is required to instruct all its contractors in that regard and advise them to submit declaration forms in respect of all contract labourers deployed in the factory run by the petitioner company within the specified time therein.

**[6]** The notice also refers to the requirement of compliance under the ESI Act by the NCPL, which was covered under the ESI Act from 20.12.1994 vide ESI Code No.38-20262 till the merger of the said company with the petitioner company, namely M/s. GNVFCL.

**[7]** It is pertinent to note that the petitioner company, instead of submitting any reply to the said notice dated 23.01.2008, had filed the instant writ petition on 15.02.2008 with the following reliefs: -

"(A) Your Lordships may be pleased to issue a writ of Mandamus or a writ in the nature of Mandamus and/or any other appropriate writ, direction or order, quashing and setting aside impugned notice/ circular dated 23.01.2008 at Annexure-A;

(B) Your Lordships may be pleased to declare that ESI Act is inapplicable to all employees working in the petitioner company during the operation of the exemption granted vide notification dated 28.11.2003 and/or notification granting status of notified area;

(C) Pending admission and final hearing of the present petition, Your Lordships may be pleased to stay the impugned notices at Annexure-A and further be pleased to restrain the respondents from taking any coercive action against the petitioner pursuant to the aforesaid notice/circular."

**[8]** The basis of challenge to the notice dated 23.01.2008 is that the petitioner company was granted exemption from the applicability of ESI Act vide notification dated 28.11.2003.

**[9]** The attention of the Court is invited to the said Notification to assert that the petitioner company has been granted exemption from the operation of the ESI Act with effect from 16.01.1994, for all its employees. The contention is that the word "employees" to be read and understood in terms of the definition of the same as assigned in Section 2(9) of the ESI Act. The contention is that the contract employees engaged by the petitioner company would fall within the meaning "employees" as defined in the aforesaid provision, and, therefore, exemption granted by the Notification dated 28.11.2003 issued by the Government of Gujarat would be extended to all contract employees engaged by the petitioner company. It was thus argued that the impugned notice dated 23.01.2008 is without jurisdiction.

**[10]** A perusal of the averments made in the writ petition indicates that the only ground taken to assail the notice dated 23.01.2008 is that the area of operation of the petitioner company is in the industrial area which has been declared as Notified Area under the Gujarat Industrial Development Act, 1962. On earlier occasion, the show

cause notice was issued by ESI Corporation, which was received by the petitioner company on 29.05.2001. The said show cause notice was challenged in a writ petition, namely Special Civil Application No. 9629 of 2002. However, pending the said writ petition, Notification dated 28.11.2003 was issued granting exemption to the petitioner company. Resultantly, the said writ petition was disposed of noticing that no cause of action survived. It was further submitted by the learned counsel for the petitioner that the exemption granted vide Notification dated 28.11.2003 is in exercise of powers conferred on the State Government by virtue of Section 90 which states that the exemption to any factory establishment belonging to any local authority from the operation of the ESI Act can be granted. The intent while granting the exemption was to include all employees employed directly or indirectly in the industrial establishment of the petitioner company. There is no intention to exempt a particular class of persons/employees employed in the factory or the establishment to which the ESI Act applied from the operation of the Act. The attempt of the ESI Corporation to extend the applicability of the ESI Act to contract labourers, thus, is in clear contravention to the Notification dated 28.11.2003.

**[11]** We may note that no one has put in appearance on behalf of the respondent- ESI Corporation in the instant matter. However, considering the contentions of the learned counsel for the petitioner, we may note the provisions of Sections 40, 41 and 90 of the ESI Act as under: -

**"40. Principal employer to pay contributions in the first instance.-** (1) The principal employer shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution.

(2) Notwithstanding anything contained in any other enactment but subject to the provisions of this Act and the regulations, if any, made thereunder, the principal employer shall, in the case of an employee directly employed by him (not being an exempted employee), be entitled to recover from the employee the employee's contribution by deduction from his wages and not otherwise:

Provided that no such deduction shall be made from any wages other than such as relate to the period or part of the period in respect of which the contribution is payable, or in excess of the sum representing the employee's contribution for the period.

(3) Notwithstanding any contract to the contrary, neither the principal employer nor the immediate employer shall be entitled to deduct the employer's contribution from any wages payable to an employee or otherwise to recover it from him.

(4) Any sum deducted by the principal employer from wages under this Act shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was deducted.

(5) The principal employer shall bear the expenses of remitting the contributions to the Corporation."

**41. Recovery of contributions from immediate employer.**-(1) A principal employer, who has paid contribution in respect of an employee employed by or through an immediate employer, shall be entitled to recover the amount of the contribution so paid (that is to say the employer's contribution as well as the employee's contribution, if any) from the immediate employer, either by deduction from any amount payable to him by the principal employer under any contract, or as a debt payable by the immediate employer.

[(1A) The immediate employer shall maintain register of employees employed by or through him as provided in the regulations and submit the same to the principal employer before the settlement of any amount payable under sub-section (1).

(2) In the case referred to in sub-section (1), the immediate employer shall be entitled to recover the employee's contribution from the employee employed by or through him by deduction from wages and not otherwise, subject to the conditions specified in the proviso to sub-section (2) of section 40."

xxx xxx xxx

**90. Exemption of factories or establishments belonging to government or any local authority.**- The appropriate government may, after consultation with the Corporation, by notification in the Official Gazette and subject to such conditions as may be specified in the notification, exempt any factory or establishment belonging to any local authority, 44 [from the operation of the Act], **if the employees in any such factory or establishment are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.**"

**[12]** A reading of Section 40 of the ESI Act indicates that a duty is cast upon the Principal Employer to pay in respect of every employee, employed by him whether directly or by or through an immediate employer, both the employer's contribution and the employee's contribution.

**[13]** Section 41 further states that a Principal Employer, who has paid contribution in respect of an employee employed by or through an immediate employer, shall be

entitled to recover the amount of the contribution so paid (that is the employer's contribution, as well as the employee's contribution, if any) from the Immediate Employer. A duty is cast on the Immediate Employer to maintain a register of employees employed by or through him as provided in the regulations and submit the same to the Principal Employer before the settlement of any amount payable under Sub-Section (1). The words " Immediate Employer" has been defined in Section 2(13), which is in relation to the employees employed by or through him, and includes a contractor. The words "Principal Employer" has been defined in Section 2(17), which covers the petitioner company herein and, as such, it is the Principal Employer, in so far as the contract employees engaged by it are concerned.

**[14]** From the conjoint reading of the aforesaid provisions, it is evident that it is the duty of the Principal Employer to ensure and to pay the employer's contribution as well as the employee's contribution to the ESI Corporation and it is entitled to recover the amount of the contribution so paid from the Immediate Employer. The Immediate Employer is further duty bound to maintain a register of employees employed by or through him and submit the same to the Principal Employer.

**[15]** Having gone through the above noted statutory provisions when we read the impugned notice dated 23.01.2008, we find that the directions contained therein are to ensure the requirement of Section 40 of the ESI Act, which cast a duty on the Principal Employer to ensure that all the contract labourers engaged by the petitioner company are registered under the ESI Scheme and they are independently covered under the ESI Act. In case the contractors are not independently covered, the deductions towards contribution under the ESI Act shall be made from the bill amount of such contractors, who shall remit the same to the ESI Corporation fund. The petitioner company was required to ensure that all such contract workers, who are engaged by it through the labour contractors are issued ESI Identity Card. The instruction therein is that all the contractors engaged by the petitioner company shall submit a declaration form in respect of all contract labourers deployed in the factory run by the petitioner company so as to ensure the compliance of ESI Act.

**[16]** Thus, the direction contained in the notice is sought to be challenged on the plea of lack of jurisdiction of the ESI Corporation to call upon the petitioner company to ensure compliance of the said directions on the premise that by virtue of the Notification dated 28.11.2003 issued by the State Government, contract employees engaged by the petitioner company through the labour contractors are covered under the exemptions granted vide Notification issued under Section 90 of the ESI Act. To deal with this contention, we have gone through the provisions of Section 90, a bare reading of which indicates that the exemption Notification may be issued by the appropriate Government ( the State Government in the instant case), to exempt any

factory or establishment belonging to any local authority from the operation of the ESI Act " if the employees in any such factory or establishment are otherwise in receipt of benefits substantial or similar or superior to the benefits provided under the ESI Act."

**[17]** Having noted above, we find that the exemption to any factory or establishment belonging to any local authority from the operation of the ESI Act is not absolute, so as to apply the same with respect of all categories of the employees employed by such factory or establishment. The the word " employees" has been defined in Section 2(9) in the manner so as to include even the contract employees employed by or through an Immediate Employer, but the purpose of such definition is to cover even the contract employees under the provisions of the ESI Act. The word "employees" as occurring in Section 90, even if is read along with the definition of the said word in Section 2(9), the same has to be read and understood in the manner in which the exemption can be granted under Section 90, which exempted only in case the employees in any factory or establishment are otherwise in receipt of benefits substantially similar or superior to the benefits provided under the ESI Act. Meaning thereby, only such factory or establishment belonging to any local authority, whose employees are in receipt of the benefits substantially similar or superior to the benefits provided under the ESI Act are entitled to exemption. There is no whisper in the entire writ petition that the contract employees engaged by the petitioner company or through an Immediate Employer/ contractor are otherwise in receipt of the benefits substantially similar or superior to the benefits provided under the ESI Act, as contemplated under Section 90 of the ESI Act. Keeping this in mind, when we have gone through the Notification dated 28.11.2003, we find that the exemption was granted to the petitioner company on certain conditions mentioned therein in paragraph No.2 of the said Notification, which are relevant to be extracted hereinunder :-

"2.The above exemption is subject to the following conditions namely:- (1) The aforesaid establishment/factory wherein the employees are employed shall maintain a register showing the names, and designations of the exempted employees:

(2) Notwithstanding this exemption, the employees shall continue to receive such benefits under the said Act to which they might have become entitled to on the basis of the contribution paid prior to the date from which exemption granted by this notification operates.

(3) The contributions for the exempted period, if already paid shall not be refunded; (4) The employer of the said establishment/ factory shall submit in respect of the period during which that factory was subject to the operation of the said Act (hereinafter referred to as the said period), such returns in such form and

containing such particulars as were due from it in respect of the said period under the Employees' State Insurance (General) Regulations, 1950."

**[18]** The Notification dated 28.11.2003 further empowers any Inspector appointed by the ESI Corporation under subsection (1) of Section 45 or other officials of the ESI Corporation authorised in this behalf to do the following acts for the purpose of: -

"3. Any Inspector appointed by the Corporation under sub-section 91) of Section 45 of the said Act, or other official of the Corporation authorised in this behalf shall, for the purpose of.

(i) Verifying the particulars contained in Assessment Year return submitted under sub-section (1) of Section 44 of the said period, or

(ii)ascertaining whether registers and records were maintained as required by the Employees' State Insurance (General) Regulations, 1950 for the said period; or,

(iii) ascertaining whether the employees continue to be entitled to benefits provided by the employer in cash and find being benefits in consideration of which exemption is being granted under this notification; or (iv) ascertaining whether any of the provisions of the Act had been complied with during the period when such provisions were in force in relation to the said factory be empowered to--

(a) required the principal or immediate employer to furnish to him such information as he may consider necessary; or

(b)enter any factory, establishment, office or other premises occupied by such principal or immediate employer at any reasonable time and require any person found in-charge thereof to produce to such Inspector or other official and allow him to examine such documents, books and other documents relating to the employment of persons and payments of wages or to furnish to him such information as he may consider necessary; or

(c) examine the principal or immediate employer, his agent or servant, or any person found in such factory, establishment, office or other premises or any person whom the said Inspector or other official has reasonable cause to believe to have been an employer; or (d)make copies of or take extracts from any register account book or other document maintained in such factory establishment, office or other premises."

**[19]** A bare reading of the Notification of exemption dated 28.11.2003, which is the bone of contention of the learned counsel for the petitioner, itself indicates that to avail the exemption, the petitioner company is required to fulfill the conditions maintained



therein such as to maintain a register of the exempted employees. The official of the ESI Corporation is authorised to ascertain whether registers and records are maintained as required by the regulations framed under the ESI Act, namely Employees State (General) Regulation, 1950 (in short as "the Regulations, 1950) and further to require the Principal or the Immediate Employer to furnish to him such information as he may consider necessary to enter any factory or establishment, office or other premises occupied by such Principal or Immediate Employer and require any person found in-charge to produce and allow him to examine such documents, books and other documents relating to the employment of persons and payment of wages or to furnish to him such information as he may consider necessary. The Inspector appointed by the ESI Corporation under sub-section (1) of Section 45 of the ESI Act or other official of the ESI Corporation authorised in this behalf is also empowered to ascertain whether the employees continue to be entitled to benefits provided by the employer in cash and kind being benefits in consideration of which exemption is being granted under the said Notification.

**[20]** The above noted contents of the Notification dated 28.11.2003 read with Section 90 of the ESI Act, make it evident that to avail the exemption under the Notification dated 28.11.2003, the requirement of Section 90 of the ESI Act, as narrated in the Notification, is to be fulfilled. Only in such cases, where the exempted employees are in receipt of the benefits substantially similar or superior to the benefits provided under the ESI Act and in whose respect the register, as required by the Employees State Insurance (General) Regulations, 1950 is maintained by the employer, exemption can be availed or extended.

**[21]** In the case of the petitioner company, to seek exemption from the ESI Act, under Section 90 by virtue of the Notification dated 28.11.2003 issued under Section 90 of the ESI Act, it was incumbent upon the petitioner company to demonstrate and establish that the contract employees engaged by it through Immediate Employer or labour contractor are in receipt of the benefits substantially similar or superior to the benefits provided under the ESI Act and further that the petitioner company is maintaining register of such contract employees as required by the Regulations, 1950 framed under the ESI Act.

**[22]** There is no whisper in the entire writ petition about the same. On the plain and simple assertion of exemption granted under Section 90 by virtue of the Notification dated 28.11.2003, issued in exercise of the power conferred under Section 90 read with the definition of employees under Section 2(9) of the ESI Act, the contention of the learned counsel for the petitioner that even the contract employees are exempted by virtue of the Notification dated 28.01.2003, is found misconceived. No foundational basis has been laid in the writ petition to demonstrate that the petitioner company is

complying with the conditions of the Notification dated 28.11.2003 so as to cover the contract employees engaged by it through the contractors within the purview of the said Notification.

**[23]** Moreover, the challenge in the writ petition is to the show cause notice, to which no reply had been given by the petitioner company at the relevant point of time. The petitioner company straightaway ran to this Court to challenge the notice dated 23.01.2008 without submitting a reply to lay factual foundation to assail the said notice.

**[24]** We may further record that during the pendency of the instant petition, which was initially cognizable by a Single Bench of this Court, amendment application namely Civil Application No. 3392 of 2009 was filed seeking the stay of the operation and implementation of two notices dated 03.03.2009 and 04.03.2009, whereby the NCPL was asked to submit year-wise salary/wages details of all its regular/contract employees for the period from 20.12.1994 till its merger with the petitioner company, i.e. upto 15.02.2007. Both the notices were addressed to the erstwhile NCPL, which was merged with the petitioner company with effect from 15.02.2007. The challenge to the said notices was on the ground that the area in which the erstwhile company, namely M/s. Narmada Chematur Petrochemicals Limited was situated, was also a Notified Area and, hence the provisions of ESI Act would not be applicable to the erstwhile NCPL on the same principle that the ESI Act is not applicable to the petitioner company.

**[25]** While disposing of the amendment application, vide judgement and order dated 21.04.2009, the learned Single Judge has noted that if the applicant company does not want to provide the details, which have been called upon, particularly in view of the status quo order dated 17.10.2008, then it may opt to do so, i.e. it may decide to not provide the details till further order, but that will be at its own risk and consequences and if the company fails in the petition, then it would not be allowed to take a plea at a later stage that now the contractors are not working in the company and/or the details about the contract labourers are not available and at that stage it would be open to the department to draw its own inference including adverse inference in accordance with law.

Alternatively, the Company may collect the details and provide it to the ESI Corporation without prejudice to its contentions, however, the ESI Corporation shall maintain details on the record of the case, but shall not proceed further with the hearing of the matter during the pendency of the writ petition.

**[26]** Having noted the above observations of this Court in the judgement and order dated 21.04.2009, while dealing with the amendment application seeking to challenge the notices dated 03.03.2009 and 04.03.2009 addressed to the erstwhile NCPL, for the period prior to the merger with the petitioner company, we are of the considered view that the petitioner company is required to submit answer to three notices under challenge herein, namely the show cause notice dated 23.01.2008 (challenged in the original writ petition) as also the notices dated 03.03.2009 and 04.03.2009 (challenged by way of amendment application), to the ESI Corporation giving details as sought therein. The petitioner company is required to establish by producing cogent material before the ESI Corporation, while submitting reply to the notice dated 23.01.2008 that all the contract employees engaged by it through the labour contractors (Immediate Employer) are/were covered by the Notification dated 28.11.2003, being exempted employees having fulfilled the conditions of Section 90, which provides that the exemption can only be granted to such factory or establishment belonging to any local authority from the operation of the ESI Act, if the employees in the factory or establishment are otherwise in receipt of benefit substantially similar or superior to the benefits provided under the ESI Act. The entire details called for by the ESI Corporation by the notice dated 23.01.2008 is required to be furnished by the ESI Corporation to make out its case of the contract employees being covered by the Notification dated 28.11.2003, as against the stand of the ESI Corporation that the exemption granted by the State Government to the petitioner company is applicable only to regular employees and the said exemption is not applicable to large number of contract labourers engaged by it. The petitioner company is also required to furnish all details in reply to the notices dated 03.03.2009 and 04.03.2009, if not already submitted/provided to the ESI Corporation in light of the directions contained in the judgement and order dated 21.04.2009.

**[27]** All the above details along with the reply to the aforesaid three notices dated 28.01.2008, 03.03.2009 and 04.03.2009 are required to be furnished by the petitioner company, after collecting the details from all the concerned persons, for the period as contained in the aforesaid notices, within a period of two months from today.

**[28]** On receipt of the said reply, along with the details as directed hereinabove, within the period prescribed by us, the ESI Corporation shall be under obligation to deal with the contentions and materials furnished by the petitioner company and pass reasoned and speaking order, directly in accordance with law, to arrive at its own conclusion with regard to the applicability of the exemption vide Notification dated 28.11.2003 in respect of the contract employees engaged by the petitioner company (Gujarat Narmada Valley Fertilizers Company Limited), as also with respect to the erstwhile

company namely NCPL, within a further period of two months from the date of receipt of the above reply.

**[29]** It is made clear that, in case, the petitioner fails to furnish its reply along with the details required by the impugned notices, within the time given above by us, it would be open for the respondent ESI Corporation to proceed in accordance with law.

**[30]** With the above observations and directions, the writ petition stands disposed of.

**ORDER IN SPECIAL CIVIL APPLICATION NO. 5329 OF 2010**

**[31]** The instant petition has been filed by one person claiming to be an active member of GIDC Employees Union, Ankleshwar, Bharuch, who claims to be an employee employed through a contractor of the company, namely, Gujarat Narmada Valley Fertilizers Company Limited. The challenge in the instant writ petition is to the Notification dated 28.11.2003 being violative of Articles 14 and 21 of the Constitution of India on the premise that the said Notification deprives the contract workers of the right to get the benefits of the ESI Act. Prayer is to quash the Notification and direct the ESI Corporation to implement and operate the notice dated 23.01.2008 by invoking the provisions of the ESI Act qua the contract workers.

**[32]** Noticing the above, we may only record that the instant petition has been filed in the capacity of the petitioner being a member of GIDC Employees Union, Ankleshwar without there being any resolution of the general body of the Union authorising the petitioner to institute the writ petition in a representative capacity, on behalf of all contract workers engaged by the company, namely the GNFC.

**[33]** Be that as it may, in view of the detailed order passed in the connected Special Civil Application No. 7824 of 2008, the present petition also stands disposed of in the same terms.