

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.846 OF 2016**

1) Confederation of Real Estate
Developers' Association of India at Goa
(CREDAI), with its Office at 315, 3rd Floor,
Gera Emporium II, Patto, Panaji 403001
(Goa), represented by its Secretary,
Mr. Jose Braganza, son of Jose Filipe
Braganza, aged 37 years, married
Indian National, Resident of H.No.130,
Angod, Mapusa, Goa.

2) M/s. Supreme Real Estates,
having its registered Office at
“Supreme”, behind New Telephone
Exchange, Opposite Bombi House,
Margao, Goa, represented herein by its
authorised Partners,
Mr. Yogesh Yeshwant Naik,
aged 37 years, married, businessman,
Indian National, resident of E-74,
“Bombi House”, Comba, Margao, Goa.

3) Risara Properties, with its Office at
Risara House, Tonca, Miramar,
Panaji, 403 001- (Goa), represented by
Mr. Gaurang Mangesh Suctancar,
son of Mangesh Suctankar, major of age,
businessman, married, Indian National,
resident of Dona Paula, Panaji, Goa.

..... **Petitioners.**

V/s

1) Employees' State Insurance Corporation,
Pancheep Bhawan,
C.I.G. Road, New Delhi 110 002.
represented by its Additional Commissioner
(Rev.).

2) Employees' State Insurance Corporation
(Regional Office-Goa),
Ministry of Labour and Employment,
Government of India,
Panchadeep Bhavan,
EDC Plot No.23, Patto, Panaji,Goa.
represented by its Regional Director

..... **Respondents.**

Mr. Shivan Desai, Advocate for the petitioners.

Ms. A.A. Agni, Senior Advocate with Ms. D. Bakal, Advocate
for the respondents.

**CORAM :- ANOOP V. MOHTA &
NUTAN D. SARDESSAI, JJ.**

Judgment reserved on :- 01/03/2017.

Judgment pronounced on : 14/03/2017.

J U D G M E N T :- (PER ANOOP V. MOHTA, J.)

The petitioners, who are carrying on their business of construction and real estate development in the State of Goa, through their registered Association along with its Members have challenged Circular No.P.12/11/11/60/20110-REV.II dated 31st July, 2015 issued by respondent No.1 (the Corporation) under the provisions of the Employees' State Insurance Act, 1948 (the Insurance Act) and E.S.I. (General) Regulations 1950, (the Regulation) including the Goa, Daman and Diu Employees' State Insurance (Medical Benefit) Rules,

1975 (the Rules) as, by the Circular, the Insurance Act and the Schemes have been extended to all construction site workers.

2. The respondents by reply dated 10th October, 2016, have resisted the prayers on every count. The petitioners filed affidavit-in-rejoinder dated 29th November 2016 and reiterated the submissions.

3. The events led to filing the petition, as per the petitioners, are that on 31st July, 2015, respondent No.1 issued the Circular bearing No. P.12/11/11/60/20110-REV.II extending the benefit of ESI Scheme to the construction site workers, deployed in the implemented area with effect from 1st August, 2015 and in pursuance thereto, respondent No.1 issued notices to the Members of petitioner No.1, as well as petitioners No.2 and 3 stating that the Employees' State Insurance Corporation, New Delhi has decided to extend the benefit of ESI Scheme to the construction site workers w.e.f. 1st August, 2015. Thereafter, vide representation dated 19th October, 2015, the petitioner No.1 requested respondent No.2 to reconsider the matter and further requested that the Insurance Act may not be made applicable to the workers engaged in construction industry. Petitioner No.1 also submitted a copy of an order dated 31st September, 2015 of the Madurai Bench of Madras High

Court in WP(MD) 16996 of 2015 and WP(MD) No.2 of 2015. However, the respondent No.1 rejected the request of the petitioners vide letter dated 21st October, 2015 addressed to the President of Petitioner No.1 and directed the Members of Petitioner No.1 to comply with the Insurance Act forthwith, so as to avoid any penal proceedings. In the said letter, respondent No.1 while not denying that Madurai Bench of Madras High Court had stayed operation of the impugned Circular, conveyed the petitioner No.1 that their office is not aware of any stay of any Court, prohibiting enforcement of ESI coverage to the construction site workers, located within the jurisdictional areas of ESIC, Goa Region. According to the petitioners, respondent No.1 thereafter, issued show cause notice dated 2nd December, 2015 threatening the members of petitioner No.1 with criminal prosecution. Being aggrieved, the petitioners have filed the present petition.

4. The petitioners have relied upon Instructions/ Circular dated 14th June, 1999 whereby the Additional Commissioner (Revenue), by addressing it to the Regional Director/Director/Jt. Director (Incharge), ESI Corporation, clarified, based upon then existing situation, that "...the policy of the ESI Corporation not to cover the workers engaged by the construction agency who belong

to the unorganised sector due to the peculiar characteristics of the construction industry and the peculiar nature of employment of workers engaged in it. ... Therefore, the existing scheme under the Insurance Act is neither applicable nor suitable for workers engaged in construction sites.” It is, therefore, submitted that in view of this clarification/clear decision of non-applicability and/or noncoverage of the Insurance Act and the decision so clarify ought not to have been disturbed. There was no change in circumstances which compelled the respondents to bring in the construction site workers within the ambit of any ESI Scheme and/or the Insurance Act.

5. The petitioners have placed on record a comparative chart in support of their submissions referring to the provisions of the Building and Other Construction Workers' Act to demonstrate that the field is already covered. The comparative chart is reproduced herein below :

COMPARATIVE CHART

Benefits under Employees State Insurance Act, 1948. Section 46	Benefits under Building and other Construction Workers (Regulation and Employment and Conditions) Section 22
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Periodical payment for sickness.	--
Periodical payment for women for ailments arising out of pregnancy or miscarriage.	Maternity benefits to female beneficiaries.
Periodical payment for disablement as a result of employment injury.	Assistance to a beneficiary in case of accident.
Periodical payment in case death as a result of employment injury.	Group insurance scheme.
Medical treatment for insured person.	Medical expenses for major ailments.
Funeral expenses	
	Pension after completion of 60 years.
	Loan, subsidy or grant in aid to local authority or employment for welfare measures for building workers.
	Financial assistance for education of children.

6. The Apex Court in **Lanco Anpara Power Ltd. vs. State of U.P.**, (2016) 10 SCC 329, at para 44 has held thus :

“ 44. The sentiments were echoed in **Bombay Anand Bhavan Restaurant v. ESI Corpn.**, (2009) SCC 61, in the following words :

“20. The Employees’ State Insurance Act is a beneficial legislation. The main purpose of the enactment as the Preamble suggests, is to provide for certain benefits to employees of a factory in case of sickness, maternity and employment injury and to make provision for certain other

matters in relation thereto. The Employees' State Insurance Act is a social security legislation and the canons of interpreting a social legislation are different from the canons of interpretation of taxation law. The courts 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 which the legislature had in placing this legislation on the statute book. The Act, therefore, must receive a liberal construction so as to promote its objects."

7. The relevant Sections i.e. Section 1(5) and 2.9 of the Insurance Act, read thus :

"1. (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 month's] 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 of the provisions have already been extended to similar establishment or class of establishments in another part of that State.]

(9) "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and-

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

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

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;

[and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment [or any person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961, (52 of 1961), [and includes such person engaged as apprentice whose training period is extended to any length of time] but does not include]-

(a) any member of 16[the Indian] naval, military or air forces; or

[(b) any person so employed whose wages (excluding remuneration for overtime work) exceed [such wages

as may be prescribed by the Central Government] a month:

PROVIDED that an employee whose wages (excluding remuneration for overtime work) exceed [such wages as may be prescribed by the Central Government] at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period;]”

8. The petitioners have cited the following Judgments in support of their submissions :

(1) *The Life Insurance Corporation of India vs. D.J. Bahadur and others*, AIR 1980 SC 2181;

(2) *M/s. Landscape Developers vs. The Regional Director, Employees State Insurance Corporation*, Appeal Under E.S.I. Nos. 1 and 2 of 2008;

(3) *Gauri Mohan Pohoomul vs. Regional Director, Employees' State Insurance Corporation and another*, 2004 SCC OnLine Bom 698;

The respondents have also cited the following Judgments in support of their submissions:

(1) *Regional Director, Employees' State Insurance Corporation, Madras*, AIR 1986 SC 1686;

(2) *Ramchand Onkarlal Agarwal vs. Union of India & Ors.*, 2006(5) Bom.C.R. 884;

(3) ***Italab (Goa) Pvt. Ltd. vs. Deputy Regional Director***, 2009(1)
Bom. C.R. 335.

9. The objects and purpose of the Insurance Act is well defined, which covers sickness cash benefits, maternity benefit, disablement and dependents' benefit and other related aspects. The Insurance Act provides for certain benefits to the employees in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto. Expressions “employee”, “factory”, “immediate employer”, “insurable employment”, “principal employer”, “wages”, and “wage period” have been defined in the Insurance Act.

10. The scope and purpose of the Insurance Act and its scheme are in the interest of employees who are working at the construction sites/offices of the contractors/developers who engage/deploy such employees' services for construction and/or related works. The expression “construction agency” is not specifically defined. It is necessary by this Scheme to have a report of a number of construction units already covered with the ESIC, number of construction site workers additionally registered by the employer/subsequent survey and number of units surveyed and

brought under coverage and the number of employees covered. Based upon the Act and the Scheme referred above, a general notice in respect to employees have been issued on the foundation that the ESI Scheme is already applicable to the employees engaged in the Offices of builders/construction agencies. As per the Scheme, site workers/employees would be entitled for benefits of complete medical care, as well as range of cash benefits in times of exigencies of employment injury, death, disablement, maternity and unemployment. With effect from 1st August, 2015, even the amended Rules and Regulations are made applicable to such employers employing construction site workers. The Scheme is also extended to those construction agencies which were earlier not covered due to employees in their offices being less than coverage limit, but now will be liable to be covered after addition of construction site workers.

11. We have also noted that the respondents' action based upon the reasons provided in the communication dated 31st July, 2015 and 21st October, 2015 with clear foundation that Section 2(9) of Insurance Act does not differentiate between permanent, temporary, casual and contract employees of an unit as all are eligible for the ESI benefits once an unit is covered under the ESI

Scheme. This is on the foundation that there was no stay of any Court, prohibiting enforcement of ESI coverage of construction site workers within the jurisdictional areas of ESIC Goa Region and thereby reiterated that registration under the Insurance Act is mandatory once an unit is eligible for coverage and to obtain the ESI Code numbers through online registration as proposed. The respondents, through their affidavit have also placed on record various reasons and background which compelled and has necessitated the respondents to extend the benefit even to such workers on sites. This was after due deliberations so as to get all benefits to all types of workers/ employees as contemplated under the Insurance Act. The extension is by Circular dated 31/07/2015 by referring to the Notification dated 21st June, 1977 under Section 1(5) of Insurance Act whereby several establishments and factories were covered. So there is notification containing exemption clause whereby certain establishments have been excluded/ exempted from the purview of the Act. The clarification, so issued, in the year 1999 was definitely kept in mind and in view of the subsequent development and requirement, based upon the decision so taken and in view of the

recommendations received from various sources, the Authorities have taken decision by following due procedure and unanimously ratified the decision of coverage of the ESI Scheme to the construction workers, in any way, can not be stated to be beyond the scope, purpose and powers of the Insurance Act, Rules, Regulations and the Scheme made thereunder. Such extension, in any way, cannot be said to be illegal, impermissible or without jurisdiction, so also the Circular issued. Merely because, earlier in the year 1999 the exemption was made and not extended by the Insurance Act to such workers, the policy decision was taken by the Government based upon the material and the prevailing situation, in our view need no interference. No validity of any clause and/or the provisions are challenged by the Petitioners and even, otherwise, the same is in the interest of employers once the Act is compulsorily made applicable and certain contribution made by the employer along with the employees, if required and would serve the purpose and avoid future obligation and liability of the employer also, in case the employee and/or its dependants claim for requisite compensation and/or damages and/or wages as required under the Insurance Act and the Scheme.

12. Therefore, considering the Scheme and the purpose of the Insurance Act, we see that the Insurance Act, in no way, can be stated to be against the employers and/or it is only in favour of the employees. Both will be benefit if the Act is extended for the various purposes, as contemplated under the Insurance Act. There is no illegality and/or issue in extending the provisions to the employees/workers, being a welfare legislation. It is unacceptable the submission that benefits under the Building and Other Construction Workers (Regulation of Employment and Condition of Service) Act, 1996 (for short “BOCW Act”), are available to the building and other construction workers with similar benefits, as it also covers the elements such as leave, sickness benefit, protection measures and others and therefore, that being a special legislation which covers the field with regard to the construction site workers and, therefore, the impugned extension/Circular is in conflict with and/or bad in law. Merely because the members of association have been registered under the BOCW Act and so also the site workers are required to make application for registration, that itself is not a sufficient reason to deny the extension of

Insurance Act to such workers/employees. The purpose and object of both the Acts is different, so also the respective schemes. The requirement to have workers insurance scheme under the BOCW Act itself means both the Acts are different on various aspects and are not in conflict with each other. The conflict and/or benefit, even if are available under one Act, it is settled that the employees/workers are not entitled to two parallel and similar benefits. Therefore, at appropriate stage and/or time, and the concerned Department will take note of and pass appropriate orders. This is in addition to the choice/option available to the employees of selecting the benefit, if at all there is any conflict. The concerned Department will decide such issue as and when occasion arises. We are not concerned with the situation as contended, as, that itself, cannot be a ground or reason to accept the case of the petitioners that the Insurance Act has been wrongly extended to the construction workers. In our view, there is no conflict. Both the Acts can work in their respective fields, together, having different object to achieve, but with clear intention and goal to consider and provide every available benefit to the construction workers/employees, as contemplated.

13. The Building and Other Construction Workers' Welfare Cess Act, 1996 ("BOCWWC Act") has again different aims and object to achieve. Merely because the members of association have been paying such cess at 1% since 1996 and have contributed a huge amount to the State exchequer by way of cess payments that by itself cannot be a reason to deny the benefits of the Insurance Act to the construction employees/workers. The BOCWW Act provides for the levy and collection of a cess on the cost of construction incurred by employers with a view to augment the resources of the Building and Other Construction Workers' Welfare Boards constituted under the BOCW Act. This Act is also in aid and in support of the BOCW Act. The levy of cess, time and manner of collection and/or its exemption have altogether different provisions and aspects, though the purpose is to regulate employment and conditions of construction workers. The submission, therefore, that the existence of these Acts is sufficient to achieve the aims, objects and purpose of the Insurance Act is also unacceptable and we decline to accept the submission that the nature of the benefits provided under the Insurance Act is also

provided under the BOCW Act and the BOCWWC Act. The comparative chart so placed on record itself makes the position clear that the foundation of both these Acts is to achieve different purposes. Some of the overlapping benefits even, if any, that itself cannot be the reason to say that the action of the respondents of extension of the benefits is unjust and contrary to the main provisions of the Insurance Act and/or is in conflict with the building construction regulations.

14. The Judgments cited by the learned Counsel appearing for the petitioners are distinguishable on facts, as well as on provisions of law. The Insurance Act is extended to the admitted activities of utilizing the workers/ employees to the development of the workers/employees' at construction sites by the construction agency/agent. The "construction agency" or its agents falls within the ambit of the provisions for various purposes as "employer", "principal employer", "immediate employer" such agency is not exempted from the provisions of the Insurance Act. By this notification, the provisions are specifically clarified and extended to avoid legal bar or confusion. Such "employees"/ "workers", subject to contribution, if any, would be entitled to get the benefits under the Insurance Act. Any construction activities or the location of

the project of construction activities may be at different places, but the “employer”/ “immediate employer” needs to be recognized, accordingly. They are under obligation to consider and recognize for all the purposes of this Insurance Act for their “construction employees/workers” at site. Therefore, the person who is carrying on construction activities and if he is deploying such “workers/employees”, they should be covered and governed by the Insurance Act. This is in the background of admitted position that the members of Association are owners and proprietors and/or carrying out business of construction or related activities at different sites/projects by deploying such “workers/employees”. They, therefore, fall within the ambit of the “employees” and the Insurance Act and its provision and so the extension being a policy decision of the Government, in no way can be stated to be unjust, unreasonable or takes away any right and/or is in conflict with any provision of other laws. Apart from that, there is no breach of any constitutional provisions. But to deny them such benefit would be against the spirit of constitution of India and the provisions of the Insurance Act.

15. The Judgment in the case of *Landscape Developers (supra)* is of no assistance on the facts and circumstances itself. The Judgment was delivered when there was no such extension

made by the respondents to such construction activities as done by the impugned circular.

16. ***Gauri Mohan Pohoomul (supra)***, is also a Judgment of 2004 when there was no such provisions extended by such Circular. This Judgment shows that the issue was discussed, but for want of specific provision earlier of covering construction workers under the Insurance Act. Now the circular which has binding effect, makes the position clear that the Insurance Act is applicable to the construction workers/employees. ***Gauri Mohan Pohoomul's case*** confirms the situation that the salaries of the employees at the site are paid by the establishment and workers were posted at their site for doing the construction work being executed by the establishment. Such establishment retained full control over their service conditions. The extension of the Insurance Act and the order passed by the ESI Court was not interfered with in that matter. Therefore, the construction activities whether it is “shop” or “establishment” makes no difference for extending the Act and its provision to the employees/workers deployed by the construction agency/agents at the respective sites.

17. The Apex Court in ***Regional Director, Employees' State Insurance Corporation, Madras (supra)***, considering the Scheme of

the Insurance Act, extended the benefits even to the casual employees who were engaged for construction work of additional buildings for expansion of a factory as contemplated under Section 2(9) of the Insurance Act. It further held that the workers employed for such construction work by the employer are “employees” and, therefore, the ESI benefits required to be extended.

18. The Division Bench of this Court (Nagpur Bench) in ***Ramchand Onkarlal Agarwal vs. Union of India & Ors.***, (supra), rejected the opposition of extending the Insurance Act because other similarly placed benefits given to the bidi and cigar workers were available. The contention that the other Act should prevail over the provisions of the Insurance Act as contended even by the learned Counsel appearing for the petitioners in that matter, was of no assistance. The field covered by the Insurance Act is not preoccupied by any special Act - the same is the position here. The Insurance Act is operating in a different field altogether.

19. The Apex Court while dealing with the definition of “employee”, referring to Section 2(9) of the Insurance Act, in ***Royal Western India Turf Club Limited vs. Employees' State Insurance Corporation and others***, (2016) 4 SC 521, has declared even the

casual employees engaged for part of work, are employees within the purview of the Insurance Act. It is laid down that the employees employed for wages in factory or establishment, on any work of, or incidental or preliminary to or connected with work, fall within the ambit of “employees”. It further held that the Insurance Act being a welfare legislation should be interpreted so as to ensure extension of benefits to the employees and not to deprive them of the same which are available under the Act. We are following the proposition of law.

20. The Apex Court while interpreting the provisions of BOCW Act and the BOCWW Act, being a welfare or remedial statute has recognized the building or other construction works and related activities of construction of any project, under the special Act. We are accepting the action of the respondents of extension and/or applicability of the Insurance Act to the construction activities of “construction agency” to its employees/workers working at different sites and places. Mere registration of such construction agencies under different provisions for different purposes that itself is not a reason to deny the benefit of the Insurance Act to the concerned workers.

21. The Apex Court in *Delhi Gymkhana Club Limited vs.*

Employees' State Insurance Corporation, (2015) 1 SCC 142 even extended the ESI Scheme, referring to Sections 1(5) and 2(12) and 2(14-AA) to the employees/workers of kitchen and catering section of a private club as they were involved in manufacturing process, factory.

22. In ***Bangalore Turf Club Limited vs. Regional Director, Employees' State Insurance Corporation***, (2014) 9 SCC 657, the ESI provisions have been extended by invoking Section 1(5) of the Insurance Act even to the race club, treating it as an “establishment” by giving liberal construction to the beneficial statute in question.

23. In ***Saraswath Films vs. Regional Director, Employees' State Insurance Corporation, Trichur***, (2010) 11 SCC 553, even extended this provision, referring to Section 2(9) to 2(13) and 2(15), to security guards on facts being “employees” of the appellant-Cinema House, though the employees were less than 14 in number by rejecting the objection that there was no relationship of employer and employees. The Supreme Court has considered the definition of “immediate employer” and “principal employer” and held that Section 2(9) and the definitions are wide and by comprehensive in nature.

24. Therefore, any person employed by or through an immediate employer or under the supervision of principal employer or his agent who is ordinarily part of the work of the establishment falls

within the ambit of the Insurance Act for all purposes. Here also the Members of the association and/or the construction agencies are employers as they are employing/deploying workers or employees for the purpose of construction activities at different sites and places. The applicability of the Insurance Act, therefore, in our view in the present facts and circumstances, cannot be stated to be in conflict with existing field and the other special laws. We are inclined to observe that such action/decision by the respondents is well within the frame work of law and the record.

ORDER

25. The petition is dismissed. Rule discharged. No costs.

NUTAN D. SARDESSAI, J.

ANOOP V. MOHTA, J.

Ms. K. Pednekar, learned Counsel appearing for the petitioners, seeks some time to challenge the Order. Ms. A. Agni, learned Senior Advocate appearing for the respondents, however, makes a statement, and as stated to be made earlier also, that the respondent-Department will not take any coercive action for six weeks from today. This, in our view, is sufficient to protect the the interest and anxiety of the petitioners.

NUTAN D. SARDESSAI, J.

ANOOP V. MOHTA, J.