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IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL UNDER E.S.I. NO.2 OF 2012

1. Dy. Director,
ESI Corporation,
“Pachadeep Bhavan,
EDC-23, Patto, Panaji – Goa.

2. Recovery Officer,
ESI Corporation,
“Pachadeep Bhavan,
EDC-23, Patto, Panaji – Goa. ... Appellants.

Versus

Nirmitee Holidays Pvt. Ltd.,
JOIA DE GOA
S. No. 2, Ilhas, Panelim,
Off. St. Pedro, Goa. 403 402 ... Respondent.

Ms A.A. Agni, Senior Advocate with Ms Jay Sawaikar, Advocate *for the Appellants.*

Mr A.V. Nigalye with Mr O.V. Kulkarni, Advocates for the *Respondent.*

CORAM:	**BHARAT P. DESHPANDE, J.**
RESERVED ON:	**01 December, 2022**
PRONOUNCED ON:	**16 December, 2022**

JUDGMENT:

The present appeal is filed under Section 82 of Employees State Insurance Act on behalf of the Appellants thereby challenging the Judgment and Order passed by ESI Court on 9 March 2011 in

Employee State Insurance Case No.4/2004. By the said impugned Judgment, the learned ESI Court allowed the application filed by Respondent under Section 75 of ESI Act holding that provisions of ESI Act are not applicable to the Respondent establishment. Similarly, the orders passed under Section 45-A along with the notices were quashed and set aside.

2. On 12 June 2013, appeal was admitted on the following substantial question of law:-

> "(a) Whether the EI Court failed to take into account the admissions in the pleadings that they were successors in interest of Mandovi Myth Riverside Resort and Section 93A was clearly attracted in as much as it provides where an employer in relation to an establishment transfers the same by sale or in any manner whatsoever the employer and the person to whom the establishment is transferred shall be jointly and severally liable to pay the amount dues in respect of contribution provided that the liability of the transferee shall be limited to the value of the assets obtained by transfer and whether the EI Court failed to take in to account that Shri Prakash More was the director of Mandovi Myth as also Nirmiti Holidays and had undertaken to clear the dues of Mandovi Myth."

3. When the matter came up for final arguments and after considering the grounds raised in the memo of appeal, it was found necessary to frame additional substantial questions of law and accordingly, vide order dated 10 November 2022, two additional substantial questions of law were framed which reads thus:-

> "(i) Whether the use of LP Gas for the purpose of cooking can be considered a manufacturing process?

> (ii) Whether in absence of any material produced by the respondent, the learned trial Court was justified in concluding that the restaurant was not an integral part of the hotel?"

4. Heard learned Senior Counsel Ms A.A. Agni along with Ms Jay Sawaikar for the Appellants and learned Counsel Mr A.V. Nigalye along with Mr O.V. Kulkarni for the Respondent.

5. In nutshell, it is the contention of the Appellants that the Respondent establishment took over the earlier establishment wherein ESI dues were pending and in view of the provisions of Section 93-A of ESI Act, the Respondent establishment is liable to pay the existing dues. However, the learned Trial Court completely failed to consider this aspect. The Respondent establishment took over Mandovi Myth Riverside Resort owned by Aishwarya Resorts Pvt. Ltd. and thereby started their own business. Recovery notices were issued calling upon Respondent establishment to deposit ₹3,19,181/- as contribution and interest from January 1997 till December 2000. The order under Section 45-A was accordingly passed levying damages for the subsequent period. The Respondent establishment filed ESI Case No.4/2004 challenging the notices and order under Section 45-A of the said Act before ESI Court wherein they admitted that they are the successors in interest of Mandovi Myth Riverside Resort. However, the learned ESI Court failed to consider such admission and unnecessarily put burden on the Appellants thereby coming to a wrong conclusion.

6. The Respondent establishment claimed that they are not the successors of Mandovi Myth Riverside Resort. However, it is their

case that said establishment was taken over by Maharashtra State Financial Corporation under the powers vide Section 29 of the State Financial Corporations Act and thereafter the Respondent establishment effected payment of the dues and took over the charge of the said establishment. They thereafter started new establishment and never employed more than ten employees. It is their contention that there is no continuity of the business of the earlier establishment and the hotel is not at all connected with the restaurant and bar and both are different entities. It is further their case that Section 93-A is not at all attracted.

7. The learned Counsel Mr Nigalye appearing for the Respondent raised preliminary objection to the tenability of the appeal on the ground that present appeal is filed by the Deputy Director and Recovery Officer as Appellants who are quasi-judicial authorities and who passed the impugned orders and notices. Such quasi-judicial authorities are not entitled to challenge the orders of their appellate authorites on being dissatisfied by the orders of their superiors. He claimed that it is directly considered as an exercise which would be subversive of judicial discipline. In this respect, he placed reliance in the case of ***The Assistant Provident Fund Commissioner v. M/s. Nirmitee Holidays (P) Ltd.***[1] decided by this Court on 30 August 2010.

8. Learned Senior Counsel Ms. A. Agni, would submit that the Appellants before this Court are the original opponents before the ESI Court and they are the authorities entitled to pass orders under ESI Act, and therefore, they are arrayed as Appellants before this

1 Writ Petition No.615/2009

Court. She submits that there is no question of judicial impropriety or indiscipline as these authorities, apart from acting as quasi-judicial authorities, are also operating and acting as administrative authorities under the Act.

9. The decision in the case of *The Additional Provident Fund Commissioner* (supra) is a case wherein challenge was raised to the order of the Employees Provident Fund Tribunal, New Delhi before this Court. While dealing with this aspect, it was argued that the Petitioner challenged the order passed by the Provident Fund Tribunal which was against the order passed by the Petitioner himself. Section 7-A and Section 7-I of the Employees' Provident Fund and Miscellaneous Act, 1952 disclosed that while discharging jurisdiction under Section 7-A of the said Act, Assistant Provident Fund Commissioner was discharging quasi-judicial functions. In view of the above fact, it was observed that the Petitioner being Assistant Provident Fund Commissioner, performing quasi-judicial functions would not be entitled to challenge order passed by appellate authority reversing his own orders as permitting such exercise would be subversive of judicial discipline.

10. In order to decide such preliminary objection raised on behalf of the Respondent, first of all it is necessary to look into the Judgment in the case of *Assistant Provident Fund Commissioner* (supra). Admittedly, the said matter is in relation to the Employees Provident Fund and Miscellaneous Act, 1952 wherein Section 7-A and Section 7-I of the said Act discloses that while discharging jurisdiction under Section 7-A of the Act, Assistant Provident Fund Commissioner was discharging quasi-judicial functions. The order

passed by Assistant Provident Fund Commissioner was challenged by the Respondent therein in an appeal filed under Section 7-I before the appellate authority. Such appellate authority is the Employees Provident Fund Tribunal who quashed and set aside the order passed by Assistant Provident Fund Commissioner. In such premises, it was observed that the Assistant Provident Fund Commissioner while discharging his quasi-judicial functions is not entitled to challenge order passed by his appellate authority reversing his own Judgment/Order.

11. The impugned order in the present matter under Section 45-A of ESI Act was passed by Deputy Director of ESI Corporation. The operative part of the said order under Section 45-A of ESI Act reads thus:-

> "*For the above reason, I, K.Ramkrishnan, Deputy Director in exercise of the powers delegated to me vide ESI Corporation resolution dated 6/3/1991, published in the govt. of India Gazette notification No. 29 part III dated 29/7/91, think fit and accordingly order that contributions amounting to Rs.29397/- for the period from 1/6/2001 to 31/3/2002 are finally determined and you as one of the principal employer of the said factory are hereby ordered to pay the aforesaid contribution within a period of 15 days from the date of this order and give intimation to that effect to this office, failing which this shall be caused to be recovered under the provision of sec. 45-C to 45-I of the said Act through recovering of ESI Corporation.*"

12. Chapter II of ESI Act 1948 deals with corporation, standing committee and medical benefit council. Section 3 deals with establishment of Employees State Insurance Corporation. The Central

Government by a notification in the Official Gazette in that behalf and by notifying the date, shall establish for administration of the scheme of Employees State Insurance in accordance with the provisions of this Act, a corporation to be known as Employees State Insurance Corporation. Such Corporation shall be a body corporate by the name of Employees State Insurance Corporation having perpetual succession and a common seal and shall by the said name sue and be sued. Section 4 of the Act deals with constitution of the Corporation which consists of the post of Chairman, vice chairman and other members as mentioned therein. Section 5 deals with the term of office of members of corporation.

13. Section 7 of ESI Act, 1948 is very material which deals with authentication of orders, decisions, etc. and provides that all orders and decisions of the Corporation shall be authenticated by the signature of the Director General of the Corporation and all other instruments issued by the Corporation shall be authenticated by the signature of the Director General or such other officer of the Corporation as may be authorised by him.

14. Chapter IV of ESI Act, 1948 deals with contributions. Section 38 provide that all employees in factories or establishments to which the Act applies shall be insured in the manner as provided under the Act. Contributions payable in respect of an employer shall comprise of contribution payable by the employer and the contribution payable by the employee and shall be paid to the Corporation, as contemplated in Section 39 of the said Act. Similarly, the duty of the principal employer to pay contributions at the first instance is envisaged in Section 40 of the Act. The method of payment of

contribution is found in Section 43 of the said Act. Appointment of social security officers, their functions and duties are found in Section 45 of the Act.

15. In the present matter, we are concerned with the order passed under Section 45-A of the said Act which deals with determination of contributions in certain cases and reads thus:-

> *"[**45-A. Determination of contributions in certain cases**.– (1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 or any [Social Security Officer] or other official of the Corporation referred to in sub-section (2) of section 45 is [prevented in any manner] by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under section 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment:*
>
> *[Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard.]*
>
> *[Provided further that no such order shall be passed by the Corporation in respect of the period beyond five years from the date on which the contribution shall become payable.]*
>
> *(2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation under section 75 or for recovery of the amount determined by such order as an arrear of land revenue under section 45-B [or the recovery under section 45-C to section 45-I]"*

16. Perusal of above provisions makes it very clear that the order for payment of contribution is required to be passed by the Corporation itself, though by delegation of such powers to concerned officer. It is therefore clear that order is passed by the Corporation through its delegated officer. Learned Counsel Mr Nigalye though relied upon the decision in the case of *Assistant Provident Fund Commissioner* (supra), failed to point out any provision wherein the aspect of determination of contributions under Section 45-A by the concerned officer is considered as quasi-judicial in nature.

17. Section 94-A deals with delegation of powers wherein it is provided that the Corporation, subject to any regulations made in this behalf and the standing committee may direct that all or any of the powers and functions which may be exercised or performed by the Corporation or the standing committee, as the case may be, may, in relation to such matters and subject to such conditions, if any, as may be specified, be also exercisable by any officer or authority subordinate to the Corporation.

18. Thus, Chapter IV of ESI Act, 1948 which deals with contributions and the manner in which payment or recovery of it could be effected, nowhere shows that such functions are quasi-judicial in nature.

19. In the case of *Assistant Provident Fund Commissioner* (supra), the facts as well as the submissions made therein are totally different and distinguishable from the facts of the present matter.

20. Even if it is considered for the sake of arguments that the Deputy Director and Recovery Officer, Petitioners herein were

exercising quasi-judicial powers, it needs to be accepted that both these officers are also performing administrative powers. Considering their administrative powers under the Act and more specifically delegative powers given to them by the Corporation, as administrative officers, they are entitled to challenge the impugned order passed by ESI Court though setting aside their own orders passed under Section 45-A. Administrative powers of such officers cannot be curtailed on the premise that they passed the impugned order by exercising quasi-judicial powers. Be that as it may, the submissions advanced by Advocate Nigalye on preliminary grounds cannot be accepted for the reason that Petitioners did not perform quasi-judicial powers while determining contribution under Section 45-A of ESI Act.

21. The learned Counsel Mr Nigalye then tried to canvass that appeal must fail as there are no substantial questions of law in the present matter. He would submit that the first substantial question of law framed while admitting the appeal on 12 June 2013 is in fact a question of fact.

22. Mr Nigalye placed reliance in the cases of (1) ***S. Subramanian v. S. Ramasamy and Ors.***[2], (2) ***Lisamma Antony & Anr. v. Karthiyayani & Anr.***[3], and (3) ***Mehboob-Ur-Rehman (Dead) Through Lrs. v. Ahsanul Ghani***[4].

23. In the case of *S. Subramanian* (supra), the Supreme Court while dealing with Section 100 of CPC observed that existence of a

2 (2019) 6 SCC 46

3 (2015) 4 ALL MR 979 (S.C.)

4 (2019) 19 SCC 415

substantial question of law is a *sine qua non* for the exercise of the jurisdiction under Section 100 of CPC. It further observed as to when substantial question of law can be said to have arisen, as dealt with in the case of ***Ishwar Dass Jain v. Sohan Lal***[5], as under:-

> *"Under section 100 CPC, after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate Court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidene which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise."*

24. In fact, above observation is squarely applicable to the facts and circumstances of the matter in hand. The first substantial question of law framed at the time of admission of the matter and remaining two substantial questions of law framed when the matter was taken up for final hearing, relate to the aspects of inadmissible evidence and omitting or not considering the evidence and unnecessarily shifting burden on the Corporation. Thus, this decision in fact supports the contention raised by the Corporation.

25. In the case of *Lisamma* (supra), a suit was instituted for injunction by the predecessor in title of the Appellant praying for restraining the Defendants/Respondent from trespassing into the suit

5 (2000) 1 SCC 434

property. The trial Court after considering evidence, decreed the suit. The original Defendants challenged it before the Appellate Court/District Court. The said First Appeal while confirming the decree of the Trial Court, modified the relief by giving reasons. The original Defendants then filed Second Appeal before the High Court wherein a substantial question of law was framed as under:-

> "*Did the courts below go wrong in overlooking the boundaries and descriptions in Ext. B1, which is a vital document so far as it relates to the identity of the property claimed by the defendants?*"

26. The Supreme Court considering above substantial question of law framed by the High Court observed that the said question of law cannot be termed as a substantial question of law. The said question of law formulated is nothing but a question of fact. Mere appreciation of facts and documents or meaning of the entries therein cannot be held to be raising a substantial question of law. Thus, facts in the present matter are totally different than the matter in hand and therefore, this decision is not helpful to the Respondents in any manner.

27. In the case of *Mehboob-Ur-Rehman* (supra), the Apex Court was dealing with Section 100(5) of CPC which gives power to the High Court to hear the appeal on the question so formulated and be allowed the Respondent to argue that the case does not involve such question. Similarly, the proviso to Sub-Section 5 states that nothing in Sub-Section 5 shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied

that the case involves such question. While dealing with this aspect, the Supreme Court observed in para 21 as under:-

> "*21. We are clearly of the view that the proviso to sub-section (5) of Section 100 CPC is not intended to annul the other requirements of Section 100 and it cannot be laid down as a matter of rule that irrespective of the question/s formulated, hearing of the second appeal is open for any other substantial question of law, even if not formulated earlier. The said proviso, by its very nature, could come into operation only in exceptional cases and for strong and convincing reasons, to be specifically recorded by the High Court. There being no such strong and convincing reason in the present case to formulate and hear the second appeal on any other question of law, the High Court cannot be faulted in rejecting the contentions urged on behalf of the plaintiff-appellant in this regard.*"

28. Above observation of the Supreme Court in fact supports the contentions of the Appellant herein. A reasoned order was passed after hearing the Respondents, on 10 November 2022 wherein two additional substantial questions of law were framed.

29. In the present matter, Appellants came before this Court on specific grounds that the restaurant was attached with the hotel wherein food was prepared with the help of LPG and therefore, it amounts to manufacturing process. Since the learned Trial Court failed to consider the burden to prove this aspect which was on the Respondent/establishment and wrongly put the burden on the Corporation, such question of law was required to be framed. If the findings are perverse, this Court is certainly entitled to frame such substantial question of law. Secondly, Corporation raised a plea that

Section 93-A of ESI Act is attracted. The provision of law will have to be looked into on the basis of material placed on record along with the evidence of the parties. Therefore, framing of additional questions of law was fully justified and there is no substance in the arguments advanced by Advocate Nigalye that no substantial questions of law arise in the present matter.

30. I am unable to accept such contention as question which is raised in the present appeal is whether provisions of Section 93-A of ESI Act are applicable/attracted to the case of the Respondent. No doubt while deciding this aspect, this Court is entitled to look into pleadings as well as evidence led by the parties before the trial Court. Each substantial question of law is correlated to the facts of the respective matter.

31. Additional two substantial questions of law were framed when the matter was partly heard. Both these substantial questions of law are found mentioned in the memo of appeal and while perusing pleadings and the record, it was very much observed that these additional substantial questions of law are material for the just decision of the appeal. Question which needs to be considered is whether use of LP Gas for the purpose of cooking can be considered as a manufacturing process. Secondly, it is also necessary to look into the impugned order as to whether and in absence of any material produced by the Respondent, learned Trial Court was justified in concluding that the restaurant was not an integral part of the hotel. These substantial questions of law are therefore borne out of the record and necessarily to be considered for the just decision of

present appeal. Objections on such substantial questions of law are therefore, devoid of any merit.

32. Ms. A. Agni submitted that the application filed by the Respondents before Trial Court under Section 75 of ESI Act along with its pleadings/contents needs to be looked into as there are vital admissions to conclude that Respondents are the successors of the earlier establishment thereby invoking provisions of Section 93-A of ESI Act. She would submit that above aspect of clear admissions on the part of Respondents have been ignored by the learned Trial Court even though issue No.1 and 2 framed before leading evidence put the burden on the Respondents to prove their case.

33. Respondents in their application filed under Section 75 of ESI Act started in para 1 itself as under:-

> "*The applicant who is successor-in-interest of Mandovi Myth Riverside Resort, is a small Resort owned by Nirmitee Holidays Pvt. Ltd. Registered Private Limited Company located at address mentioned in the caption.*"

34. Though it is the case of Respondents that they never employed 20 or more employees at all times, provisions of ESI Act were never made applicable.

35. Respondents amended their petition under Section 75 of ESI Act by incorporating para 1-A to 1-F thereby pleading as under:-

> "*I-A. Ms Mandovi Myth Riverside Resort was owned by M/s Aishwarya Resorts Pvt Ltd, a company incorporated under the Companies Act, 1956. Shri Ashok Shrirang Salvi and Shri. Amol Ashok Salvi were*

the directors of the said company and they were managing its affairs including the business of Mandovi Myth Riverside Resort, which was a residential hotel situated at Panelim, St. Pedro, Tiswadi Goa. The said company obtained loans from the Maharashtra State Finance Corporation for business of the hotel. However, there were defaults in the payment of loan instalments and the arears of the loan and interest were around Rs. 3 crores in March 2001. The business of the hotel had come to a stand-still. The establishment was completely closed by then and no employees were employed therein. Even before the hotel was closed, it never employed the requisite number of the employees for coverage under the Employees State Insurance Act, 1948.

I-B. In the last week of March 2001, the Maharashtra State Financial Corporation, in exercise of the powers vested in it under Section 29 of State Financial Corporations Act, issued public Notices for take over the said hotel. After publication of the said Notices, Shri Prakash More effected the payment of dues of the said Corporation and took over the charge thereof. He started the hotel after its renovation by employing new employees. Hence the present establishment started after April 2001, is a new establishment, and it has not employed ten or more employees therein at any point of time. There was no continuity in the business of the establishment after its closure and take over by Maharashtra State Financial Corporation and hence, it became a fresh business. The recovery of dues relating to the old establishment can not be made from the present establishment, which have no connecion with former.

I-C. ***By order dated 14/08/2003 issued by the Registrar of Companies, Goa Daman and Diu, the name of M/s Aishwarya Resorts Pvt. Ltd. was changed to M/s Nirmiti Holiday Pvt. Ltd.***

I-D. Applicants State that their establishment is and was residential hotel and it never employed ten or

> *more persons therein. There is a restaurant and bar in the said hotel premses which is a completely separate and independent establishment. The said restaurant and bar is given to a contractor for running it on contract. The business of the restaurant and bar is completely independent from residential hotel and there is no functional integrity between the two. The said establishment also does not employ ten or more employees. The Applicants further submit that the rates of wages assumed by the Respondent for detemination of contribution are imaginary.*
>
> *I-E. Assuming without admitting that there is a functional integrity between the residential hotel of Applicants and the said restaurant and bar, the Applicants state that the number of employees employed by both establishments did not cross the requisite mumber of coverage under the Employees' State Insurance Act, 1948.* ***Neither of said establishment employ electrical power and no manufacturing process is carried out therein.***
>
> *1-F. The Applicant further state that they have not employed any person who were employed prior to closure of the said hotel and restaurant. As such, no beneficiary of the earlier period is available now.*"
>
> (Emphasis supplied)

36. On careful perusal of the above pleadings, it is very much clear that firstly, the Respondent is admittedly a successor-in-interest of Mandovi Myth Riverside Resort. Said Mandovi Myth Riverside Resort was running a business of a residential hotel by obtaining loan from Maharashtra State Financial Corporation. There were defaults in payment of loan installments and arrears mounted upto ₹3 crores in March 2001. The Maharashtra State Financial Corporation vide Section 29 of the State Financial Corporation Act issued public notices for takeover of the said hotel. After publication of such notice, Mr Prakash More who was looking after the affairs of the Respondent

effected payment of dues of the said Corporation and took over the charge thereof. Mr More started hotel after its renovation. Said Mr More is the Chairman of the Respondent who even verified the pleadings and also deposed in the matter before trial Court by filing affidavit in evidence for and on behalf of Respondent.

37. Even though there are specific pleadings that Mandovi Myth Riverside Resort was in arrears of more than ₹3 crores of loan in March 2021 and was taken over by Maharashtra State Financial Corporation in exercise of powers under Section 29 of State Financial Corporation Act, not a single document has been placed on record. In fact, the witness examined by the present Appellant as RW3 produced on record documents at Exh.66 colly including the proceedings before the J.M.F.C., Panaji, the order of the Regional Director dated 6 August 2003, the plea tendered by representative of M/s Mandovi Myth, copies of challan, order passed by Magistrate dated 4 July 2008 and 21 August 2009 and the letter dated 28 December 1998.

38. Most importantly, the letter dated 28 December 1998 (Exh.66 colly) is the one which answers all the questions which are tried to be raised on behalf of Respondents in the present matter. It also shows that Mr Prakash More who claims to be the Chairman of the Respondent-Company was also a Director of Mandovi Myth Riverside Resort. Contents of letter dated 28 December 1998 reads thus:-

"

MANDOVI MYTH
RIVERSIDE RESORT
SURVEY NO. 2, OFF ST PEDRO, PANELIM,
ILHAS OLD GOA, GOA. TEL.: 0832 – 234521,234722

Date: 28.12.98

To,
The Regional Director,
E.S.I. Corporation,
Panchadeep Bhavan,
E.D.C. Complex, Patto,
Panaji – Goa.

Respected Sir,

With reference to your letter No.32/Goa/ 1568/98.555 dated 28/10/98, I would like to say that I, Mr. Prakash More was one of the Director in this Establishment, and other two directors were Mr. Amol Salvi and Mr. Ashok Salvi. I was a minor share-holder in this Establishment and Mr. Amol Salvi and Mr. Ashok Salvi were managing the Establishment.

From January 1999, I am taking over the Company and the E.S.I. Liabilities we had we will clear within one month.

Therefore, I request you to give us one month's time to complete all the formalities and records.

I hope you will do the needful.

Thanking you.

Yours faithfully,
For MANDOVI MYTH
sd/-
PRAKASH MORE
DIRECTOR"

39. Contents of the above letter dated 28 December 1998 and that too from Mandovi Myth through its Director Mr Prakash More addressed to Regional Director ESI Corporation specifically prove that Mandovi Myth was very much covered under the ESI Act and Mr

More undertook to clear all the liabilities within a period of one month. Thus, it now does not lie in the mouth of the Respondent that said Mandovi Myth was a separate and distinct entity from the Respondent. The connection between two establishments is clearly established. Mr More who is the Director of the Respondent clearly admitted that he is taking over the said Company/Mandovi Myth from January 1999. He also admitted that he was a minor shareholder in Mandovi Myth along with Mr Amol Salvi and Mr Ashok Salvi. Therefore, the averments in amended para No.1-A are clearly contrary to the letter dated 28 December 1998.

40. Learned Trial Court in para 15 of the impugned judgment failed to take into consideration the letter dated 28 December 1998, quoted above wherein the name of the Director as Prakash More is printed above the signature. Similarly, though the witness who produced this document was unable to state as to whether such document was signed by Mr More, would not have precluded the learned Trial Court in comparing the signature of Mr Prakash More which is admitted by him on the affidavit in evidence produced at Exh. 43 colly. It is permissible for the Civil Court to compare two signatures to find out whether it is signed by one and the same person, as permissible under Section 73 of the Evidence Act.

41. On comparing the signature of Mr More at Exh. 43 colly of the Trial Court record with the letter dated 28 December 1998 (Exh. 66 colly), it is quite clear that both the signatures match with each other and could be concluded that the same are of Mr More only. Similarly, these documents at Exh. 66 colly dated 28 December 1998 are produced from the record maintained by the Corporation in their

office. The letter was addressed to Regional Director, ESI Corporation, Panaji and it was received by the Corporation. Thus, there is absolutely no doubt that such letter was addressed to the Corporation from Mandovi Myth and signed by Mr More as Director. Creating doubt on the Corporation itself and discarding such letter produced from the official record of the Corporation, was not at all justified. The Corporation will not be trying to fabricate documents. Denial on the part of Mr More about issuance of such document was obvious as he was trying to evade the contribution to be paid to the Corporation by only changing the name of the establishment and by forming another private limited company.

42. Be that as it may, Respondent failed to show any documents that Mandovi Myth Riverside Resort was defaulter and that Maharashtra State Financial Corporation took over the said hotel. Similarly, there is no document on record to show that the Respondent through Mr More paid all such dues to Maharashtra State Financial Corporation and took over the said establishment by starting and registering a new establishment as tried to be projected. The burden is certainly on the Respondent who filed application under Section 75 of the ESI Act before the Trial Court. The Appellants in their written statement specifically denied the contents of para No.1 as well as amended para No.1 except the fact that M/s Nirmitee Holidays Pvt. Ltd. is the successor in interest of Mandovi Myth Riverside Resort Pvt. Ltd. In the additional written statement, it has been claimed that since M/s Nirmitee Holidays Pvt. Ltd. took over M/s Mandovi Myth Riverside Resort, same code number was

allotted to them as per the provisions of Section 93-A of ESI Act. This fact is clear from the evidence produced on record.

43. The Judgment in Labour Case No.367/03/B produced at Exh.66 colly shows that M/s Mandovi Myth Riverside Resort was prosecuted for the offence punishable under Section 85(a) of ESI Act, punishable under Section 85(i) of the said Act for non-payment of contribution within time. In that matter, Mr Vaibhav Sawant was Accused No.3 who pleaded guilty and accordingly he was sentenced to suffer simple imprisonment till the rising of the Court and to pay fine of ₹10,000/- on the ground that contribution towards the default was deposited with the Corporation. No doubt it is also a fact that Mr Prakash More who was arrayed as Accused No.2 as Managing Director and occupier of M/s Mandovi Myth was discharged as no evidence was brought on record to show that Mr More was in fact responsible as a Managing Director to pay the contribution and was looking after day to day affairs. However, the fact remains that M/s Mandovi Myth Riverside Resort was very much covered under the ESI Act and that it was subsequently taken over by the Respondent M/s Nirmitee Holidays Pvt. Ltd.

44. Mr More stepped into the witness box by filing affidavit in evidence and reiterated his contention raised in the application under Section 75 of ESI Act. When he was asked about the public notice issued by Maharashtra State Financial Corporation, he only stated that he can produce such notice. However, no such document was placed on record. Thus, adverse inference ought to have been drawn that there was no such notice issued by the Maharashtra State

Financial Corporation under Section 29 of the State Financial Corporation Act.

45. The cross examination of Mr More tried to pretend as under:-

> "*I am not aware if the old establishment i.e. M/s Mandovi Myth owned by M/s Aishwarya was covered under the Act.*"

46. This answer given by Mr More while deposing before the ESI Court in the year 2009 is clearly a blatent lie in view of his own letter dated 28 December 1998 addressed to Regional Director, ESI Corporation and quoted earlier for reference.

47. The fact remains that though averments were made about the loan, repayment, takeover by Maharashtra State Financial Corporation and thereafter purchasing it by the Respondent from Maharashtra State Financial Corporation, no evidence is produced on record. It clearly goes to show that Mr Prakash More who was the Director of Mandovi Myth Riverside Resort, allegedly paid all the dues to Maharashtra State Financial Corporation and thereafter changed the name of M/s Mandovi Myth Riverside Resort to M/s Nirmitee Holidays Pvt. Ltd. This aspect is clearly admitted by Mr More in his cross examination as under:-

> "*The reason why we changed the name was for the reason that it was earlier closed down, that we had purchased it from MFSC and we wanted our brand name.*"

48. This itself shows that Mr More who was one of the Directors in the earlier company namely Mandovi Myth, paid the entire dues to

Maharashtra State Financial Corporation and thereafter changed the name of the firm/company by taking over the earlier company.

49. Admittedly, M/s Mandovi Myth was covered under the ESI Act and therefore, only because said company was taken over by another company, the coverage of the Corporation does not extinguish. In such circumstances, provisions of Section 93-A of ESI Act clearly stands attracted, which reads thus:

> "*93-A. Liability in case of transfer of establishment.- Where an employer, in relation to a factory or establishment, transfers that factory or establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the factory or establishment is so transferred shall jointly and severally be liable to pay the amount due in respect of any contribution or any other amount payable under this Act in respect of the periods up to the date of such transfer:*
>
> *Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer.*"

50. The learned ESI Court has completely failed to take into consideration specific admissions in the pleadings and the documents placed on record. Unnecessary burden was shifted on the Corporation even though issues framed by it show that the burden was squarely on the company itself. The material brought on record through the only witness examined i.e. Mr More is not at all sufficient to discharge burden cast upon them by both the issues. Thus, provisions of Section 93-A of ESI Act is squarely attracted. The substantial question of law framed on 12 June 2013 is therefore answered in affirmative.

51. The learned Trial Court discussed the case of ***M/s Suburban Ply and Panels (P) Ltd. v. Regional Provident Fund Commissioner***[6]. In that matter, there was sufficient evidence produced by the establishment that the assets of M/s Orissa Ply were transferred and delivered to M/s Suburban Ply by Orissa State Financial Corporation pursuant to an agreement cum undertaking dated 4 January 1999 and therefore, it was observed that such transfer by OSFC in favour of M/s Suburban Ply could not be brought within the ambit of Section 17-B of Employees Provident Fund Act. In the matter in hand, except oral statement of Mr More, there is no documentary proof to show that M/s Mandovi Myth was taken over by Maharashtra State Financial Corporation under Section 29 of the State Financial Corporation Act and was thereafter auctioned or purchased by M/s Nirmitee Holdings Pvt. Ltd. Thus, applying such ratio without any evidence on record is not at all justified.

52. The learned Trial Court then relied in the case of ***ANK Seals, Nagpur v. Employees State Insurance Corporation***[7]. In that case, the facts clearly disclose from para 2 that the property owned by M/s J.J. Cold Tread, Nagpur was attached and sold by virtue of powers vested under State Financial Corporation Act and that too after giving notice under Section 29 of the said Act and following procedure thereof. M/s ANK Seals being the highest bidder purchased the said plot along with the building and free from all encumbrances vide registered sale-deed produced at Annexure 1. Considering the above fact, Bombay High Court at Nagpur Bench

6 2004 LAB. I.C. 1190

7 (2006) III CLR 274

observed that provisions of Section 93-A of ESI Act are not applicable. Again, at the cost of repetition, there was a registered sale-deed produced before the Court by ANK Seals to prove that it was an independent and separate entity from the earlier establishment and that they purchased the plot along with all infrastructure in an auction conducted by State Financial Corporation after following all the procedure, which is not at all the case in the present matter. In absence of any document that assets of M/s Mandovi Myth were attached under Section 29 of State Financial Corporation Act and thereafter auctioned, transfer of such establishment directly from the earlier establishment to present establishment attracts the provision of Section 93-A of the ESI Act. Apart from it, evidence of Mr More clearly goes to show that he only changed the name of M/s Aishwarya Resorts Pvt. Ltd. to M/s Nirmitee Holidays Pvt. Ltd. by order dated 4 August 2003. Even though no document to that effect is placed on record, it is evident from the letter dated 28 December 1998 that Mr More was also one of the Directors in Mandovi Myth Riverside Resort/Aishwarya Resorts Pvt. Ltd., changed to M/s Nirmitee Holidays Pvt. Ltd. Thus, ratio in the case of ANK Seals has been wrongly applied to the matter in hand and that too without any evidence.

53. The substantial question of law framed on 10 November 2022 in connection with use of LPG gas for the purpose of cooking, is no longer *res integra*. Mr Nigalye also admitted that use of LPG for preparing food is considered as manufacturing process. Case of ***Bombay Anand Bhavan Restaurant v. Deputy Director, Employees'***

State Insurance Corporation and Anr[8], considered the aspect of use of LPG in para Nos.27 to 32, 37 to 39 as under:-

> "*27. Both the appellants prepare sweets, savories and other beverages in their establishments. It is a settled position of law that cooking and preparing food items qualifies as manufacturing process. In the case of ESI v. Spencer and Co. [(1978) L.I.C 1759], the Madras High Court held, while dealing with the case of a hotel run by Sponsor and Company, that preparation of coffee, peeling of potatoes, making bread-toast, etc., in a hotel, involve 'manufacturing process'. Similarly the Bombay High Court in Poona Industrial Hotel Limited v. I. C. Sarin, [(1980) L.I.C. 106] held that the kitchen attached to Hotel Blue Diamond run by the Petitioners therein, should be considered as a 'factory' for the purpose of ESI Act. Hence, it is beyond doubt that there is manufacturing process involved in the establishment of the appellants.*
>
> *28) We need not go into the details of the number of workers in the establishment of the appellants in the 12 months preceding the relevant period as the same has been proved beyond doubt. So, the essential question which comes up for consideration is whether there has been use of power in the aid of the manufacturing process. It is the contention of the respondent corporation that use of LPG gas amounts to use of power.*
>
> *29. The definition of `Power' is in two parts. Firstly, it is electrical energy, and includes any other form of energy which is mechanically transmitted. The second part of the definition provides for exclusion from the definition of power, i.e., it does not include power generated by human or animal energy. The definition is wide enough to include all forms of energy which is mechanically transmitted. We will revert back to this definition little later after understanding what is LPG*

8 (2009) 9 SCC 61

Gas and the mechanism employed while transmitting the energy from LPG containers.

30. The New Encyclopaedia Britannica, 15th Edition contains an article on liquefied petroleum gas which is also called LP Gas, or LPG. The article is extracted:

"Liquefied petroleum gas, also called LP Gas or LPG, any of several liquid mixture of the volatile hydrocarbons propene, propane, butene, and butane. It was used as early as 1860 for a portable fuel source, and its production and consumption for both domestic and industrial use have expanded ever since. A typical commercial mixture may also contain ethane and ethylene as well as a volatile mercaptan, an odorant added as a safety precaution."

31. LPG or LPG gas is the abbreviation of liquefied petroleum gas. This group of products includes saturated hydrocarbons, propane and butane, which can be stored and transported separately or as a mixture. This is called liquefied petroleum gas, because these gases liquefy under moderate pressure. LPG is used as a fuel for domestic (cooking), industrial, horticulture, agricultural, heating and drying processes. LPG can be used as an automotive fuel or as a propellant for aerosols, in addition to other specialists applications. LPG can also be used to provide lighting through the use of pressure lanterns.

32. The gas cylinder is filled with a liquefied fuel gas, such as liquefied butane or the like, having a relatively low activity. A portion of the liquefied fuel gas is enclosed in the body of the gas cylinder which is vaporized, causing the internal pressure of the gas cylinder to be higher than the outside pressure. Therefore, there is conversion from one form of energy to another. A valve mechanism having a stem is mounted on the body of gas cylinder. The gas cylinder is joined to the gas cooking stove so that the stem is pushed inwards and the valve mechanism is opened. Thus, the fuel gas is discharged owing to the internal *pressure. The gas cooking stove incorporates a body, which is provided with a valve mechanism for supplying fuel gas to the burner and an operating member for opening/closing the valve mechanism. The valve mechanism in gas cooking equipment is to reduce high pressure gas supply to a lower working pressure. This is done to ensure steady supply of the gas at constant pressure. (Assistance is taken from the internet).*

37) LPG is stored in a cylinder fitted with a tube. Upon careful perusal of the definitions, which we have noticed earlier, it is clear that an LPG cylinder would qualify as an appliance which provides power. This power is transmitted by a tube which upon careful reading of the definition qualifies as transmission machinery as it is an appliance or device by which the motion of a primary mover is transmitted. In fact an analogy between the transmission of electricity and transmission of LPG can be drawn. The movement or transfer of electrical energy takes place over an interconnected group of lines and associated equipment between points of supply and points at which it is transformed for delivery to consumers or is delivered to other electric systems. Transmission is considered to end when the energy is transformed for distribution to the consumer.

38. In many countries transmission of LPG also takes place in a similar manner from a large fixed tank. In case of LPG stored in a cylinder the mechanism of transmission is essentially the same as the gas travels from the cylinder where it is stored to the gas cooking stove. While transmission of electricity involves a switch, transmission of LPG involves a valve mechanism or a regulator to ensure smooth flow. Hence, LPG is a source of energy which is mechanically transmitted by way of the tube attached to the machinery.

39. In our view, the use of LPG satisfies the definition of power as it is mechanically transmitted and is not *something generated by human or animal agency. Since the establishment of the appellants involves a manufacturing process with the aid of LPG gas, which can now be termed as power, the establishment of the appellants can be termed as factories, and therefore, the ESI Act will apply to these establishments.”*

54. ***In the case of G.L. Hotels Limited v. T.C. Sarin***[9], the Supreme Court was dealing with the issue as to whether the hotels run by the appellants are factories within the meaning of the provisions of Section 2(12) of Employees State Insurance Act, 1948 and therefore, covered under Section 1 of the said Act. It was mainly argued on behalf of the hotels/appellants that entire premises of the hotel cannot be treated as factory merely because process of cooking food is carried on in its kitchen which forms only a part of the said premises. After discussing the definition including manufacturing process, and the submission as found in para No.7, it is observed thus:-

“*7. THE observation in the aforesaid paragraph namely "no part of the premises is used for purposes unconnected with the manufacturing processes" has been strongly relied upon by Shri Sorabjee to contend that according to this Court the rest of the premises of the hotel must be shown to be connected with the kitchen activities and unless it is so shown, the rest of the hotel-premises cannot be covered by the said Act. There is no doubt that in the course of explaining the activity which was under consideration in the said judgment the Court has made the observation in question to show how in fact, even the activities carried on in the rest of the premises were also connected with the manufacturing process. The observation is, however, not the basis of the conclusion*

9 1993 (4) SCC 363

arrived at there. The observation has to be understood in the context in which it was made and cannot be interpreted to mean that in every case, such a connection has necessarily to be established in all respects. It is enough according to us, that the manufacturing activity has a broad connection with the activities carried on in the rest of the premises. For example, in the present case, it cannot be denied that kitchen is an integral part of the hotel-business. Those who occupy hotel do depend upon the food and the beverages which are prepared in its kitchen. It is not possible to conceive of a hotel without a kitchen. Lodging and boarding are both essential components of the services rendered by a hotel. Hence, it cannot be denied that the activity in the kitchen has a connection with activities carried on in the rest of the hotel premises. It should not further be forgotten that the definition of certain premises as a factory or of certain activities as an industry etc. given in social welfare legislations like the present, are necessarily artificial. The object is to extend the welfare coverage to as large a section of the individuals as possible. Such definitions cannot be tested on the anvil of the common usage of the terms defined. The present is an illustration of the kind. At the same time, the contention advanced by Shri Sorabjee cannot be dismissed lightly and may have to seriously considered in appropriate cases. We are not accepting it in the present case because as pointed out above, it cannot be said that the kitchen activity has no relation at all with the activities in the other premises of the hotel. In the circumstances, we dismiss all the appeals with costs."

55. The above observations are squarely applicable to the facts of the matter in hand.

56. Thus, there is no dispute that use of LPG for the purpose of cooking is considered as manufacturing process. Accordingly, the said substantial question of law has to be answered in affirmative.

57. It therefore takes us to the last substantial question of law framed on 10 November 2022, which is in fact correlated to the first substantial question of law framed on 12 June 2013. It is also discussed elaborately that M/s Mandovi Myth was covered under the ESI Act which was running a hotel including the restaurant. However, Respondent in their pleadings specifically claimed that the hotel was separate from the bar and restaurant and it was not integral part of the business. At one stage, Mr More claimed that restaurant and bar though existing at one corner of the same building was given to one contractor and there was no functional integrity between the two. It is also claimed that the restaurant and bar was not catering to the customers residing in the hotel premises only. First of all, it is necessary to look into evidence produced by the Respondent before the Trial Court in this respect. Except the testimony of Mr More, there is absolutely no other document or material to prove such contention. The contractor was not examined as a witness, The documents by which said contractor was allegeldy given contract to run restaurant and bar was not produced before the Trial Court. Thus, bare words of Mr More could not have been accepted by the learned Trial Court to shift the burden on the Corporation.

58. Mr More in his affidavit in evidence at paras 5 and 6 claimed that vide order dated 14 August 2003 issued by Registrar of Companies, the name of M/s Aishwarya Resorts Pvt. Ltd. was changed to M/s Nirmitee Holidays Pvt. Ltd. No such document was placed on record before the Trial Court. However, the statement of Mr More on oath in para 5 of Exh. 43 colly further proves that only the name of the establishment was changed from M/s Aishwarya

Resorts Pvt. Ltd. to M/s Nirmitee Holidays Pvt. Ltd. The composition of the management or the company was not changed. It is the contention of Mr More in para 3 of his affidavit that M/s Mandovi Myth Riverside Resort was owned by M/s Aishwarya Resorts Pvt. Ltd wherein Mr Ashok Salvi and Mr Amol Salvi were the Directors and were managing affairs of the said Resort. During cross examination, Mr More firmly stated that he was not a Director in the company named M/s Aishwarya Resorts Pvt. Ltd. However, letter dated 28 December 1998 quoted earlier at Exh. 66 colly shows that Mr Prakash More was one of the Directors in Mandovi Myth Riverside Resort Ltd. Thus, it is evident from the record that Mr More deposed contrary to the documents and tried to pretend that he had no connection with M/s Aishwarya Resorts Pvt. Ltd./Mandovi Myth Riverside Resort and that such establishment was taken over by him by paying the dues of M/s Aishwarya Resorts Pvt. Ltd. to MSFC. In absence of any such documents and the fact of the letter dated 28 December 1998, testimony of Mr Prakash More is clearly untrustworthy and in fact found to be contrary to the record.

59. It is further contended by Mr More that the hotel was only a residential hotel and that it had no connection with the restaurant and bar. Except bare words of Mr More, whose testimony is clearly found to be untrustworthy and contrary to the documents, there is absolutely no other material on record. During cross examination, he admitted that the restaurant and bar is at one corner of the same building wherein he was conducting the business of hotel. It is his claim that restaurant and bar was run independently by one contractor and it was not integral part of the hotel. Again, neither

there is any document nor any witness examined to that effect. It is clear from the earlier record of the ESI Corporation of Mandovi Myth Riverside Resort which was covered under the ESI Act, restaurant and bar was part and parcel of the hotel business. The observations in para 7 of *G.L. Hotels Limited* (supra) are squarely applicable.

60. It is well established that once establishment is covered under the ESI Act, it continues to remain so until the code number alloted to such establishment is withdrawn. There is a procedure to be adopted for removing the name of the establishment from the list of covered establishments with the Corporation. No such procedure was adopted. Therefore, when Mandovi Myth Riverside Resort was found covered under the ESI Act, which was taken over by the present establishment, not only provisions of Section 93-A attract, but present establishment is duty bound to pay all the existing dues/arrears of the earlier establishment.

61. Learned Trial Court completely failed to consider above aspects and in absence of any material produced by the present Respondent, concluded that that restaurant was not integral part of the hotel only on the reasons that the witnesses examined by the Corporation failed to prove that such hotel and restaurant are one and the same. Once again it is required to note that burden to prove that restaurant and bar was not the integral part of the hotel was on the Respondent herein and not on the Corporation. It is not the case that Respondent herein succeeded in proving such issue thereby shifting burden on the Corporation to disprove it by leading cogent evidence. Accordingly, question No.3 needs to be answered in negative.

62. In sum and substance, the first substantial question of law needs to be answered stating that Section 93-A of the ESI Act stands attracted to the Respondent as it is only a successor in interest of M/s Mandovi Myth Riverside Resort. The second substantial question of law is to be answered in affirmative in view of the findings in the case of *Bombay Anand Bhavan Restaurant* (supra). The third substantial question of law is answered in affirmative holding that the hotel is integral part of the restaurant and bar and that the Trial Court, in absence of any material in this regard, erred in concluding otherwise.

63. Having said so, appeal must succeed. The impugned Judgment and Order dated 9 March 2011 passed in ESI Case No. 4/2004 is hereby quashed and set aside. Parties shall bear their own cost.

BHARAT P. DESHPANDE, J.

JOSE FRANCISCO DSOUZA

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