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

***THE HONOURABLE SRI JUSTICE CHALLA GUNARANJAN**

CIVIL MISCELLANEOUS APPEAL No. 498 of 2008

% 09.05.2025

The Regional Director, ESI Corporation

……Petitioner

And:

$1. K.S.R.Cotton Mills Pvt.Ltd., &
another

….Respondents.

!Counsel for the petitioner : Sri Venna Kalyan Chakravarhi
rep. Sri U.R.P.Srinivas

^Counsel for the respondent :

<Gist:

>Head Note:

? Cases referred:

1. 1980 SCC OnLine AP 45
2. 2014 AIR SCW 6214
3. AIR 2015 Hyderabad 134
4. AIR 2008 Himachal Pradesh 53
5. 2004 AIR SCW 4326
6. AIR Online 2023 SC 52
7. FAO No.1112 of 1988 and batch decided on 06.11.2024
   By High Court of Punjab and Haryana at Chandigarh.
8. 2025 SCC OnLine AP 1313

HIGH COURT OF ANDHRA PRADESH AT AMARAVATI

* * * *

CIVIL MISCELLANEOUS APPEAL No. 498 of 2008

DATE OF JUDGMENT PRONOUNCED: 09**.05.2025**

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE RAVI NATH TILHARI

&

THE HONOURABLE SRI JUSTICE CHALLA GUNARANJAN

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

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RAVI NATH TILHARI,J

_____

CHALLA GUNARANJAN,J

THE HONOURABLE SRI JUSTICE RAVI NATH TILHARI

THE HONOURABLE SRI JUSTICE CHALLA GUNARANJAN

CIVIL MISCELLANEOUS APPEAL NO: 498/2008

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

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

2. No representation for the respondents.

3. This appeal under Section 82 of the Employees' State Insurance Act, 1948 (in short 'ESI Act')has been filed by the Regional Director of ESI Corporation challenging the order dated 29.03.2007 in ESI O.P.No.7 of 1998 passed by the Presiding Officer, Labour Court, Guntur.

4. The respondent No.1 – K.S.R Cotton Mills Private Limited filed petition being ESI O.P.No.7 of 1998 under Section 75 of ESI Act with the prayer to declare it as seasonal factory and not covered under the ESI Act. The respondent No.1 is a company incorporated under Indian Company's Act situated at Etukur Road. The case set up was that it dealt in pressing the lint into bales which is exclusively a seasonal one and it used to function hardly for 2 to 3 months in a year. It was depending upon the availability of ginned cotton. It was a seasonal factory within the meaning of Section 2(19A) of ESI Act. The respondent No.1 in ESI/the present appellant issued a letter dated 15.10.1997 stating as if it was factory covered under ESI Act. The respondent No.1 herein was not given any opportunity. After sometime, the appellant also sent a letter dated 08.01.1998 demanding for production of records, which was duly replied by respondent No.1

on 14.02.1998 submitting interalia that respondent No.1 factory was seasonal factory and was exempted from the purview of ESI Act.

5. The appellant/respondent No.1 in ESI OP filed counter. The case set up was that the inspector of the Regional Director, ESI Corporation visited the establishment on 10.02.1997 and verified Form-01 submitted by the factory. It was found that there were more than 10 workers employed from 07.01.1995 to February, 1997. Respondent No.1 was also engaged in a commercial activity of purchase and sale of ginned cotton and seeds. The establishment was covered under Section 2(12) of ESI Act but the respondent No.1 did not comply with the provisions of the ESI Act. Consequently the notice dated 12-02-1999 was issued.

6. The learned Presiding Officer, Labour Court, Guntur framed the following points for consideration:

> "i) Whether the petitioner is a seasonal factory within the meaning of Section 2(19A) or shop within the meaning of Section 1(5) read with G.O.Ms.No.187, dated 02.03.1978?
>
> ii) To what relief the petitioner is entitled to?"

7. On behalf of petitioner in ESI OP (respondent No.1 herein), D.Sivaram Prasad was examined as PW1 and on behalf of the respondent therein (appellant herein), RW1 – A.B.Sastry & RW2 – K.Yesu were examined. The parties also filed their respective documentary evidences.

8. The Presiding Officer recorded the finding that the respondent No.1-factory was a seasonal factory within the meaning of Section 2(19A) of ESI Act, as it was engaged in main and pre-dominate activity of cotton ginning. It could not be treated as establishment. Merely because the respondent No.1 herein was

engaged in sale of cotton lint, cotton pressing and separation of seeds from the cotton, the factory did not loose its characteristic of seasonal in nature. So it was exempted from the operation of ESI Act and the Presiding Officer also recorded the finding that the seven workers were employed within the prescribed wage limit which were less than 10 and therefore under any circumstance, the establishment was neither factory nor a shop within the meaning of Section 2(12) and Section 1(5) of ESI Act. The action initiated by the present appellant was illegal. The learned Court recorded the finding that the remaining workers were receiving more than the prescribed limit under ESI Act, so they were exempted employees to whom ESI Act provisions did not apply. It was not covered under the ESI Act.

9. The ESI O.P. of respondent No.1 herein was allowed by an order dated 29.03.2007. The orders impugned were set aside.

10. Challenging the order dated 29.03.2007, the present appeal has been filed.

11. Learned counsel for the appellant submitted that the respondent No.1 factory is not a seasonal factory. It was also engaged in purchasing and selling of cotton. He placed reliance in the case of ***The*** **Employees' State Insurance Corporation, Hyderabad v. M/s. Jayalakshmi Cotton & Oil Products (p) ltd.** [1], **Delhi Gymkhana Club Ltd., v. Employees State Insurance Corporation**[2],

[1] 1980 SCC OnLine AP 45
[2] 2014 AIR SCW 6214

R.C.C.(sales) Private Limited v. E.S.I.Corporation[3], **M/s. Vardhman Textiles Ltd., v. State of H.P.**[4]

12. Learned counsel for the appellant next submitted that, after the amendment in ESI Act, in 1989 vide Act 29 of 1989, with effect from 29.10.1989, under Section 1(6), the number of persons employed, is of no relevance. Even if the number of persons employed is less than 10, the ESI Act shall be applicable. He submitted that prior to the amendment of 1989, the number of employed person was relevant to consider the applicability of ESI Act but not after the 1989 amendment. He placed reliance in ***Employees State Insurance Corporation v. Hyderabad Race Club***[5] and ***ESI Corporation v. M/s.Radhika Theatre***[6].

13. We have considered the aforesaid submissions and perused the material on record.

14. We shall consider the first submission first, which is that the respondent – factory is not a seasonal factory.

15. Section 2(19A) of ESI Act defines Seasonal Factory, as under:

> "(19A) "seasonal factory" means a factory which is exclusively engaged in one or more of the following manufacturing processes, namely, cotton ginning, cotton or jute pressing, decortication of groundnuts, the manufacture of coffee, indigo, lac, rubber, sugar (including gur) or tea or any manufacturing process which is incidental to or connected with any of the aforesaid processes and includes a factory which is engaged for a period not exceeding seven months in a year –
>
> (a) in any process of blending, packing or repacking of tea or coffee; or

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[3] AIR 2015 Hyderabad 134
[4] AIR 2008 Himachal Pradesh 53
[5] 2004 AIR SCW 4326
[6] AIR Online 2023 SC 52

(b) in such other manufacturing process as the Central Government may, by notification in the Official Gazette, specify;"

16. In ***M/s.Jayalakshmi Cotton & Oil Products*** (supra) upon which learned counsel for the appellant placed reliance, the factory was doing decortications of cotton seeds and oil extraction from December to June every year in addition to cotton ginning and pressing. The Co-ordinate Bench of this Court held that the other manufacturing process viz., decortications and oil extraction and solvent extraction were only adjuncts to the primary manufacturing process of cotton ginning and pressing. The activities in the factory were interconnected. Therefore, the factory was a seasonal factory. The co-ordinate bench laid down the essential conditions requisite for a factory to be called a seasonal factory.

17. Para Nos. 8 to 10 of M/s. Jayalakshmi Cotton & Oil Products (supra) read as under:

> 8. The essential conditions requisite for a factory to be called as a "seasonal factory" are:
>
> "(1) the factory must be engaged exclusively;
>
> (2) in one or more of the manufacturing process, viz., cotton ginning, cotton or jute pressing, decortication of groundnuts; or
>
> (3) any manufacturing process which is incidental to or connected with any of the aforesaid processes.
>
> The first two conditions; exclusive engagement in the manufacturing process of cotton ginning, cotton pressing, decortication of groundnuts do not present any difficulty. But the real problem is: as to what is incidental to or connected with the aforesaid manufacturing processes."
>
> 9. It is the contention of the learned counsel for the Corporation that the decortication of cotton seeds and oil extraction are not incidental to or connected with the cotton ginning or cotton pressing. He fervently pleads that the oil section and solvent extraction unit work all-through the year and one unit of the factory

cannot be branded as seasonal and the rest not and that the factory as a whole is liable for contribution. According to him, it is the entire premises that constitutes a factory. He submits that the four units of the factory, viz., cotton ginning and pressing, cotton seeds, decortication, oil extraction and solvent extraction are located in the same premises and that the main activity in the factory premises is cotton seed oil extraction and the last three sections are perennial and it is only the first section, i.e., ginning and pressing that is seasonal. According to him, the main activity in the factory is not cotton ginning and pressing and, therefore, the factory does not fall within the fold of the seasonal factory defined in S. 2(12) of the Act. The learned counsel placed reliance on a decision of the Supreme Court in Nagpur Electric Light and Power Company, Ltd. v. Regional Director, Employees' State Insurance Corporation [A.I.R. 1967 S.C. 1364], wherein the Supreme Court observed:

> "Any premises including the precincts thereof, (excepting a mine and railway running shed) constitute factory if-
>
> (1) twenty or more persons are working or were working thereon on any day of the preceding twelve months; and
>
> (2) in any part thereof a manufacturing process is being carried on with the aid of power.
>
> If these two conditions are satisfied, the entire premises including the precincts thereof constitute a factory, though the manufacturing process is carried on in only a part of the premises."

10. In Employees' State Insurance Corporation v. S.M. Sriramulu Naidu [AIR 1960 Mad 248], the Madras High Court held:

> "The essential requisites of a factory under the Act are- (1) a premises, a geographical area within a certain boundary;
>
> (2) in a part of which at least manufacturing process should be carried on with the aid of power; and
>
> (3) twenty or more persons should be working in the premises.

It is not necessary that all the twenty persons should be working in the same section or department. So long as the efforts of all the departments are coordinated to achieve the main object of the factory, that is, the manufacture, the decision whether a particular place is a factory or not, would depend largely

on the question, whether those activities are carried on within the premises of the factory. The premises need not be a single building; a number of buildings within a single compound might constitute a factory."

18. In ***M/s. Jayalakshmi Cotton & Oil Products*** (supra) further held as under in para Nos. 11 & 12:

11. .....The perplexing question is whether the decortication of seeds, oil extraction and solvent extraction are incidental to or connected with the cotton ginning and pressing. **It is common ground that the factory is not exclusively engaged in cotton ginning or pressing.** But it is an admitted fact that the petitioner-factory started only with the cotton ginning are pressing in March 1973, and subsequently added the cotton seed decortication section and oil mill and solvent extraction sections, ... It is also admitted that the cotton ginning and pressing is a seasonal activity but the cotton seed oil extraction and solvent extraction are perennial. **Thus the activities in the factory are interconnected and solvent extraction and oil seeds sections though perennial are closely connected with or incidental to cotton ginning and pressing**. In Royal Talkies, Hyderabad v. Employees' State Insurance Corporation [1978 - II L.L.N. 2681], the Supreme Court had occasion to consider whether the employees of cycle stand and canteen run in a cinema theatre by contractors are covered by the definition of "employee" under S. 2(9) of the Act. The Supreme Court observed in Para 14, at pages 274 and 275;

> "No one can seriously say that a canteen or cycle stand or cinema magazine booth is not even incidental to the purpose of the theatre. The cinema goes ordinarily find such work an advantage, a facility, an amenity and sometimes a necessity. All that the statute requires is that the work should not be irrelevant to the purpose of the establishment. It is sufficient if it is incidental to it. A thing is incidental to another if it merely appertains to something else as primary. Surely such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either. Much depends on time and place, habits and appetites, ordinary expectations and social circumstances. In our view, clearly the two operations in the present case, namely, keeping a cycle-stand and running a canteen are incidental or adjuncts to the primary purpose of the theatre."

12. Here, as there, **the primary manufacturing process is cotton ginning and pressing. The other manufacturing process, viz., decortication and oil extraction and solvent extraction are only adjuncts to the primary manufacturing process of cotton ginning and pressing. We have, therefore, no hesitation in holding that the petitioner-factory is a seasonal factory**."

19. The law as laid down in the aforesaid case is that even if the factory is not exclusively engaged in cotton ginning or pressing but is also engaged in manufacturing process which are only adjuncts to the primary manufacturing process, it will still be a seasonal factory.

20. In the present case it has not been disputed that the primary and predominant activity is cotton ginning or/and cotton pressing. It could also not be argued that sale and purchase of cotton was the predominant activity nor that such sale or purchase of cotton was not incidental or unconnected to the predominant activity. Whether the sale or purchase is incidental or connected would depend upon various factors and would be a question, not a pure question of law. Consequently, the finding recorded by the learned court that merely because of sale of cotton lint, the factory would not loose its characteristic of 'seasonal' in nature, in our view neither calls for interference nor gives rise to any substantial question of law in the present appeal.

21. In ***Delhi Gymkhana Club*** (supra) Hon'ble Apex Court observed that the ESI Act is a beneficial piece of social welfare legislation aimed at securing the well-being of the employees and the court will not adopt a narrow interpretation which will have the effect of defeating the objects of the Act. Similarly in ***R.C.C.(Sales) Private Limited*** (supra), it was held that the ESI Act is a beneficial legislation and the main purpose of the enactment, is to provide for certain benefits to employees of a factory under certain circumstances. There is no dispute on the aforesaid proposition of law but for the applicability of the ESI Act, it must be a 'factory' and not a 'seasonal factory', which is excluded from the purview of the Act. We are of the view that if the factory is covered under the

expression seasonal factory, the provisions of the ESI Act would not be extended, only on the ground of the ESI Act being the beneficial legislation. The exemption from applicability of the ESI Act has been granted by the Act itself.

22. **M/s. Vardhman Textiles Ltd.,** (supra) the cotton bales and cotton wastes, were said to fall within the definition of cotton ginned and unginned of the agricultural produce, within meaning of Himachal Pradesh Agricultural and Horticulture Produce Marketing (Development and Regulation) Act. That is not the point involved in this appeal.

23. As considered above, in the present case, the finding is that the respondent No.1 is a seasonal factory and it could not be shown as to how the respondent No.1 is not a seasonal factory and not covered under the definition of a seasonal factory under Section 2(19A) of ESI Act, when the predominant/primary manufacturing process is cotton ginning etc as mentioned in Section 2(19A) of ESI Act. So, the first submission fails.

24. Now, we proceed to consider the next submission of the learned counsel for the appellant.

25. We record that, the finding of the learned Labour Court that, there were less than 10 employed persons on wages, was not challenged before us and no argument contrary to the said finding was advanced. So, we proceed to consider the submission taking the finding on number of employed persons on wages, as less than 10.

26. The point for consideration is whether in view of the amendment vide Act No. 29 of 1989, i.e., Section 1(6) of ESI Act, the number of employed persons is not relevant to determine the applicability of the ESI Act.

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

> ***1. Short title, extent, commencement and application*** *- (1) This Act may be called the Employees' State Insurance Act,1948.*
>
> *(2) It extends to the whole of India [***].*
>
> *(3) It shall come into force on such date or dates as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and [for different States or for different parts thereof].*
>
> ***(4) It shall apply, in the first instance, to all factories (including factories belonging to the government) other than seasonal factories:***
>
> ***[PROVIDED that nothing contained in this sub-section shall apply to a factory or establishment belonging to or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.]***
>
> *(5) The appropriate Government may, in consultation with the Corporation and [where the appropriate Government is a State Government, with the approval of the Central Government], after giving one months' notice of its intention of so doing by notification in the Official Gazette, extend the provisions of this Act or any of them, to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise:*
>
> *[PROVIDED that where the provisions of this Act have been brought into force in any part of a State, the said provisions shall stand extended to any such establishment or class of establishments within that part if the provisions have already been extended to similar establishment or class of establishments in another part of that State.]*
>
> ***(6) A factory or an establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under this***

Act or the manufacturing process therein ceases to be carried on with the aid of power.]

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

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

> *"12. "factory" means any premises including the* ***precincts thereof whereon ten or more persons are employed or were employed on any day of preceding twelve months,*** *and in any part of which a manufacturing process is being carried on or is ordinarily so carried on, but does not include a mine subject to the operation of Mines Act, 1952 (35 of 1952) or a railway running shed"*

30. Section 2(12) provides that the 'factory' means any premises including the precincts thereof whereon ten or more persons are employed or were employed on any day of preceding twelve months, and in any part of which a manufacturing process is being carried on or is ordinarily so carried on, but it does not include a mine, subject to the operation of Mines Act, 1952 or a railway running shed. So, as per the definition of the 'factory', to be a 'factory', there should be employed 10 or more persons i.e., in present, or 10 or more persons were employed previously on a date preceding 12 months. We are confining to the aspect of number of the persons employed, in view of the limited argument raised on this aspect. Consequently, if at present or on any date preceding 12 months, 10 or more persons are/were employed in any premises including the precincts thereof, it

would be a 'factory' and covered by the ESI Act, subject however to the fulfilment of the other statutory requirements. The finding recorded in the present case is that there are less than 10 persons employed on wages. So, we are of the view that the respondent No.1 would not be even a 'factory' and therefore the ESI Act would not be applicable.

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

32. Sub-Section (6) of Section 1, starts, "a factory or an establishment to which this Act applies shall continue to be governed by this Act". So, it provides for continuation of the applicability of ESI Act i.e., if the Act was already applicable, then even after the reduction of number of persons employed it is reduced below 10, the Act shall continue to apply. The provision is clear that if the ESI Act was applicable to a 'factory' considering the number of the persons employed being not less than 10, then if there was reduction in the number of its employed persons below 10, still such factory would continue to be governed by the ESI Act. The reduction in number of employees below 10, would not bring out the factory from the purview of the ESI Act, after the amendment, is the correct reading and interpretation of Section 1(6) of the ESI Act.

33. It is not the case of the appellant that the respondent NO.1 was previously covered by ESI Act. It was for the first time, respondent No.1 was sought to be covered under the ESI Act vide the proceedings impugned before EI Court. In our view, for the applicability of ESI Act, for the first time, what is relevant is that, it

should be a 'factory' as defined under Section 2(12). If the number of persons employed is less than 10, it would not be a 'factory' under Section 2(12) for the purposes of Section 1(4). Sub-section (6) of Section 1, is not relevant at all in the present case. Sub-Section (6) applies to a 'factory' which was under the purview of the ESI Act and there was reduction in the number of the persons employed below 10, which is not the case at hand.

34. In ***M/s. Radhika Theatre*** (supra) the Radhika Theatre was running since 1981 and it paid ESI contributions up to September, 1989. Thereafter, as its employees were less than 20, it did not pay the contributions. The demand notices issued by ESI Corporation were challenged before the EI Court on the ground inter-alia that prior to the insertion of Sub-section (6) of Section 1 w.e.f. 20.10.1989, the Radhika Theatre employed less than 20 persons, and therefore, it was not liable under the provisions of the ESI Act. The EI Court dismissed the case. Further, the High Court allowed the appeal taking the view that, sub-Section (6) of Section 1 came to be inserted w.e.f. 20.10.1989, and the same shall not be applicable retrospectively to an establishment, established prior to 20.10.1989/31.03.1989. The matter reached the Hon'ble Apex Court. Hon'ble Apex Court held that prior to the insertion of Sub-section (6) of Section 1 of the ESI Act, only those establishments/factories engaging more than 20 employees were governed by the ESI Act. However, after 20.10.1989 i.e., after the amendment, there was a radical change. Under the amended provision a factory or establishment to which ESI Act applied would be governed by the ESI Act notwithstanding that

the number of persons employed therein at any time fell below the limit specified by or under the ESI Act. Therefore, on and after 20.10.1989, irrespective of number of persons employed, a factory or an establishment shall be governed by the ESI Act.

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

> *"7. Prior to insertion of Sub-section (6) of Section 1 of the ESI Act, only those establishments/factories engaging more than 20 employees were governed by the ESI Act. However, thereafter, Sub-section (6) of Section 1 of the ESI Act has been inserted on 20.10.1989, and after 20.10.1989 there is a radical change and under the amended provision a factory or establishment to which ESI Act applies would be governed by the ESI Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under the ESI Act. Therefore, on and after 20.10.1989, irrespective of number of persons employed a factory or an establishment shall be governed by the ESI Act. Therefore, for the demand notices for the period after 20.10.1989, there shall be liability of every factory or establishment irrespective of the number of persons employed therein. With respect to such a notice it cannot be said that amended Section 1 inserting Sub- section (6) is applied retrospectively as observed and held by the High Court. Only in case of demand notice for the period prior to inserting Sub-section (6) of Section 1 of the Act, it can be said that the same provision has been applied retrospectively. Therefore, the High Court has committed a very serious error in observing and holding that even for the demand notices for the period subsequent 20.10.1989 i.e., subsequent to inserting Sub-section (6) of Section 1 the said provision is applied retrospectively and the High Court has erred in allowing the appeal and setting aside the demand notices even for the period subsequent to 20.10.1989. Sub-section (6) of Section 1 therefore, shall be applicable even with respect to those establishments, established prior to 31.03.1989/20.10.1989 and the ESI Act shall be applicable irrespective of the number of persons employed or notwithstanding that the number of persons employed at any time falls below the limit specified by or under the ESI Act."*

36. At this stage, we may mention that Section 2(12) which defines 'factory', prior to its substitution by Act 29 of 1989, Section 3(v) w.e.f. 20.10.1989, in the

definition of the 'factory' Clause (b) used the expression "20 or more persons". After the amendment, the expression used is "10 or more persons were employed".

37. Learned counsel for the appellant emphasised that in ***M/s. Radhika Theatre***, it has been held that, even if the number of employees was less than 10 in view of the amendment in 1989, the ESI Act was applicable. So, the demand notice issued was justified and the order passed by EI Court was unsustainable. The submission that the Hon'ble Apex Court has held that after the amendment, irrespective of number of persons employed, a factory or an establishment, would be governed by the ESI Act, is not the correct reading of the judgment in ***M/s. Radhika Theatre*** (supra). The judgment clearly shows that Radhika Theatre was covered under ESI Act, even before the amendment of the year 1989. Thereafter, employees were less than 20 in number when Sub-section (6) of Section 1 was incorporated. The Hon'ble Apex Court observed in para-7 as quoted above that "……and under the amended provision **a factory or establishment to which ESI Act applies would be governed by the ESI Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under the ESI Act.**" So it is very clear from the judgment that, for the applicability of Sub-section (6) of Section1, the first and foremost condition is that the Act was applicable to the 'factory' or the 'establishment'; which shall continue to be applied even if the number falls below 10. Section 1(6) makes

the continuity, of the applicability of the Act, irrespective of reduction in the number of persons employed below specified limit under or by the Act.

38. In ***Employees State Insurance Corporation v. Punjab State Electricity Board and batch***[7], the High Court of Punjab and Haryana at Chandigarh, on consideration of ***M/s.Radhika Theatre*** (supra) has also taken the view that Sub-section (6) of Section 1 governs those premises which were covered under the ESI Act prior to Amending Act of 1989. Para Nos.16 to 19 in ***Punjab State Electricity Board*** (supra) read as under:

> "16. In terms of Section 1(4), the Act is applicable at the first instance to all factories including factories belonging to the government other than seasonal factories subject to notification in the official gazette under Section 1(3). 'Factory' is defined under Section 2(12). Prior to amendment of 1989, Section 2(12) read as under :
>
> > "Section 2(12)'"factory means any premises including the precincts thereof where on twenty or more persons are working or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on but dues not include a mine subject to the operation off the Indian Mines Act, 1923 or a railway running shed:"
>
> 17. The provision came for consideration before the Supreme Court in the case of Employees State Insurance Corporation vs. Radhika Theatre, 2023 AIR (SC) 673, wherein the Supreme Court held as under :
>
> > "7. Prior to insertion of Sub-section (6) of Section 1 of the ESI Act, only those establishments/factories engaging more than 20 employees were governed by the ESI Act. However, thereafter, Sub-section (6) of Section 1 of the ESI Act has been inserted on 20.10.1989, and after 20.10.1989 there is a radical change and under the amended provision a factory or establishment to which ESI Act applies would be governed by the ESI Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under the ESI Act. Therefore, on and after 20.10.1989, irrespective of number of persons employed a factory or an establishment shall be governed by the ESI Act."

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

(emphasis supplied)

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

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

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

39. Recently, in ***ESI Corporation v. Sri Ramakrishna Rice Mill***[8] this Court has also taken the same view on the construction of Section 1(6) of the ESI Act as amended in 1989.

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

41. We conclude that we are of the considered view that:

i) The respondent No.1-factory is a seasonal factory as held by the learned Labour Court and so out of the purview of the ESI Act.

ii) Section 1(6) of ESI Act is not attracted. The number of employed person, if there is reduction below the specified number, with respect to a 'factory' as covered under Section 2(12) of the Act, after the amendment of 1989, then only the number of employed persons would not have the effect of bringing out the factory out of the purview of the ESI Act, which Act would continue to apply. But, if, the ESI Act was previously not applicable at all and for the first time it was being applied, the number of employed person would be relevant, and if below 10, the ESI Act could not be applied.

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

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[8] 2025 SCC OnLine AP 1313

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

No order as to costs.

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

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RAVI NATH TILHARI,J

_____
CHALLA GUNARANJAN,J

Dated:09.05.2025.
Note: L.R. copy be marked
B/o.
AG

THE HONOURABLE SRI JUSTICE RAVI NATH TILHARI

THE HONOURABLE SRI JUSTICE CHALLA GUNARANJAN

CIVIL MISCELLANEOUS APPEAL NO: 498/2008

Date: 09.05.2025.

Dated:
Note: L.R. copy be marked
B/o.
AG