PETITIONER:
EMPLOYEES STATE INSURANCECORPORATION

Vs.

RESPONDENT:
M/S. APEX ENGINEERING PVT. LTD.

DATE OF JUDGMENT: 06/11/1997

BENCH:
S.B. MAJMUDAR, M. JAGANNADHA RAO

ACT:

HEADNOTE:

JUDGMENT:
THE 6TH DAY OF NOVEMBER, 1997
Present:
Hon'ble Mr. Justice S.B. Majmudar
Hon'ble Mr. Justice M.Jagannadha Rao
Vijay K.Mehta, Adv. for the appellant
Wasim A. Qadri, Adv. (A.C.) for the Respondent

J U D G M E N T

The following Judgment of the Court was delivered:
S.B. Majmudar. J.

Employees' State Insurance Corporation has brought in challenge judgment and order rendered by a Division Bench of the High Court of Bombay. Nagpur Bench in Letters Patent appeal whereunder the Division Bench confirmed the order of the learned Single Judge holding that the Managing Director of the respondent-company is not an employee as defined in Section 2(9) of the Employees' State Insurance Corporation Act, 1948 (hereinafter referred to as 'the Act'). The present appeal on grant of special leave to appeal under Article 136 of the Constitution of India reached final hearing before us. We have heard learned advocate for the appellant-Corporation as well as learned advocate Shri S. Wasim A. Qadri, who was requested by us to assist the Court as amicus curiae, as respondent-company being served has to thought if fit to appear through any counsel. Before considering the main question in the controversy between the parties it is necessary to note the backdrop facts leading to these proceedings.

Background Facts.

Respondent is a private limited company incorporated under the Companies Act, 1956. It is engaged in the manufacture of motor seats. Its factory at the relevant time was located in M.I.D.C. Nagpur. It also had a branch factory at Nagpur. On or about 09th September 1969 the Board of Directors of the respondent-company resolved to elect one of the directors Shri V.N.Dhanwate as Managing Director of the company and also conferred on him the authority to borrow, invest and lend the funds with certain limitation specified in the Resolution. The Board of Directors also resolved to grant annual remuneration of Rs. 12,000/- to Shri Dhanwate for rendering services as Managing Director. The appellant-

Corporation by its communication dated 23rd May 1974 informed the respondent-company that Shri Dhanwate being the Managing Director who was also paid a regular remuneration was to be included along with other 19 employees engaged for wages by the company for the purposes of coverage of the company as a factory under Section 2 Sub-section (12) of the Act. after considering all the facts and circumstances the appellant-Corporation by its order dated 1st July 1974 directed that the company be covered as a factory under Section 2 sub-section (12) of the Act and hence it was directed to comply with the provisions of the Act.

Being aggrieved by the appellant's decision the respondent-company moved in application under Section 75 read with Section 76 of the Act before the Employees' State Insurance Court. The Insurance Court by its judgment dated 05th September 1975 allowed the application of the respondent-company and held that the company is not covered by Section 2 sub-section (12) of the Act as it had only 19 employees and shri Dhanwate cannot be treated to be an employee within the meaning of Section 2 sub-section (9) of the Act and hence the Company cannot be said to have employed 20 employees so as to be covered as a factory under Section 2 sub-section (12) of the Act. The said decision of the ESI Court was challenged before the High Court in appeal. Learned Single Judge of the High Court agreed with the ESI Court and dismissed the appeal. The appellant-Corporation thereafter carried the matter in Letters Patient Appeal under Clause 15 thereof. The Division Bench of the High court by the impugned judgment dismissed the said appeal and concurred with the view of the learned Single Judge that the Managing Director Shri Dhanwate could not be held to be an employee within the meaning of Section 2 Sub-section of the Act.

Contentions of Learned Counsel

In Support of the appeal the learned counsel for the appellant-Corporation vehemently contended that the decision rendered by the ESI Court and as confirmed by the learned Single Judge and the Division Bench of the High Court did not correctly interpret the relevant provisions of the Act especially Section 2 Sub-section (9) and Section 2 sub-section (22) of the Act. That the Division Bench of the High Court had erred in laking the view that the Managing Director was principal employer as defined by Section 2 sub-section (17) of the Act and as such could not simultaneously be treated as an employee as per Section 2, sub-section (9) of the Act. It was also submitted that the High Court had erred in relying upon decision of this Court in the case of Regional Director Employees State Insurance Corporation Trichur V. Ramanuja Match Industries [(1985) 2 SCR 119] which did not apply on the facts of the present case. On the contrary according to him the controversy in the present case had to be decided in the light of judgment of this Court in the case of Shri Ram Prasad v. Commissioner of Income.tax. New Delhi, [AIR 1973 SC 637]. It was also contended that in any view of the matter even assuming that the Managing Director could be considered to be a principal employer as defined by Section 2 sub-section (17) of the Act there was nothing illegal in he being treated simultaneously as an employee if he satisfied all the requirements of Section 2(9) of the Act. In support of these contentions learned counsel placed reliance on various decisions of the High Court to which we will make a reference at an appropriate stage in this judgment.

Learned counsel Shri Qadri, amicus curiae, was good enough at our request to look into the matter and fairly

placed for our consideration the relevant aspects of the matter centering round correct construction of the provisions of the Act. He submitted that even if Managing Director could be considered to be a principal employer it could not be said that the he could not have simultaneously a dual capacity of being an employee on remuneration. He however placed before us the contrary view taken by the High Court of Calcutta in the case of Employees' State Insurance Corporation v. M/s. Ashok Plastic (P) Ltd. 1988 Lab. I.C. 793. He also invited our attention to other judgment of the High Courts and of this Court which will be referred to by us hereinafter.

Consideration of Point in Dispute.

The controversy in the present case rotates round the interpretation of the term 'employe' as defined by Section 2 Sub-section (9) of the Act. It reads as under:

"2(9). 'employee' means by person employed fro wages in or in connection with the work of a factory or establishment to which this Act applies and-

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

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

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service; and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, purchase or branch thereof or with the purchase or branch or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment, or any person engaged, as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961, or under the standing orders of the establishment; but does not include-

(a) any member of the India naval, military or air forces; or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government.

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

A mere look at the aforesaid provisions shows that before a person can be said to be an employee the following characteristics must exist qua his service conditions-

(1) He should be employed for wages. This would pre-suppose relationship between him as employee on the one hand and the independent employer on the other;

(2) Such employment must be in connection with the work of the factory or establishment to which the Act applies;

(3) He must be directly employed by the principal employer on any work of, or incidental or preliminary to or connected with work of, the factory or establishment;

(4) In the alternative he should be employed by or through an immediate employer on the premises of factory or establishment or under supervision of principal employer or his agent;

(5) We are not concerned with clause (3) of the said definition. But the inclusive part of definition being relevant has to be noted as Condition No.5. He should be employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof. We are also not concerned with the exempted categories of persons in the present case and hence we need not dilate on the same.

(6) This is subject to the further condition that the wages of the person so employed excluding remuneration for overtime should not exceed such wages as prescribed by the Central Government.

The definition of 'wages' is provided in Section 2 sub-section (22) of the Act. It reads as under :

"2(22). 'wages" means all remuneration paid or payable, in cash to an employer, if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off and other additional remuneration, if any paid at intervals not exceeding two months, but does not include-

(a) any contribution paid by the employer to any pension fund or provident fund, or under this Act;

(b) any travelling allowances or the value of any travelling concessions;

(c) any sum paid to the person employed to defray special expenses

entailed on him by the nature of his employment; or

(d) any gratuity payable on discharge;"

A conjoint reading of the aforesaid provisions of the Act clearly indicates that Shri Dhanwate who was one of the directors of the company was entrusted with the work of Managing Director on remuneration of Rs.12,000/- per year, that is, Rs.1000/- per month and in view of this remuneration he had to discharge his extra duties as Managing Director even apart from his function as an ordinary director. Thus it could not be gainsaid that he was receiving this remuneration under the contract of employment pursuant to the resolution of the Board of Directors and that remuneration was paid to him because he was carrying on his extra duties as Managing Director. So far as the first condition is concerned it must, therefore, he held that he was a person employed for wages and his employer was the company which is a legal entity by itself. It could not, therefore, be said that he was a self employed person or agent of the employer which would be the case of a managing partner in a partnership firm which by itself is not a legal entity. The first condition is, therefore, clearly satisfied in the present case. So far as the second condition is concerned it also cannot be denied that the duties as a Managing Director were entrusted to him in connection with the work of the establishment and for such work which he would carry out he would be entitled to the remuneration of the Managing Direct. The High court has placed strong reliance on the Articles of Association which stated the extra duties of Managing Director. But those extra duties were in connection with the work of the establishment and not dehors it and it was for these extra duties that he was to be paid the remuneration which otherwise would not have been paid to him if he had remained an ordinary director. Consequently the emphasis put by the High Court on these extra duties to be carried out by the Managing Director would not detract from the applicability of the second condition of the definition of 'employee'. So far as the third condition is concerned, by the resolution of the Board of Director he was directly employed and entrusted with the work of Managing Director. The said condition is also, therefore, satisfied. The alternative condition no. 4 would not obviously apply on the facts of the present case as it is not the case of the respondent-company that Shri Dhanwate was employed through any immediate employer other than the principal employer. So far as condition no.5 is concerned Shri Dhanwate can be said to have been employed for wages on any work connected with the administration of the establishment as his functions as Managing Director entitled hi, as noted by the High Court, to borrow money not exceeding Rs. 10,00,000/- at any time with or without security as he deemed fit. He was also authorised to invest a sum not exceeding Rs. 10,00,000/- in aggregate in either movable or immovable assets as may be necessary. He was further empowered to lend a sum not exceeding Rs.1,000/- without any security. These all were funds of the company which could be invested by him even the power to borrow money was also for the purpose of the company. All these activities were connected with the administration of the factory. The fifth condition was also, therefore, satisfied by him. So far as the last condition is concerned it is also not in dispute between the parties that remuneration of Rs. 12,000/- per year Rs.1000/- per month as paid to him for discharging his duties as Managing Director remained within

the permissible limits of wages as prescribed by the Central Government at the relevant time for applicability of the definition of the term 'employee' as per Section 2 sub-section (9) of the Act. Thus all the requisite conditions for applicability of the term 'employee' as defined by the Act stood satisfied in the case of Shri Dhanwate.

However the Division Bench of the High Court in the impugned judgment has placed emphasis on the fact that because Shri-Dhanwate was appointed as a Managing Director with wide powers as aforesaid he could be said to be principal employer. 'Principal employer' is defined by Section 2 sub-section (17) of the Act as under :

> "2(17). 'Principal employer' means-
> (i) in a factory, the owner or occupier of the factory, and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under the Factories Act, 1948, the person so named;
> (ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed the head of the department ;
> (iii) in any other establishment, any person responsible for the supervision and control of the establishment ;

The above provision would apply in a case where the Managing Director is found to be the owner or occupier of the factory. Now it is obvious that Managing Director by himself cannot be said to be the owner of the factory which belongs to the private limited company, namely, the respondent herein and the working of the factory is controlled by the entire body of Board of Directors. But the Managing Director though being one of the directors cannot be said to be the sole owner of the factory, Nor can he said to be an occupier of the factory as the does not occupy the factory only by himself. It is also not the case of the respondent that Shri Dhanwate had been named an occupier of the factory under the Factories Act, 1948. So far as the term 'occupier' of the factory is concerned it is defined by Section 2 sub-section (15) of the Act to have the meaning assigned to it in the Factories Act. 1948. Dealing with the definition of the said term as found in Section 7(1) of the Factories Act Dr. A.S. Anand, J., speaking on behalf of a Bench of two learned Judges of this court in the case of J.K. Industries Ltd. & Ors. v. Chief Inspector of Factories and Boilers & Ors. [(1996) 6 SCC 665] held that to be termed as an occupier of the factory within the meaning of Section 2(n) of the Factories Act the person concerned must have ultimate control over the affairs of the factory. Dealing with the question as to who can be said to be having ultimate control over the affairs of the factory owned by a company the following pertinent observation were made in para 21 of the Report as under :

> "There is a vast difference between as person having the ultimate control of the affairs of a factory and the one who has immediate or

> day-to-day control over the affairs of the factory. In the case of a company, the ultimate control of the factory, where the company is the owner of the factor, always vests in the company, through its Board of Directors. The Manager or any other employee, of whatever status, can be nominated by the Board of Directors of the owner company to have immediate or day-to-day or even supervisory control over the affairs of the factor. Even where the resolution of the Board of Directors says that on officer or employee, other than one of the directors, shall have the 'ultimate' control over the affairs of the factor, it would only be a camouflage or an artful circumvention because the ultimate control cannot be transferred from that of the company, to of its employees or offices, except where there is a compete transfer, of the control of the affairs of the factory."

It cannot, therefore, be said as assumed by the High Court in the impugned judgment that Shri Dhanwate being appointed as a Managing Director could be said to be principal employer within the meaning of Section 2 sub-section (17) of the Act as he could be said to be occupier within the meaning of Section 2 (15) of the Act read with Section 2 (n) of the Factories Act. As per the Articles of Association the ultimate control over his working was with the Board of Directors as a whole as the High court has noted that Shri Dhanwate was allowed to exercise all the powers exercisable by a director under the supervision and control of the Board of Directors.

But even assuming that the High Court was right that Shri Dhanwate could be said to be principal employer there is nothing in that Act to indicate that a Managing Director being the principal employer cannot also be an employee. It other words he can have dual capacity. So far as this aspect of the matter is concerned we can profitably refer to a decision of a Bench of three learned Judges of this Court in the case of Shri Ram Prasad (supra). In that case this Court was concerned with the question whether the Managing Director of a company can be said to be a servant of the company whose remuneration could be treated to be salary assessable to income tax. The relevant observations of this court speaking through Jaganmohan Reddy, J., as found in paragraph 6 and 7 of the Report read as under:

> "Generally it may be possible to say that the greater the amount of direct control over the person employed, the stronger the conclusion in favour of his being a servant. Similarly the greater the degree of independence the greater the possibility of the services rendered being in the nature of principal and agent. It is not possible to lay down any precise rule of law to distinguish one kind

of employment from the other. The nature of the particular business and the nature of the duties of the employee will require to be considered in each case in order to arrive at a conclusion as to whether the person employed is a servant or an agent. Though an agent as such is not a servant, a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant. It is again true that a director of a company is not a servant but an agent inasmuch as the company cannot act in its own person but has only to act through directors who qua the company have the relationship of an agent to its principal. A Managing Director may have a dual capacity. He may both be a Director as well as employee, depending upon the nature of his work and the terms of his employment. Whether or not a Managing Director is a servant of the company apart from his being a Director can only be determined by the articles of association and the terms of his employment."

In paragraph 13 of the Report relying on the Article of Association and terms and conditions of the agreement appointing the assessee as Managing Director the following pertinent observations were made :

"Where the articles of association and terms and conditions of the agreement definitely indicate that the assessee was appointed to manage the business of the company in terms of the articles of association and within the powers prescribed therein and under the terms of the agreement he can be removed for not discharging the work diligently or if is found not be acting in the interests of the Company as Managing Director, then it can hardly be said that he is an agent of the company and not a servant.

The Control which the company exercise over the assessee need not necessarily be one which tells him what to do from day to day. Nor does supervision imply that it should be a continuous exercise of the power to oversee or superintend the work to be done. The control and supervision is exercised and is exercisable in terms of the articles of association by the Board of Directors and the company in its general meeting. The fact

that power which is given to the Managing Director emanates from the articles, of association which prescribes the limits of the exercise of that power and that the powers of the assessee have to be exercised within the terms and limitations prescribed thereunder of the Directors in indicative of his being employed as a servant of the company. Hence remuneration payable to the assessee would be salary."

We have already seen the powers and duties of Managing Director as entrusted to Shri Dhanwate as per the Articles Association. They clearly indicate that he had to work under the control and supervision of the Board of Directors and to discharge his function to earn his remuneration of Rs.1000/- per month by working as Managing Director and by discharging extra duties as entrusted to him.

The aforesaid decision of this Court clearly rules that the Managing Director while acting as such can have dual capacity both as Managing Director on the one hand and as servant or employees of the company on the other. The Division Bench is the impugned judgment with respect was in error in bypassing the ratio of the aforesaid decision of this Court by observing that it was a judgment rendered under the Income Tax Act and, therefore, it had no bearing on the scheme of the present Act. We also find that the Division Bench was equally in error when it placed reliance for its decision on the judgment of this court in the case of Regional Director Employees State Insurance Corporation Trichur v. Ramanuja Match Industries (supra). In the said decision a Bench of two learned Judges of this Court held that a partner of a firm receiving salary is not an employee within the meaning of Section 2 sub-section (9) of the Act. Ranganath Misra, J. (as the then was), speaking for this court held that the partners cannot be held employees of the partnership firm. A partnership firm is not a legal entity and in a partnership firm each partner acts as an agent of the other. The position of a partner qua the firm is thus not that of a master and a servant or employer and employee which concept involved an element of subordination and not that of equality. The partnership business belongs to the partners and each one of them is an owner thereof. In common parlance the status of a partner qua the firm is thus different from employees working under the firm. It may be that a partner is being paid some remuneration for any special attention which he devoted but that would not involve any change of status and bring him within the definition of employee.

We fail to appreciate how these observations can ever be pressed in service on the facts of the present case. Respondent-company is not a partnership firm. it is a separate legal entity. It has chose one of its directors to act as Managing Director on payment of remuneration for the extra work to be done by him as such. He has to discharge his function as Managing Director under the supervision of the entire Board of Directors. Thus there is employer-employee relationship between two separate entities. On the one hand is the Managing Director employed as such and on the other the respondent-company being a separate legal entity which employs him. In this connection we may also usefully refer to a decision of this Court in the case of Bacha f. Guzdar v. Commissioner of Income-Tax, Bombay

[(1955) 1 SCR 876]. A Constitution Bench of this Court speaking through Ghulam Hasan, J., brought out the clear legal distinction between a firm and a company by observing that the position of a shareholder of a company is altogether different from that of a partner of a firm. A company is a juristic entity distinct from the shareholders but a firm is a collective name or an alias for all the partners. Of course the decision was rendered in the light of Income-tax Act wherein the question was whether agriculture income would include the divided paid to a shareholder of a company.

It must, therefore, be held that the Managing Director of respondent-company could not be treated on par with partner of a partnership firm being given some remuneration for his extra work. The decision of this Court in Ramanuja Match Industries (Supra) was, therefore, clearly inapplicable to the facts of the present case and was erroneously pressed in service by the Division Bench of the High Court in the impugned judgment in deciding the appeal of the appellant-Corporation.

Now is the time for us to refer to decisions of other High Courts and this Court to which our attention was invited by the learned counsel for the parties appearing before us.

A Division Bench of the Karnataka High Court in the case of Regional Director, Employees' State Insurance Corpn. v. M/s. Margarine & Refined Oils Co. (P) Ltd., Bangalore 1984 Lab. I.C. 844 took the view which has commanded to us in the present proceedings. It was held by the High Court that the Managing Director of a private limited company was an employee as defined by Section 2 sub-section (9) of the Act. In this connection it was observed by the High Court that a company is a legal person and a corporate entity and as such it can employ one of its directors as Managing Director. the Managing Director of the Company covered by the Act becomes an employee of the company within the meaning of Section 2(9) of the Act and remuneration paid to him for the functions he discharges as Managing Director would amount to wages as defined under Section 2 (22) of the Act for the purpose of calculating employees' contribution. The aforesaid decision of the High Court correctly interprets the relevant provisions of the Act.

In the case of Non-Ferrous Rolling Mills (P) ltd. v. the Regional Director, Employees' State Insurance Corporation, Madras 1977 Lab.I.C. 1706 a learned Single Judge of the High Court of Madras held that a director of a private limited company appointed on remuneration to be the Managing Director of the factor, could still be said to be an employee of the company as he was getting wages within the meaning of Section 2 sub-section (22) of the Act. It was also held that even if the director of the company was entrusted with the work of managing the factory and thus could be treated to be principal employer as defined by Section 2 sub-section (17) of the Act, he could still be treated as an employee of the company within the meaning of section 2(9) of the Act as he satisfied all the relevant conditions of the said definition. For coming to that conclusion reliance was placed on a decision of the Privy Council in the case of Lee v. Lee's Air Farming Ltd. [1961 A.C. 12] and also on a majority decision of the Court of Appeal in England in the case of Boulting v. Cinematograph Association etc. [(1963) 1 A11 ER 716].

In the Privy Counsel case one Lee who was the governing director of a private limited company which was formed for the purpose of carrying on the business of serial top-

dressing, was also a qualified pilot manning the company's aircraft. While piloting one of the company's aeroplanes, Lee killed. His widow claimed compensation for his death under the New Zealand Workers compensation Act, 1922 against the company. The Privy Council had to examine the question whether Lee even though being a governing director of the company could still be treated as a worker of the company when he was flying the company's aircraft as pilot on remuneration. The judicial committee of the Privy Council observed that company was different entity from Lee. Although Lee was the governing director of the company, he was nonetheless a worker under the company while flying its aircraft for wages. On the moot question posed for their consideration the Privy Council laid down the legal position in the following terms :

> "EX facie there was a contract of service. Their Lordships conclude, therefore, that the real issue in the case is whether the position of the deceased as sole governing director made it impossible for him to be the servant of the respondent company in the capacity of chief pilot of that company. In their Lordships' view, for the reasons which have been indicated, there w as no such impossibility. The respondent company and the deceased were separate legal entities. Their Lordships consider, therefore, that the deceased was a worker.

In this connection we may also usefully refer to the decision of the Court of Appeal in the case of Boulting v. Cinematograph Association Etc. (Supra). In that case the court of Appeal had to decide the question whether two brothers who bore the name of Boulting and who were the managing directors of a film company called the Charter Film Production Co. Ltd. could be regarded as employees of the company, because they also did work for the same company on the technical side of film production as film directors, film producers, film editors and film script writers. The question arose out of a controversy with a trade union of workers of the film industry in Britain. Eligibility for membership of this trade union was governed by R.7 of the Articles of Association. This rule provided that the association shall consist of all employees engaged on the technical side of film production. The Court of appeal, by a majority, held that the two managing directors were employees within the meaning of the rule above quoted nonetheless they being managing directors of the employer company. In this connection the observations of Upjohn, L.J., constituting the majority of the Court of Appeal deserve to be noted as under :

> "I cannot myself escape from the conclusion that the position of the Boulting Brothers, although anomalous perhaps, it strictly within the wording of R.7, for they are in fact employees of Charter engaged on the technical side of film production. True it is that as directors, they are not employees, but it cannot, I think be doubted that a managing director may for many purposes properly be regarded

as an employee."

The decision of the Madras High Court following the aforesaid decision lays down the correct legal position. Thus even assuming that Shri Dhanwate was a principal employer even the in the light of the aforesaid discussion it has to be held that he could have a dual capacity both a Managing Director on the one hand and as an employee of the company on the other.

We may at this stage refer to two decisions to which our attention was invited by learned amicus curiae counsel. A Division Bench of the High Court of Kerala in the case of Employees' State Insurance Corporation, Ernakulam v. Victory Tile Works [44 Indian Factories Journal 304] had to consider whether a person who satisfies the definition of 'principal employer' under Section 2 (17) of the Act could simultaneously satisfy the requirements of the definition of the term 'employee' under Section 2(9) of the Act. Subramonian Poti, J. (as the then was), speaking for the court observed that Employees' State Insurance Act, 1946 is intended to cover all wage-earners whether they are manager, supervisors, clerks, workmen or any other class of employees provided they fall within the definition of 'employee' under Section 2(9) of the Act. It is order from the scheme of the Act that there is no apparent conflict of interest between the principal employer and the employee and there is no reason why if a person falls within the definition of 'principal employer' he cannot in certain cases be also an 'employee' he cannot in certain cases be also an 'employee'. In our view, the aforesaid decision squarely falls in line with the scheme of the Act and the decisions of other High Courts on the point to which we have made a reference earlier.

Now is the time for us to consider the dissenting voice of Calcutta High Court emanating from its decision in the case of M/s Ashok Plastic (P) Ltd. (Supra). In that case of director of the company who was paid for some remuneration was held not to satisfy the requirements of Section 2(9) of the Act, Now it must be noted that the Calcutta High Court in that case was considering an entirely different fact situation. Being a director of the company some remuneration was paid to him in connection with his specialised activities. It was found as a fact that he was not employed on remuneration on a regular basis. This distinctive features itself would rule out the applicability of the said decision to the facts of the present case. However certain observation were made by Sukumar Chakravarty, J., speaking for the Division Bench of the Calcutta High Court in that case in paragraph 27 of the Report to the following effect :

> "It is true that "wages" as defined in S.2 (22) of the Act means "all remuneration paid or payable in cash to an employee, if the terms of the contract of employment express or implied were fulfilled and includes.....". For Laking the character of "wages" as defined in the above Section, "remuneration" must be paid or payable in cash to an employee. All remuneration will not take the character of "wages" within the meaning of S.2(22) of the Act. The special allowance of Rs.300/- or Rs.500/- as the case may be, which is being paid to the Director, Shri

Gupta under the description of remuneration in the instant case is therefore not the "wages" within the meaning of S.2(22) of the Act."

The aforesaid observation, in our view, are not borne out from the express language of Section 2 sub-section (22) of the Act which defines "wages" to include any types of remuneration paid or payable to an employee. If a person satisfies the definition of the term "employee" as found in Section 2 sub-section (9) of the Act and is paid remuneration for discharging the extra work assigned to him for earning such remuneration it cannot be said that it would not be "wages" as wrongly assumed by the High Court in the aforesaid decision in paragraph 24 of the Report.

As a result of the aforesaid discussion it must be held that the Division Bench of the High Court in the impugned judgment had erred in taking the view, on the facts of the present case, that Shri Dhanwate as Managing Director of the company was not an employee within the meaning of Section 2 sub-section (9) of the Act. On the other hand it must be held that he was an employee of the company and as such could be added to the list of remaining 19 employees so as to make a total of 20 for covering the establishment under Section 2 sub-section (12) of the Act which defines "factory) to mean, "any premises including the precincts thereof (a) .....; or (b) whereon twenty or more persons are employed or were employed for wages on any day of the proceeding twelve months, and in any part of which a manufacturing process in being carried on without the aid of power or is ordinarily so carried carried on".

Before parting with this case we must put on record out high sense of appreciation for the assistance rendered by the amicus curiae advocate Shri Qadri at our request.

In the result this appeal is allowed. The judgment and order of the Division Bench of the High Court in Letters Patent Appeal No. 14 of 1985 are set aside. Similarly the judgment of the learned Single Judge of the High Court as well as that of ESI Court in the Case No. 2 of 1974 are also set aside and the ESI Case No. 2 of 1974 filed by the respondent-company is ordered to be dismissed. Ordered accordingly. No costs.