



CMA(MD).Nos.921 and 953 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON : 19.06.2023

PRONOUNCED ON : 12.07.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)Nos.921 and 953 of 2018

and

CMP(MD).Nos. 10094 and 10260 of 2018

1.M/s.Sri Harikrishna Paper (P) Limited
Nallur Village, Pushpathur 624 618
Palani Taluk, Dindigul District
Represented by its Director Appellant in CMA.No.921 of 2018

2.M/s.SVA Syntex Private Limited
Thalayuthu, Palani Taluk
Dindigul District
Represents by its Director Appellant in CMA.No.953 of 2018

Vs.

E.S.I.Corporation
Sub Regional Office
4th Main Road, K.K.Nagar
Madurai 625 020
Represented by its Joint/Assistant Director
...Respondent in both appeals



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COMMON PRAYER: Civil Miscellaneous Appeals filed under Section 82(2) of the Employees' State Insurance Act 1948, to set aside the order dated 19.09.2017 passed by the ESI court (Labour Court), Madurai in E.S.I.O.P.Nos.18 and 17 of 2009 and allow the ESIOPs filed by the appellants.

For Appellants : Mr.M.E.Ilango
in both the appeals

For Respondent : Mr.P.Ganapathysamy
in both the appeals

COMMON JUDGMENT

Both these appeals have been filed by the Management challenging the order passed by the E.S.I.Court, Madurai in ESIOP.Nos.17 and 18 of 2009 wherein the order the E.S.I.Corporation under Section 45-A of the E.S.I.Act demanding contribution for the apprentices appointed under the Certified Standing Orders of the factory have been confirmed.

2.Factual Background:

(i).In CMA(MD).No.921 of 2018, the appellant is admittedly a factory and they are covered under E.S.I.Act. An inspection was conducted on 13.03.2008 and a show cause notice was issued on 26.06.2008 why the contribution should not be recovered from the



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employer towards apprentice wages and trainee wages.

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(ii). A Form C-18 notice was issued on 26.06.2008 in which a sum of Rs.48,901/- was demanded as contribution towards apprentice wages and trainee wages. After affording opportunity to the management, an order under Section 45-A of the Act was passed on 26.12.2008 confirming the contribution of Rs.48,901/-. Challenging the same, the management had filed ESIOP.No.18 of 2009

(iii).In CMA(MD).No.953 of 2018, admittedly the appellant management is a factory and it was covered under the E.S.I.Act. An inspection was conducted on 28.11.2005 and a Form C-18 notice was issued on 25.09.2008 demanding a sum of Rs.1,60,019/- for the period between April 2004 to March 2007 towards the omitted wages of stipend paid to the apprentices. After affording opportunity to the management, the provisional order was confirmed by way of an order under Section 45-A of the Act on 24.12.2008. This order was challenged by the management in ESIOP.No.17 of 2009.

3.The primary contention of the management before the ESI Court was that the definition of employee under Section 2(9) of the E.S.I.Act does not include an apprentice or a trainee. Therefore, the stipend or



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wages paid to the trainees could never be considered to be wages under Section 2(22) of E.S.I.Act. The Hon'ble Supreme Court in a judgment reported in *(1975) 2 SCC P 835 (The Employees' State Insurance Corporation and another Vs. The Tata Engineering & LOCO Motive Co.Ltd., and another)* has held that there is no provision to cover the apprentices under E.S.I.Act. However, it pointed out that the parliament has got power to amend the E.S.I.Act and to incorporate necessary provisions to cover apprentices and trainees. Subsequent to the said judgment, the E.S.I.Act was amended with effect from 20.10.1989 under Central Act 29 of 1989. Under the Amended Act, Section 2(9) of the Employees' State Insurance Act, 1948 was amended to cover the apprentices except those who were appointed under Apprentices Act, 1961 or appointed under the Standing Orders of an establishment.

4.It was further argued on the side of the management that the term 'establishment' would also include a factory and therefore, any apprentice appointed under the Certified Standing Order of a factory is also exempted after the Central Amendment Act 29 of 1989. The orders under Section 45-A of the E.S.I.Act have been passed with regard to both the factories only relating to the period prior to 01.06.2010. Because with



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effect from 01.06.2010, Section 2(9) of the E.S.I.Act was further amended granting exemption only to the apprentices engaged under Apprentices Act 1961. The Apprentices appointed under the Certified Standing Order of an establishment are not exempted. Therefore between 20.10.1989 and 31.05.2010, the apprentices appointed under Certified Standing Order of a factory are also exempted. It was further contended that the term 'establishment' would include the meaning of a factory. Therefore, merely because the term 'establishment' is used under Section 2(9) of the E.S.I.Act, it does not mean that the exemption is applicable only to the establishment, but it is also applicable to the factories. Since apprentices and trainees are exempted under the Act, the orders passed by the Corporation under Section 45-A of the Act are without jurisdiction and hence, they had prayed for setting aside those orders.

5.Per contra, the learned counsel appearing for the Corporation had contended before the E.S.I.Court that the factory has been defined under Section 2(12) of the E.S.I.Act whereas there is no specific definition for an establishment under E.S.I.Act. Throughout the Act, the term 'factory' and the 'establishment' have been used in contra distinction with one and other and therefore, the term 'establishment' would never include a



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factory and hence the exemption granted to the apprentices or trainees under the Central Act 29 of 1989 is applicable only to a non-factory establishment and not to a factory. Therefore, the orders passed under Section 45-A of the E.S.I.Act may be sustained.

6.The E.S.I.Court after considering the submissions made on either side, had accepted the contention of the E.S.I.Corporation and had arrived at a finding that the term factory and establishment have been used in E.S.I.Act with a different meaning and therefore, the word 'establishment' would never include a factory. Hence, the exemption granted to the apprentices who are engaged as per the Certified Standing Orders of an establishment is applicable only to the employees of an establishment and not to the employees of a factory.

7.Based upon the above said findings, the E.S.I.Court had dismissed the petition filed by the management. Challenging the same, the present appeals have been filed by the management.

8.Though the appellants /management are different in both appeals, since a common issue is involved, both appeals are tagged together.



9.The following common substantial questions of law have been raised in both the appeals.

“(i).Whether the lower Court is justified in coming to a conclusion that the exemption provided under Section 2(9) of the Act is applicable only to apprentices employed under the certified standing orders of the establishments and that such exemption is not available to apprentices employed under the certified standing orders of the factories?

(ii).Whether the Lower Court is justified in coming to a conclusion that the factories and establishment are different under the provisions of the Industrial Employment (Standing Orders) Act, 1946?”

10.Contentions of the learned counsel appearing for the appellants:

(i).The term 'factory' has been defined under Section 2(12) of the E.S.I.Act. However, the term 'establishment' has not been defined in the said enactment. The word 'establishment' would only refer to an industrial establishment.

(ii).The term 'establishment' is a genus and the term factory is a species falling within the term 'establishment'. Therefore, as a result, when the apprentices appointed under Certified Standing Order of an establishment are exempted then it is nothing but consequential that the



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apprentices appointed under the Certified Standing Order of a factory are also exempted.

(iii).The term 'industrial establishment' is defined under Section 2(e) of the Industrial Employment (Standing Orders) Act, 1946. As per the said definition, an industrial establishment also means a factory as defined in Section 2(m) of the Factories Act 1948.

(iv).There is no separate procedure contemplated under Industrial Employment (Standing Orders) Act, 1946 for certifying Standing Order of an establishment and a factory. The same procedure has to be followed for getting a Standing Order certified for a factory or an establishment by a competent authority.

(v).As per Section 12(A) of the Industrial Employment (Standing Orders) Act 1946, the Model Standing Orders are applicable to both a factory and an establishment and there is no distinction between them.

(vi).The word establishment has been defined only under Section 2(6) of the Tamil Nadu Shops and Establishments Act, 1947. However, the said definition does not include a factory. The definition given in a State enactment cannot be imported into a Central enactment to mean that the word 'establishment' does not include a factory. The dispute



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relating to the contribution in relation to the stipend paid to the apprentices appointed under the Standing Orders of the factory is only between 20.10.1989 and 30.05.2010. From 01.06.2010 onwards, the apprentices appointed under the Certified Standing Order of a factory or an establishment are covered under E.S.I.Act. Only the apprentices appointed under the Apprentices Act 1961 are exempted.

(vii).The learned counsel for the management referred to the Judgment of the Hon'ble Supreme Court reported in **(2006) 2 SCC 381(Regional Provident Fund Commissioner, Mangalore Vs. Central Arecanut & Coca Marketing and Processing Co-operative Ltd., Mangalore)**, the judgment of our High Court reported in **2017 SCC Online Madras 21262 (The Deputy Director, Sub Regional Office, Madurai Vs. M/s.S.V.A Syntex Private Limited represented by its Managing Director)** and another Judgment reported in **(2019) 3 LLJ 178 (Diamond Shipping Agencies Represented by its Managing Director Vs. Employees Provident Fund Appellate Tribunal and another)** to contend that the term 'establishment' interpreted under Section 2(9) of the E.S.I.Act would mean and include a factory also. Therefore, any apprentices appointed under Certified Standing Order of a



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factory are also exempted from the purview of E.S.I.Act. As a result, an order passed under Section 45-A of the Act demanding contribution from the employer relating to the wages of apprentices/trainees are without jurisdiction and they are liable to be set aside.

11.Contentions of the respondent/E.S.I.Corporation:

(i).As per Central Amendment Act 29 of 1989, only apprentices engaged under Apprentices Act 1961 and the apprentices engaged by an establishment under the Standing Orders of an establishment are exempted. The apprentices appointed under the Standing Orders of a factory are not exempted. When the legislature has not thought fit to include the term 'factory' but has only incorporated the word 'establishment', this Court cannot presume that the term 'establishment' also includes a factory.

(ii).Section 1(4) of the E.S.I.Act clearly points out that it is applicable to all factories except the seasonal factories. As per Section 1(5) of the E.S.I.Act, the Act could be extended to any other establishment or class of establishment, industrial, commercial, agricultural or otherwise with approval of appropriate Government. Therefore, according to the learned counsel, unless an establishment is



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notified under Section 1(5) of the E.S.I. by the appropriate Government, it can never be considered to be an establishment under E.S.I.Act.

(iii).Admittedly, the appellant in both the appeals are factories which are automatically covered under E.S.I.Act without any notification by the appropriate Government. Therefore, the Act has maintained a clear distinction between the factory and the establishment. As a result, the term 'establishment' under Section 2(9) of the E.S.I.Act can never be construed to include a factory also. It only refers to a non-factory establishment. The Act has chosen to use the two expressions namely factory and establishment in different connotation in different sections of E.S.I.Act.

(iv).The learned counsel for the respondent had relied upon the judgment of our High Court reported in **2011-IV-LLJ 874 (Madras) (BSNL Vs. UOI), (1978) 4 SCC 204 (Royal Talkies Vs.E.S.I.C), AIR 1994 SC 1154 (E.S.I.C Vs. R.K.Swamy), 1979 (2) SCC 616 (S.Mohan Lal Vs. R.Kondian)** and **2009 Lab.I.C 3194(Bangalore Turf Club Limited Vs. RD, ESIC)** to contend that the word factory, industrial and establishment have been used in various labour laws and different meanings have been given to these words in the respective enactments



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and we cannot apply the definition in one Act to another Act unless the said Act specifically provides for the same. Only when the language used in the definition is in *pari materia*, a comparison is possible. Therefore, in the present case, the employer cannot try to import the definition of industrial establishment from the Industrial Employment (Standing Orders) Act 1946 into the Employees' State Insurance Act 1948.

(v).The legislature in their wisdom has specifically used the term 'establishment' in contra distinction to the term 'factory' under Section 2(9) of the Act. Therefore, the Court cannot supply any new word or meaning to what is not already found in the statute so as to include the term factory under the definition of establishment. Hence, he prayed for sustaining the order passed by the E.S.I. Court in both cases.

12.I have considered the submissions made on either side and perused the records and citations paced by both the counsels.

13.It is not in dispute that the appellant in both the appeals are factories and their employees are covered under ESI Act. The dispute arose when the E.S.I.Corporation demanded contribution from these managements for the apprentices/ trainees who were appointed under the Certified Standing Orders of the factory. The E.S.I.Corporation claimed

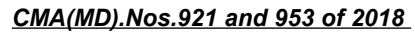


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that only those employees who were appointed under Apprentices Act 1961 were exempted. Those employees under the Apprentices Act, 1961 and those employees of an establishment are exempted. However, the apprentices appointed under Certified Standing Orders of a factory are not exempted on the ground that the term 'establishment' does not include a factory but it refers only to a non-factory establishment.

14. On the other hand, the management had contended that the word establishment referred in Section 2(9) of the E.S.I. Act means and includes a factory and therefore, the apprentices appointed under Certified Orders of a factory are also exempted from the purview of E.S.I. Act.

15. A perusal of the definition of Section 2(9) of an Amended Employees' State Insurance Act, 1948 does not cover the apprentices under the definition of an 'employee'. The Hon'ble Supreme Court in a judgment reported in *(1975) 2 SCC 835 (The Employees' State Insurance Corporation and another Vs. The Tata Engineering & Locomotive Co. Ltd. and another)* while interpreting Section 2(9) of the Employees' State Insurance Act, 1948 in Paragraph No.11 has held as follows:



16. In order to get over the judgment of the Hon'ble Supreme Court to bring in certain kind of apprentices under the purview of the Act, Parliament in its system introduced Act 29 of 1989 with effect from 1.1.1989 and amended the definition of employee.

(a). the apprentices engaged under Apprentices Act 1961 or

(b). the Apprentices appointed under Certified Standing Order of
ablishment.

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exempted and all other apprentices were brought within the purview of E.S.I.Act.

19. Now the present dispute relates to the period between April 2004 to March 2007. Therefore, it is governed by the definition of employee as per Amendment Act 29 of 1989 which is extracted as follows:

“2(9). ”?employee?” means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and?-

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

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

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

[and includes any person employed for wages on any work



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connected with the administration of the factory or establishment or any part, department or branch thereof 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 Indian] naval, military or air forces;

or

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

Provided that an employee whose wages (excluding remuneration for overtime work) exceed²² [such wages as may be prescribed by the Central Government] at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period;] ”

20.The contention of the corporation is that the apprentices who were appointed under Standing Order of the establishment alone are exempted. But in the present case, the appellants are admittedly not establishments, but factories. Therefore, the apprentices appointed under the Standing Order of a factory are not exempted. Therefore, the issue



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now that arises for consideration is whether the term 'establishment' found in Section 2(9) of the Amending Act 29 of 1989 refers only to a non-factory establishment or it includes a factory also.

21.The learned counsel for the appellant/management had contended that the said term 'establishment', only means an industrial establishment which includes a factory as per definition of an industrial establishment under Section 2(e) of Industrial Employment (Standing Orders) Act 1946. According to the appellant/management, only under the said Act, the Standing Orders are certified by the competent authorities. There is no separate procedure for certifying the Standing Order for a factory and the establishment. Therefore, the definition of a term industrial establishment found in the establishment (Standing Order Act 1946) should be taken into consideration. However, this Court is not inclined to accept the said contention in view of the fact that the industrial establishment is considered to be one of the establishments to be notified by appropriate Government under Section 1(5) of the Act. Only those industrial establishments that are notified under the Act would come within the purview of E.S.I.Act. It is not the case of the management that their industrial establishment is not covered under ESI



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Act, in view of non-notification by appropriate Government. Therefore, the said contention is liable to be rejected.

22.As pointed out by either counsel, the Act defines a factory under Section 2(12) and Section 1(4) of the E.S.I.Act makes the Act applicable to all the factories except the seasonal factories. However, for an establishment to be brought within the purview of the Act, it has to be notified by the appropriate Government as contemplated under Section 1(5) of the Act. Therefore, the Act maintains a clear distinction between a factory and an establishment but the term 'establishment' has not been defined under the Act.

23.As rightly pointed out by the learned counsel appearing for the E.S.I.Corporation, the definition of establishment found in Tamil Nadu Shops and Establishments Act 1947 cannot be taken into consideration, in view of the fact that the definition in one Act cannot be imported to mean and define the same in an another enactment especially the central enactment.

24. The term 'employee' is defined under Section 2(f) of the Employees' Provident Funds and Miscellaneous Provisions Act 1952 which is extracted as follows:



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“2(f).”employee” means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of (an establishment), and who gets his wages directly or indirectly from the employer, (and includes any person-

(i)employed by or through a contractor in or in connection with the work of the establishment;

(ii).engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961) or under the standing orders of the establishment;] ”

25.A perusal of both the E.S.I.Act and E.P.F Act would disclose that both of them operate almost on the same set of employees. Therefore, the definition of employee in E.P.F Act is *pari materia* with the definition of an employee under E.S.I.Act especially with regard to the coverage of apprentices.

26. The Hon'ble Supreme Court in a judgment reported in **(2006) 2 SCC 381 (Regional Provident Fund Commissioner, Mangalore Vs. Central Arecanut & Coc Marketing and Processing Co-operative Ltd., Mangalore)** had an occasion to consider the exemption with regard to the apprentices who are appointed by a factory through Standing Orders.



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In the said judgement, the Provident Fund Authorities had initiated proceedings to determine the contribution for the stipend paid to the apprentices in a chocolate factory. The Writ Court as well as the Writ Appellate Court had rejected the demand of the Provident Fund Authorities. The Regional Provident Fund Commissioner had approached the Hon'ble Supreme Court seeking to reverse the order of the High Court. The Hon'ble Supreme Court found that there are no certified Standing Orders for the said factory and they are governed by Model Standing Order as contemplated under Section 12(A) of the Industrial Employment (Standing Orders) Act 1946. The apprentices were appointed in that factory only under the said Model Standing Orders. The Hon'ble Supreme Court was pleased to observe that the trainees were apprentices engaged under the Standing Orders of the establishment and they are liable to be excluded from the definition of employee as per Section 2(f) of the E.P.F.Act In the case on hand, the both the factories are governed by their respective Certified Standing Orders which are marked before the E.S.I.Court.

27.In the judgment cited supra, the Hon'ble Supreme Court while



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considering the apprentices appointed in a chocolate factory under the Model Standing Orders has categorically held that they are exempted from the purview of E.P.F.Act. Therefore, it is clear that the Hon'ble Supreme Court has categorically found that there is no distinction between the standing order of an establishment and the standing order of a factory. Hence, the contention on the side of the E.S.I.Corporation that only the apprentices under the Standing Order of the establishment are exempted but not those who are appointed under the Standing Order of a factory is not legally sustainable.

28.The learned Single Judge of this Court in a judgment reported in ***2017 SCC Online Madras 21262 (The Deputy Director, Sub Regional Office (Madurai) Vs. M/s.S.V.A Syntex Private Ltd., Represented by its Managing Director M.Amarnath)*** has taken a similar view and has held against the ESI Corporation in favour of the appellant in CMA.(MD).No.953 of 2018 with regard to a different period.

29.In view of the above said deliberations, both the substantial



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questions of law in both the appeals are answered in favour of the appellants. The orders passed by the E.S.I.Court are hereby set aside and both the Civil Miscellaneous Appeals are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

12 .07.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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To

1. The Labour Court
Madurai

2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR,J.

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Pre-delivery Common Judgement made in
C.M.A(MD)Nos.921 and 953 of 2018
and
CMP(MD).Nos. 10094 and 10260 of 2018

12.07.2023