IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 04.12.2017

CORAM

THE HON'BLE MR. JUSTICE M.DURAISWAMY

C.M.A.Nos.1511 & 1512 of 2016 and

C.M.P.Nos.11569 & 11570 of 2016

M/s.Thermo Electrics Madras Manufacturing
rep by its Partner Mrs.Suman Toshniwal
No.267, Kilpauk Garden Road,
Chennai - 600 010. ... Appellant in C.M.A.No.1511/2016

M/s.Toshniwal Instruments (Madras) Private Limited
rep by its Partner Mr.Rohit Toshniwal
No.267, Kilpauk Garden Road,
Chennai - 600 010. ... Appellant in C.M.A.No.1512/2016

Vs.

ESI Corporation
rep by its Regional Director,
143, Sterling Road,
Chennai - 600 034. ... Respondent in both C.M.As

Civil Miscellaneous Appeals filed under Section 82 (2) of the Employees' State Insurance Act, 1948 against the judgment and decree dated 29.04.2016 passed by the Employee Insurance Court (Principal Labour Court), Chennai in E.I.O.P.Nos.30 & 31 of 2004.

For Appellant : Mr.C.Saravanan
(in both C.M.As)

For Respondent : Mr.P.Chandrasekar
(in both C.M.As)

C O M M O N J U D G M E N T

Since the issues involved in both the Civil Miscellaneous Appeals are identical, both the appeals are disposed of by this common judgment.

2.Heard Mr.C.Saravanan, learned counsel appearing for the appellant in both the Civil Miscellaneous Appeals and Mr.P.Chandrasekar, learned counsel appearing for the respondent in both the Civil Miscellaneous Appeals.

3.The brief case of the appellants is as follows:

According to the appellants, they are an independent Small Scale Industry and never employed more than 8 employees at any point of time and hence, not coverable under the ESI Act. The respondent, by its letter dated 12.08.1997, directed the petitioners to produce certain records so as to decide whether the Units viz., the petitioners are functioning in the same address and could be coverable severally or jointly. Inspite of the appellants' reply that they are not connected with the other Establishments, the respondent, by its letter dated 26.09.1997, clubbed the petitioners along with the other two Establishments and assigned a common Code Number and advised the petitioners to comply with the provisions of the ESI Act. The petitioners sent separate reply stating that they are not coverable under the Act. Thereafter, the respondent issued Demand Notices dated 09.01.2002 and 10.01.2002 and also offered personal hearings, in which the appellants appeared and produced relevant documents to prove that the nature of business is not dependant on that of the other two Establishments or vice versa. Similarly, there is no interchangeability of the petitioners with those of the two Establishments. Further, according to the appellants, there is no unity of management of the three Establishments. Thereafter, the respondent issued an order dated 5/9.9.2002 wherein the respondent had held that the three Establishments are to be clubbed as one Unit for the coverage under the ESI Act, which is illegal.

4.The brief case of the respondent is as follows:

According to the respondent, the Inspector surveyed the three Units viz., M/s.Thermo Electrics Madras Manufacturing, M/s.Toshni Tek International and M/s.Toshniwal Systems and and Instruments Private Limited functioning at No.267, Kilpauk Garden Road on 16.07.1997 and based on his report, the respondent has treated the above Units as one Unit for the purpose of ESI coverage by clubbing the employees working in these three Units and allotted a common Code Number and intimated the same vide Form C11 dated 26.09.1997. Since the appellants did not comply with the same, Form C18 Adhoc Notice dated 09.01.2002 was issued and several opportunities of personal hearing were given for production of documents. The Three Units are being run by the same family members and there is unity of ownership and functional integrity of these three Units. The Inspector in his Survey Report dated 17.04.1997 had reported that he had witnessed the interchangeability of employees. Hence, according to the respondent, the order dated

5/9.9.2002 issued by the respondent as per the directions of the Hon'ble High Court, is valid.

5.Before the Employees' Insurance Court viz., the Principal Labour Court, Chennai, on the side of the appellants, P.W.1 was examined and 26 documents, Exs.P1 to P26 were marked. On the side of the respondent, R.W.1 was examined and 8 documents, Exs.R1 to R8 were marked. The Labour Court, taking into consideration the case of both parties, rightly came to the conclusion that on the basis of the coverage, the amount of contribution payable by the three Units is not determined so far and no order has been passed under Section 45 A of the ESI ACT. Further, the ESI Court also recorded the submission of the learned counsel for the respondent that the appellant has filed the E.I.O.Ps before the ESI Court even before the determination of the contribution under Section 45 A of the ESI Act. Further, the ESI Court has rightly held that it is a premature litigation and accordingly, dismissed the petition.

6.Admittedly, the respondent has not determined the contribution under Section 45 A of the ESI Act. Even before the determination of the contribution under Section 45 A of the ESI, the appellants have filed the Original Petition in E.I.O.P.Nos.30 & 31 of 2004 before the Employees' Insurance Court, Principal Labour Court, Chennai. Therefore, it is clear that the appellants have initiated the proceedings at a premature stage, which was rightly dismissed by the ESI Court.

7.It is evident from the Show Cause Notice dated 10.01.2002 that the respondent had issued the Show Cause Notice claiming the contribution amount of Rs.4,07,801.63p for the period from 01.04.1996 to 30.09.2001.

8.Under the amended provisions of Section 45 A of the Employees' State Insurance Act, which came into force with effect from 01.06.2010, no order shall be passed by the Corporation in respect of the period beyond five years from the date on which the contribution shall become payable. Therefore, it is clear that the respondent cannot claim the contribution from the appellants for the period beyond five years from the date on which the contribution shall become payable.

9.In the case on hand, the contribution was claimed for the period from 01.04.1996 to 30.09.2001. As already stated, so far, the respondent has not passed any order adjudicating the contribution payable by the appellants. In these circumstances, in view of the proviso to Section 45 A, the respondent cannot pass any order determining the contribution payable by the appellants.

10.The learned counsel appearing for the appellants relied upon a judgment reported in 2017 SCC Online 8494 [The Employees' State Insurance Corporation, through its Director, Sub Regional Office, ESI Complex, Salai Street, Vannarpettai, Tirunelveli - 627 003 and another Vs. M/s.Dharangadhara Chemical Works Ltd., Sahupuram - Arumuganeri Post, Thoothukudi District, rep by its General Manager - HR and others] wherein this Court held as follows:

> "...
> 3.The ESI Court rightly notes that no doubt there was litigation pending between the company and the Corporation till the year 2012. But the fact remains that there was no interim order. If the Corporation chose to keep quiet in the matter, then obviously limitation would intervene. In this case, limitation did intervene in the form of statutory amendment in the year 2010. That apart, in paragraph 18 of the impugned order, the ESI Court noted that the company has been regularly paying contribution right from the year 1997. The Corporation collects contribution only to provide facilities to the workers. In this case, no facilities were provided during the period in question by the Corporation to the employees. On the other hand, the company had provided sufficient facilities for its employees by spending considerable amount. That is why, the trade unions instead of supporting the Corporation chose to stand by the management then. By now, the employees have become unidentifiable. The question of recovery of their contribution at this point of time had become impossible. Holding that the impugned order is barred by limitation, the ESI Court rightly allowed the petition. The order of the ESI Court setting aside the order dated 31.03.2013 passed by the Corporation is sound in law. No substantial question of law has arisen for consideration in this appeal. Therefore, this appeal is liable to be dismissed."

11.The ratio laid down by this Court in the above referred judgment squarely applies to the facts of the present case.

12.In these circumstances, I make it clear that though I am agreeing with the order passed by the Employees' Insurance Court, Principal Labour Court, Chennai, the respondent cannot pass orders determining the contribution payable by the appellants in view of the proviso to Section 45 A of the ESI Act.

13.With these observations, both the Civil Miscellaneous

Appeals are disposed of. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS IV)

//True copy//

Sub Assistant Registrar

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To

1.The Employee Insurance Court
(Principal Labour Court),
Chennai.

Copy To

The Section Officer
VR Section, High Court,
Madras-104(2 Copies)

+2cc's to Mr.T.N.C.Kowshik, Advocate SR.No.85564, 85565
+2cc's to Mr.C.Saravanan, Advocate SR.No.86653

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C.M.P.Nos.11569 & 11570 of 2016

SV(CO)
GN(05/01/2018)