IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.12.2017

CORAM

THE HON'BLE MR. JUSTICE R.SURESH KUMAR

W.P.No.35502 of 2003

W.P.M.P.No.43171 & 43172 of 2003

M O Hasan Kuthoos Maricar Ltd.,
299, MG Road,
Muthialpet,
Pondicherry – 605 003
Rep by its Director. ...Petitioner

Vs.

1. The Assistant Regional Director,
   Regional Office (Tamil Nadu)
   Employee State Insurance Corporation,
   143, Sterling Road,
   Chennai 600 034.

2. The Recovery Officer,
   Office of the Recovery Officer,
   Employee State Insurance Corporation,
   143, Sterling Road,
   Chennai 600 034. ...Respondents

Prayer:- Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus to call for the records of the first respondent in proceedings No.TN/INS.I/51-13064-56 dated 01.09.97 and the consequential proclamation attachment and recovery proceedings of the second respondent dated 14.11.2003 and 21.11.2003 in proceedings No.TN/Recy/ ESI.CP-3/55-13064-56 and quash the same and direct the first respondent to hold an enquiry under Section 45.A of the ESI Act in respect of the claim made against the petition.

For Petitioner : Mr.Haroon
for T.S.Gopalan

For Respondents: Mr.P.Chandrasekar, ESI
Assist by Mr.TNC.Kaushik

O R D E R

The prayer sought for in this writ petition is for a writ of Certiorarified Mandamus to call for the records of the first respondent in proceedings No.TN/INS.I/51-13064-56 dated 01.09.97 and the consequential proclamation attachment and recovery proceedings of the second respondent dated 14.11.2003 and 21.11.2003 in proceedings No.TN/Recy/ ESI.CP-3/55-13064-56 and quash the same and direct the first respondent to hold an enquiry under Section 45.A of the ESI Act, in respect of the claim made against the petition.

2. The short facts which are required to be noticed for disposal of this writ petition are as follows :-

The petitioner Company started in the year 1973 was having an Agency Division at 90, Kamaraj Salai, Thattanchavady, Pondicherry 605 009 and at 299 MG Road, Muthialpet, Pondicherry 605 003. The petitioner is also engaged in transport business along with a petrol bunk at Karaikal. The Agency Division at Pondicherry is separately covered under the ESI Act under Code No.55-13064-56 and the establishment at Karaikal is separately covered under ESI Act under separate code No.55-13494-78. The employees at Pondicherry and Karaikal of the petitioner are governed by separate service conditions.

3. It is the claim of the petitioner that the petitioner had been regularly paying the contribution under ESI Act for its employee of the Agency Division and Transport Division. However on 16.04.1997, the Insurance Inspector sent a report to the petitioner alleging that in respect of the period from June 1996 to February 1997, the petitioner is liable to pay contribution at Rs.37,323/-. Followed by this, recovery notice dated 01.09.1997 also was issued, wherein it was claimed a sum of Rs.41,148/- from the petitioner.

4. It is further claimed by the petitioner that the petitioner was expecting an enquiry under Section 45-A of the ESI Act pursuant to the Inspector's report dated 16.04.1997, as the petitioner's business activities in the Agency Division by then was very shambled, no such notice was received for enquiry under Section 45-A of the ESI Act. While so, the second respondent by notices dated 12.09.1997 & 28.08.1998 proceeded with attachment proceedings against the petitioner. On 19.09.1998, the petitioner has sent a reply to the second respondent regarding the attachment notice dated 28.08.1998, informing that for the period from June 1996 to February 1997, the petitioner had paid the ESI contribution to the tune of Rs.49,708/- which includes the contribution of Rs.41,148/- claimed by the respondents for the period June, 1996 to February, 1997.

5. It is the further claim of the petitioner that, in order to appreciate the said claim made by the petitioner, instead of holding an enquiry, the second respondent by notice dated 08.03.1999 threatened the petitioner with prosecution and on 28.03.1999 the petitioner sent a letter to the Manager, ESI Corporation, Pondicherry informing that the petitioner had paid ESI contribution upto June 1997. Thereafter, after four years, on 26.09.2003, the petitioner was required to appear before the Local Office, Pondicherry. However, the petitioner could not have attended on the said date. When the petitioner was expecting fresh notice from the second respondent, the second respondent to the shock and surprise of the petitioner proceeded with the attachment proceedings on 17.11.2003, published in the newspaper publication seeking attachment of the petitioner's office at 299, MG Road, Muthialpet, Pondicherry. Simultaneously, the second respondent had also issued notice to the petitioner's bank namely City Union Bank Ltd., Karikal Branch, Karaikal and Tamilnadu Mercantile Bank, Karaikal Branch, Karaikal, seeking to attach the petitioner's money lying at the said bank. There is no information as to how the contribution was arrived at Rs.2,82,633/- as demanded by the respondents Corporation.

6. It is the further case of the petitioner that since no Section 45A enquiry was conducted and without which since the respondent proceeded to recover the amount by way of attachment of the property of the petitioner and also attach the money lying in the account of the petitioner's Transport Division at its bank, the petitioner having no other option had approached this Court by filing this writ petition with the aforesaid prayer.

7. Heard Mr.Haroon, learned counsel appearing for the petitioner and Mr.P.Chandrasekar, learned Standing Counsel appearing for the respondents.

8. Mr.Haroon, learned counsel appearing for the petitioner has raised a prime ground stating that, no notice had been served before the issuance of order and also he submitted that only after filing of the writ petition, order dated 07.01.2003 passed under Section 45A of the Act was produced by the respondents Corporation before this Court by filing additional Typed set of papers, which itself disclose the fact that before the enquiry under Section 45-A of the Act, no notice had been served on the petitioner.

9. It is also the submission of the learned counsel appearing for the petitioner as has been averred in the affidavit, when the petitioner was expecting notice under Section 45-A of the Act, no such notice had been issued or

served on the petitioner, all of as sudden, by way of exparte proceedings, the said order dated 07.01.2003 seems to have been passed and with great efforts the petitioner was able to get that order only from its bank and till filing of the writ petition and even after that, it has not been served directly on the petitioner. Once notice had not been given and no enquiry had been conducted after putting the employer under notice, no Section 45-A enquiry could have been completed and therefore, what has been stated in the said order dated 07.01.2003 that, notice had already been sent and not claimed by the petitioner, may not be justifiable for the respondents Corporation to pass the order under Section 45-A of the Act

10. Mr.Haroon, learned counsel appearing for the petitioner in support of his contention has relied upon the following two judgments of this Court. The first one is 2001-I-LLJ (44) in the matter of "Hafees Motor Trasport, Pudukottai Vs. The Deputy Regional Director, Employees' State Insurance Corporation, Madras" . The second judgment is 2004(2) LLN. 1071 in the matter of "Madras Hotel Ashoka (Private) Ltd. Vs. The Regional Director, Employees' State Insurance Corporation, Madras".

11. In respect of the first case is concerned, as referred by the learned counsel appearing for the petitioner, wherein pursuant to the notice issued by the ESI Corporation, the employer Management appeared before the authority for enquiry on a particular date. Thereafter, for various reasons the enquiry seems to have been adjourned and finally on a particular date, when the enquiry was posted, the Management/employer could not appear before the enquiry proceedings for some personal reasons. Thereafter, on behalf of the employer a detailed objections seems to have been filed, where it has been explained how the management employer would not be subjected to the provisions of ESI Act as the strength of the employees and other aspects may not require invocation of the provisions of ESI Act. However, the ESI Corporation in that case had proceeded to pass orders demanding ESI Contribution from the Management in that case. Therefore, only on that context, the learned Judge of this Court had interfered with the said order of demand for ESI contribution passed by the ESI Corporation.

12. In respect of the second case ie., 2004(2) L.L.N. 1071 is concerned, in that case, admittedly, no notice was sent by the ESI Corporation before passing orders under Section 45A of the Act and admittedly no enquiry was conducted. Only in that context, the fact was conceded by the ESI Corporation before this Court in the said judgment and they also wanted to have a fresh enquiry after sending notice to the employer. Based on the

said concedement on the part of the ESI Corporation, said order was passed directing the ESI Corporation to have a fresh enquiry and pass order under Section 45A of the Act.

13. I have perused the facts of the said two cases referred to by the learned counsel appearing for the petitioner, and in my opinion, in both the cases, since the facts are entirely different from the facts of this case, those judgments may not be applicable to the facts of this Case.

14. I have heard Mr.P.Chandrasekar, learned Standing Counsel appearing for the ESI Corporation. The learned Standing Counsel would invite the attention of this Court to the order passed by the respondents Corporation date 31.12.2002/7 Jan 2003. In the said order, it has been specifically mentioned that, the employer was given an opportunity to represent his case in person at the time of personal hearing on 25.10.2002. Both notices were sent to factory address and Principal employer's residential address. The notice sent to the factory address was returned un-delivered with remarks "not claimed". But the notice sent to the Principal employer's residence address neither returned un-delivered nor acknowledgement card received back. Since the employer had not claimed the notice sent to them, it was treated as served and accordingly, they proceeded to complete the enquiry and pass orders. In this regard, the learned Standing Counsel relied upon the averments made in the said order dated 07.01.2003 and for easy reference the extract of the said order is hereby reproduced.

> "ORDER UNDER SECTION 45-A OF THE ESI ACT, 1948 AS AMENDED
>
> M/S.M.O.HUSSAIN KUTHOOS MARICAR LTD., a Factory/an Establishment, situated at Muthialpet, 299, M.G.Road, Pondicherry-3, Code No.55-13064-56 a factory/Establishment covered under the ESI Act, 1948 required to pay the contribution in accordance with Sec.40 of the said Act read with Regulations 29 and 31 of the Employees' State Insurance (General) Regulations, 1950 framed under the Act. As the employer in relating to this factor/establishment failed to pay the contributions as required by law, a notice was issued to the Principal Employer by this office vide letter of even No. dated 20.09.2002 to show cause within 15 days why contributions as per statement enclosed be not recovered from the employer.

The Employer was given an opportunity to represent his case in person at the time of personal hearing on 25.10.2002.

Both notices were sent to factory address and Principal employer's residential address. The notice of the factory address was returned un-delivered with remarks "Not Claimed". But the notice of the Principal employer's residential address neither returned un-delivered nor acknowledgement card received back. Hence it is treated as served.

I have applied my mind to all the relevant fact of the case and my findings are as under:-

Both Notices sent to the factory address and Principal Employer's address. The Notice of the factory address was returned un-delivered with remarks "Not Claimed". But the notice of the Employer's address neither returned undelivered not ack. card received back. Hence the notice is treated as served. The employer has neither replied to the notice nor appeared for personal hearing nor paid any contribution amount till date. Hence we have no other alternative but to proceed to recover the amount.

For the above reasons, I, GIRIJA VAIDYANATHAN, DEPUTY DIRECTOR, in exercise of the powers delegated to me by the ESI Corporation think fit and accordingly order that contribution totaling Rs.1,23,624/- (Rupees One lakh twenty three thousand six hundred and twenty four only) for the period 3/99 to 9/2001 are finally determined and you as one of the Principal Employers are hereby ordered to pay the above amount together with interest payable failing which this shall be caused to be recovered under Section 45-C to 45-I of the Act."

15. The learned Standing Counsel for the respondents would also submit that even the said order passed under Section 45-A also had subsequently been sent to the petitioner i.e, employer and that time also, the order passed under Section 45-A

of the Act was also returned as unclaimed by the petitioner. In this regard, the endorsement made in the postal cover has also been filed in the Types sent of papers which discloses the following facts:-

"REGD. POST WITH AD.

Intimation Served
Not Claimed
Returned to Sender
CL.34

R:L:No:54
NUNGAMBAKKAM POST OFFICE
CHENNAI - 600 034"

"Int served" Sd/- 24/1
'' Sd/-
25/1

If undelivered, please returned to:-
EMPLOYEES' STATE INSURANCE CORPORATION
REGIONAL OFFICE (TAMIL NADU)
143, STERLING ROAD, CHENNAI - 600 034."

16. The learned Standing Counsel would further submit that, since the notice has been sent to the employer which had been specifically not claimed by them, the respondents Corporation had no other option to proceed with the enquiry in accordance with law. Accordingly, the enquiry was completed where based on the inspection report, the number of employees had been taken into account and the salary based on the Minimum Wages Act has been taken into account for the purpose of calculation of their salary and the corresponding contribution of the employer. Accordingly, contribution of the employer was fixed and ultimately the order of demand for employer's contribution with interest had been demanded. In spite of these development, since the petitioner had not come forward to make the contribution, after having given long rope for three years, consequential recovery proceedings were initiated by which, the property of the petitioner was proceeded to be attached by giving paper publication and also sent intimation to the Banks, where the petitioner is having account, to attach the money lying in the Bank account. Therefore, the learned Sanding Counsel would submit that the respondents Corporation at any point of time has not violated the procedure contemplated under the ESI Act and the rules made therein and therefore the petitioner cannot make out his case much less on the ground of non issuance of notice by the ESI Corporation.

17. I have considered the rival submission made by both sides. It is the prime ground raised by the learned counsel appearing for the petitioner that in both, neither notice nor

orders passed under Section 45A of the Act had been served on the petitioner. It is vehemently contended on the part of the learned counsel appearing for the petitioner that subsequent to the inspection, notice should have been served to the petitioner and the enquiry under Section 45-A is a mandatory one and the petitioner's participation is must and without the petitioner's participation, the views of the petitioner/employer as to whether the petitioner concerned is to be covered under the ESI Act, if it is covered and already it has been making contribution regularly for its employees, those factors have to be taken into account. Only for the said purpose Section 45-A enquiry is contemplated under the Act. Without having issued notice to the employer, such enquiry, if it is conducted, it is not a full-fledged enquiry, as without hearing the case of the employer, the decision arrived at by the ESI Corporation can not be considered in consonance with the provisions of the Act.

18. In order to support his argument, the learned Standing Counsel has relied upon the notices sent to the petitioner and at least the postal cover endorsement, through which the order under Section 45-A of the Act was sent by the respondents Corporation, shows that the petitioner had deliberately not claimed the postal cover sent by the ESI Corporation.

19. In this regard, the learned counsel appearing for the petitioner would submit that, the issuance of the order under Section 45-A of the Act sent by the ESI Corporation has not been claimed by the petitioner, based on which it cannot be construed that the notices sent by the ESI Corporation has also not been claimed by the petitioner. Though the postal endorsement in respect of the notices not claimed by the petitioner, before enquiry, has not been produced before this Court by the ESI Corporation, that would not in any way make it to say that notices not at all been sent to the petitioner. The attitude of the petitioner, in this regard has also been established, when the order under Section 45-A was sent to them, they deliberately not claimed the same. When this petitioner employer has refused or not claimed the communication sent by the ESI Corporation through Registered Post, this Court has no option to construe that, even notices sent by the ESI Corporation could have only been met with the same fate at the hands of the petitioner by not claiming the same. This conclusion is alone possible based on the conduct of the party and therefore in this regard the claim made by the learned counsel appearing for the petitioner that no notice was sent to the petitioner before the enquiry can not be accepted.

20. Since it is an admitted case that the petitioner has already been covered under the ESI Act and he has given ESI contribution for its both transport and agency division, the question of covering the petitioner under ESI Act is no more in dispute and the only dispute is that, during the period under which the claim was made by the ESI Corporation, has already been made or not, by the petitioner. Once the opportunity was given to the petitioner, such opportunity should have been grabbed by the petitioner and appeared before the enquiry to produce those documents that the contribution had already been paid. But purposely the petitioner has avoided by not claiming the notices sent by the ESI Corporation therefore the said plea, that they have already made the contribution, can not be taken into account. Therefore, this Court finds that there is no infirmity in the impugned proceedings issued by the respondent's Corporation.

21. With the result, the writ petition is dismissed. Consequently, connected miscellaneous petitions are also closed. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

rts
To
1. The Assistant Regional Director,
Regional Office (Tamil Nadu)
Employee State Insurance Corporation,
143, Sterling Road,
Chennai 600 034.

2. The Recovery Officer,
Office of the Recovery Officer,
Employee State Insurance Corporation,
143, Sterling Road,
Chennai 600 034.

+1cc to Mr.T.N.C.KAUSHIK, Advocate, S.R.No. 92158
+1cc to Mr.T.S.GOPALAN & CO, Advocate, S.R.No. 91873

W.P.No.35502 of 2003 and
W.P.M.P.No.43171 & 43172 of 2003

SR(CO)
TR(27/02/2018)