



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 29.11.2017

WEB COPY

CORAM
THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

C.M.A (MD) No.793 of 2017
and
C.M.P. (MD) Nos.8622 and 8623 of 2017

1.M/s.ICD's represented by its partners
I.C.M.Jahira Begum.

2.C.M.Salmaan Fahad ... Appellants/Petitioners

Vs.

The Deputy Director,
Sub Regional Office,
Employees' State Insurance Corporation,
Panchdeep Bhavan, IV th Main Road,
K.K.Nagar, Madurai. ... Respondent/Respondent

PRAYER:- Civil Miscellaneous Appeal filed under Section 82(2) of Employees' State Insurance Act, 1948, to set aside the Fair and Decreeal Order dated 06.06.2017, made in E.S.I.No.127 of 2014 on the file of the ESI Judge, ESI Court (Labour Court), Madurai.

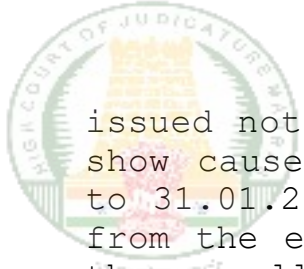
For Appellants :Mr.V.Nagendran
For Respondent :Mr.P.Ganapathsamy

J U D G M E N T

This appeal is directed against the order dated 06.06.2017 made in E.S.I.No.127 of 2014, on the file of the ESI Court (Labour Court), Madurai.

2.One Saboora Beevi, was running a ready made textile show room in the name and style of ICD's, at Door No.289, Kamarajar Salai, Madurai-625 009. The said establishment was brought under the coverage of the Employees' State Insurance Act, 1948. The same was challenged by the said Saboora Beevi by filing E.S.I.O.P.No.16 of 1997. It is seen that the said petition was not prosecuted and it came to be dismissed for default on 14.10.2010.

<https://hcservices.co.in/Shop/Services/> 3.The Revenue Service, the issued regarding the applicability of the Employees' State Insurance Act, to the said establishment had attained finality. The Employees' State Insurance Corporation



issued notice in Form C-18 calling upon the principal employer to show cause as to why contribution for the period from 14.08.1997 to 31.01.2012 for a sum of Rs.11,16,178/- should not be recovered from the employer. This notice, dated 12.04.2012 was received by the appellants herein. The appellants informed the corporation that the principal employer Saboora Beevi died on 10.11.2009 and that even prior to her death she had closed down the business with effect from 30.06.2009. It was the contention of the appellants that the present partners had commenced a new business under a new partnership after obtaining a new TIN Number. They, therefore, contended that they are not liable to pay any contribution. It was submitted that they are engaging only nine employees which is below the ceiling limit. The explanation submitted by the appellants herein was not found to be satisfactory. The Employees' State Insurance Corporation came to the conclusion that there was a transfer of establishment from the said Saboora Beevi in favour of the appellants herein.

4. Therefore, an order under Section 45A of the Employees' State Insurance Act came to be passed on 08.04.2013. The demand made earlier vide show cause notice dated 12.04.2012, was confirmed. Challenging the same, the appellants herein filed E.S.I.O.P.No.127 of 2014, before the ESI Court, Madurai. The same was dismissed by order dated 06.06.2017. The appellants aggrieved by the dismissal of their petition and filed this appeal.

5. The appeal is admitted, since the following substantial questions of law have arisen for consideration:-

(i) Whether the findings of the lower Court as per Ex.A.17 the business run by Tmt. Saboora Beevi has been transferred in the name of her daughter is legally maintainable as per section 93 of the E.S.I. Act?

(ii) Whether the appreciation of evidence of PW1 by the lower Court as an admission of transfer of business is correct in law?

(iii) Whether the demand set out in the impugned order under Section 45A of the ESI Act is hit by limitation.

6. According to the learned counsel appearing for the appellant, the said Saboora Beevi executed a settlement deed on 13.06.2008 in favour of her daughter Jahira Begam, settling the building bearing Door No.289, Kamarajar Salai, Madurai-625 009. He would contend that a mere reading of the terms of the settlement deed would show that what was transferred was only the building alone and nothing else. He would further contend that the Establishment run by Saboora Beevi, was closed in the year 2009 on 30.06.2009 and that the appellants herein started a new partnership on 01.04.2010 onwards. In fact, they have obtained a new TIN number.



7. Per contra, the learned standing counsel appearing for the respondents would highlight the fact that the issue regarding the coverage had already attained finality in view of the dismissal of E.S.I.O.P.No.16 of 1997, dated 14.10.2010. He would lay particular emphasis on the use of the "வகையறா" in the settlement deed. Accordingly to him, what was transferred was not only the building as such but also the business that was running therein.

8. I carefully went through the entire material on record and also applied my mind to the rival contentions. As per Section 93-A of the Employees' State Insurance Act, 1948, if there is a transfer of establishment either in whole or in part by the employer, the transferee shall be jointly and severally liable to pay the amount due in respect of any contribution or any other amount payable under the Act in respect of period up to the date of such transfer. Of course, liability of the transferee shall be limited to the value of the assets obtained by him by such transfer.

9. In the present case, the order under Section 45A of the Employees' State Insurance Act came to be passed only on 08.04.2013. The said order called upon the appellants to pay contribution for the period from 14.08.1997 to 31.10.2012. By Act 18 of 2010, Section 45A of the Employees' State Insurance Act has been amended and it states that no order under Section 45A of the Act shall be passed by the Corporation in respect of the period beyond five years from the date on which the contribution shall become payable.

10. Therefore, the respondent/Corporation could not have called upon the appellants to pay the contribution for the period prior to 07.04.2008. I, therefore, answer the second substantial question of law raised in this appeal in favour of the appellants. The next question is whether the matter should be remitted to the file of the respondent/Corporation for fresh determination in accordance with law. It is the contention of the appellants that they are running altogether a new establishment. But according to the respondent/ corporation, it is old wine in a new bottle. In other words, the very same establishment continues to be run and that therefore the provision of the Act would continue to apply.

11. The learned counsel appearing for the appellants would rely on Section 1(6) of the Employees' State Insurance Act which states that an establishment to which the Act applies shall continue to be covered by the Act, even if the number of employees falls below the statutorily stipulated limit. Therefore, this Court, has to necessarily deal with the question as to whether the establishment owned by Beevi was actually closed or not. It is true that on 30.06.2009, she gave a letter to the Commercial Tax Office informing that she is no longer running the establishment.



12. This Court has to consider the various circumstances that have been stated in the impugned order by the appellants. It is not in dispute that the building in which the establishment was originally run has been fully settled in favour of one of the appellants namely, Jahira Begum. Saboora Beevi was running a garments textile Show Room. The appellants also continue to run the very same business. Even, the name of the establishment has not under gone any change. It is again admitted that Saboora Beevi did not inform Employees' State Insurance Corporation that she has closed down the business. The appellants have also not informed. If they had informed the Employees' State Insurance Corporation at the appropriate time an inspection would have been conducted to find out if the establishment was really closed or not. In particular there would have been a verification of the stock register. It would have revealed if really business had been shut down. These are matters that lie within the special knowledge of the appellants. It was entirely for them to have convinced the respondent authorities that the business commenced by them is a new one and is not a continuation of the earlier business.

13. Section 106 of the Indian Evidence Act can very well be invoked in this case. The respondents had clearly given a finding in the impugned order that the employer did not avail the opportunity given to him and was in the habit of avoiding of communication from the Employees' State Insurance Corporation. The records were not produced. The records particularly the stock register and accounts were not produced. In these circumstances, one has to be necessarily hold that the establishment originally run by Saboora Beevi, was actually transferred as a whole by the appellants herein. The establishment was brought under the coverage of Employees' State Insurance Act, 1948. E.S.I.O.P.No.16 of 1997, filed by Saboora Beevi challenging coverage came to be dismissed for default. One must come to the conclusion that the establishment now run by the appellants is also covered by the proviso of the Employees' State Insurance Act, 1948. It is again beyond dispute that none of the formalities that have be to be observed at the time of formal closure of an establishment or business was observed in the case. I, therefore, answer the first substantial question of law against the appellants. The matter is remitted to the file of the respondent. It is open to the respondent to determine the contribution payable by the appellants and pass afresh orders in accordance with law for the period from 01.04.2008 onwards.

14. The order dated 06.06.2017, made in E.S.I.O.P.No.127 of 2014, on the file of the ESI Judge, ESI Court (Labour Court),
<https://hcc.madras.gov.in/hccservices/> aside accordingly.



15. This Civil Miscellaneous Appeal is allowed accordingly. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/

Assistant Registrar (T&P)

/True copy/

Sub Assistant Registrar

To,

1. The ESI Court (Labour Court), Madurai.

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

3. The Deputy Director,
Sub Regional Office,
Employees State Insurance Corporation,
Panchdeep Bhavan,
IVth Main Road,
K.K.Nagar, Madurai.

+1cc to Mr. P. GANAPATHISAMY, Advocate, SR.No. 90142

+1cc to Mr. V. NAGENDRAN, Advocate, SR.No. 90415

C.M.A (MD) No. 793 of 2017
and
C.M.P. (MD) Nos. 8622 and
8623 of 2017
29.11.2017

TSG

KK/SV MMS/04.05.2018/SAR-4/5P-7C