



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 09.11.2017

DELIVERED ON : 14.11.2017

CORAM:

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A. (MD) No.123 of 2011

and

M.P (MD) No.1 of 2011

1.Lingam Restaurant,
Rep. by S.Unnamalai.

2.S.Arasappan

3.S.Annamalai ... Appellants/Petitioners 2 to 4

Vs.

1.The Regional Director,
Employee's State Insurance Corporation,
143, Sterling Road, Chennai-34

2.Recovery Officer,
Employee's State Insurance Corporation,
143, Sterling Road, Chennai-34

... Respondents/Respondents

PRAYER: Civil Miscellaneous Appeal is filed under Section 82 of the Employees State Insurance Act, 1948, against the fair and decreetal order, dated 16.07.2010 passed in E.S.I.O.P.No.24 of 1997 on the file of the Employee's State Insurance-cum-Principal District Court, Thanjavur.

For Appellant : Mr.P.Velmurugan

For R - 1 : Mr.P.Ganapathy Samy

For R - 2 : No appearance

JUDGMENT

This Civil Miscellaneous Appeal has been filed by the Appellants/claimants against the fair and decreetal order, dated 16.07.2010 passed in E.S.I.O.P.No.24 of 1997 on the file of the Employee's State Insurance-cum-Principal District Court, Thanjavur, raising various grounds.



2.The brief facts of the petitioners are as follows:-

Originally one late.A.Subramanian is the proprietor of Hotel Valli. The second petitioner, who is the wife of late.A.Subramanian, is the proprietrix of Lingam Restaurant. Hotel Valli and Lingam Restaurant are two separate establishments. During the pendency of the appeal, the proprietrix of Hotel Valli viz., A.Subramanian died. Hence, his wife and two sons were impleaded as petitioners 2 to 4. Since both the establishments had engaged employees below 10 in number respectively, they are not covered under the Employees State Insurance Act. However, the Inspector of Employees State Insurance Corporation had clubbed these two establishments as one and held that the petitioner - establishment is covered under the Employee's State Insurance Act and accordingly, the first respondent directed the petitioner - establishment to pay a sum of Rs.15,655.37/- as contribution in respect of its employees for the period from 27.07.1990 to 31.03.1993 and a sum of Rs.8,917.97 as interest at the rate of 12% per annum for each day's default. Aggrieved by the same, late A.Subramanian has filed the petition.

3.The respondents filed a counter-affidavit stating that the statutory Inspector of the respondents had conducted inspection on 01.03.1991 and had found that six persons were employed in the said Hotel Valli and five persons were employed in Lingam Restaurant and was using power. These two units are using common power, cash counter, entrance, phone, name board and the expenditure pertaining to Hotel Valli has been booked under the head of Lingam Restaurant and both the units are one and the same and the first petitioner in order to avoid coverage under the Employee's State Insurance Act alleges that they are separate units. The statutory Inspector conducted inspection on 11.10.1993 and 03.10.1994 and found that they have not paid contribution in respect of their employees. On verification of the ledger maintained, it was also found that more than ten persons were employed. Lingam Restaurant is functioning from 15.10.1990 and was using power. A show-cause notice was issued by the first respondent on 22.06.1995 claiming the above mentioned sum, which was challenged by the petitioners in E.S.I.O.P.No.24 of 1997 and prayed for dismissal of the petition.

4.Before the Employee's State Insurance-cum-Principal District Court on the side of the claimants, one witness viz., P.W.1 was examined and nine documents viz., Ex.P.1 to Ex.P.9 were marked and on the side of the respondents, three witnesses viz., R.W.1 to R.W.3 were examined and eleven documents viz., Ex.R.1 to Ex.R.11 were marked.

5.After hearing both sides and perusing the oral and documentary evidence adduced on either side, the Employee's State Insurance-cum-Principal District Court, by order dated 16.07.2010, dismissed the original petition and confirmed the order passed by the first respondent.



6. Against the fair and decreetal order, the appellants/petitioners have preferred the present appeal.

7. Heard the learned counsel appearing for the appellants/petitioners and the learned counsel appearing for the second respondent and perused the materials available on record.

8. The learned counsel appearing for the appellants/petitioners submitted that the lower Court has failed to see that there are two separate establishments and registered in the commercial Tax office and the lower Court has failed to see that no opportunity of personal hearing was granted to the appellants/petitioners to put forth the submissions and produce the documentary evidence. He has further submitted that the lower court has failed to see that no determination of contributions under Section 45A of the ESI Act, 1948, were made by the respondents and the lower Court has failed to follow the procedures laid down under the proviso to Section 45A of the ESI Act, 1948 and raised the following substantial questions of law involved in the appeal:-

1. Whether the notice of demand dated 26.06.1995 issued by the first respondent is an assessed order passed under Section 45A of the ESI Act, 1948?

2. Whether the first respondent has assessed the demand for contributions in strict adherence to the proviso to Section 45A of the ESI Act, 1948?

3. Whether the first respondent has followed the principles of natural justice as contemplated under Section 45A of the ESI Act, 1948?"

9. The learned counsel for the appellants/claimants, in support of his contentions, placed reliance upon the following decisions:-

(i) *Madras Hotel Ashoka (Private) Limited Vs. Regional Director, Employee's State Insurance Corporation, Madras* reported in 2004(2) L.L.N.1071.

(ii) *Employee's State Insurance Corporation Vs. Rajkot Municipal Corporation* reported in (2016) 1 CLR 195 and

(iii) *Hazari Sah Vs. State of Bihar and others* reported in (2009) 122 FLR 972.

10. In *Madras Hotel Ashoka (Private) Limited Vs. Regional Director, Employee's State Insurance Corporation, Madras* reported in 2004(2) L.L.N.1071, the Division Bench of this Court has held that for the purpose of determination of liability of the petitioners when no enquiry was conducted prior to the issuance of the show-cause notice under Section 45A of the Act, the Employee's State Insurance Corporation has to initiate enquiry afresh and the matter has to be sent back to the Department for fresh enquiry under Section 45A of the Act.



11.The learned counsel for the first respondent/Employee's State Insurance Corporation would also fairly submit that they have not conducted any enquiry under Section 45A of the Act before the issuance of the show-cause notice.

12.The learned counsel for the appellants/petitioners would submit that if the matter is remitted back, they are willing to co-operate for the enquiry.

13.Based on the above submissions made by the learned counsel appearing for both sides and also on perusal of the materials available, this Court finds that the matter has to be remitted back to the file of the first respondent for fresh enquiry.

14.Accordingly, this Civil Miscellaneous Appeal is allowed and the fair and decreetal orders passed in E.S.I.O.P.No.24 of 1997 on the file of the Employee's State Insurance-cum-Principal District Court, Thanjavur, are set aside and the matter is remitted back to the file of the first respondent for fresh enquiry and the first respondent is directed to conduct an enquiry and pass fresh orders, after affording reasonable opportunity to the appellants/petitioners and dispose the same within a period of two months from the date of receipt of a copy of this Judgment. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CSII)

/True Copy/

Sub-Assistant Registrar

To

1.The Principal District Judge,
The Employee's State Insurance Court, Thanjavur.

2.The Regional Director,
Employee's State Insurance Corporation.
143, Sterling Road, Chennai-34

3.Recovery Officer,
Employee's State Insurance Corporation.
143, Sterling Road, Chennai-34

4.The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court, Madurai.

+One cc to Mr.P.Velmurugan, Advocate, SR.No.87069

+One cc to Mr.P.Ganapthisamy, Advocate, SR.No.87103

ps

RL/7C/4P/SKN/RSK/SAR4/29/11/2017

Judgment in
C.M.A. (MD) No.123 of 2011
14.11.2017