IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.11.2017

DELIVERED ON : 16.04.2018

CORAM:

THE HONOURABLE MR.JUSTICE C.T.SELVAM
AND
THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Civil Miscellaneous Appeal No.3703 of 2008
and
M.P.Nos.1 and 2 of 2008 and C.M.P.Nos.12974 and 12975 of 2016

Employees' State Insurance Corporation,
represented by its Assistant Director,
143, Sterling Road,
Nungambakkam, Chennai - 600 034. .. Appellant

Vs

M/s.Southern Petro Chemical Industries Corporation Ltd.,
represented by its Manager-Human Resource Management,
Mr.D.S.B.Naveendhar,
88, Mount Road, Guindy,
Chennai - 600 032. .. Respondent

Civil Miscellaneous Appeal filed u/s.82 of the Employees State Insurance Act, 1948, against the order of Employees State Insurance Court, Chennai, [Principal Labour Court, Chennai - 104] in ESI OP No.21 of 2007 dated 17.06.2008.

For Appellant : Mr.Venkatachalapathy, senior counsel for Mrs.S.Jayakumari

For Respondent : Mr.Vijay Narayan, senior counsel for M/s.AAV Partners

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J U D G M E N T

[Judgment of the Court was made by C.T.SELVAM, J]

This Civil Miscellaneous Appeal arises against the order of Employees State Insurance Court, Chennai, [Principal Labour Court, Chennai - 104] in ESI OP No.21 of 2007 dated 17.06.2008.

2. Appellant passed an order u/s.45-A of the Employees State Insurance Act (hereinafter referred to as 'Act') dated 26.05.2004 requiring the respondent as principal employer to pay a sum of Rs.31,93,78,088/- towards contribution due for the period between 16.01.1977 and 31.10.1992 together with statutory interest. The said order was challenged by respondent in E.I.O.P.No.21 of 2007 on the file of Employees Insurance Court (Principal Labour Court), Chennai. Court below held in favour of respondent and set aside the order u/s.45-A of the Act passed by appellant on 26.05.2004 and determined the contribution payable by respondent as Rs.76,61,492/- for the period 16.01.1977 to 31.10.1992. Taking note of the position that respondent had already paid a sum of Rs.30,88,660/-, Court below directed respondent to pay the balance contribution in a sum of Rs.45,72,832/- with statutory interest thereon. Under spot verification letter dated 25.02.1993, the Inspector of appellant Corporation found that respondent had paid wages to the tune of Rs.43,58,35,730.52/- between the period 1977 and 31.10.1992. Other expenditure having wage content were informed to be Rs.4,13,35,65,046.78. A team headed by a Deputy Director of the appellant Corporation submitted a report dated 15.06.1998. It was the contention of respondent before Court below that save one head viz., work-in-progress, such report was complete in respect of all other heads of account. It was the contention of appellant Corporation that the report was not complete and contribution payable by respondent had to be determined on adhoc basis since respondent had failed to produce the entire records. Court below found that the team headed by the Deputy Director, verified records in the respondent premises from 20.01.1997 to 30.04.1997 and thereafter, under letter dated 26.06.1997 (Ex.P6), required respondent to pay the contribution that had actually been worked out 'so far'. Court below found that the requirement in Ex.P6 that respondent produce certain records regards causal, temporary, construction and contract employees was only in respect of wages paid by it and did not relate to the 50 heads of account classified as other expenditures. It found that under Ex.R10 report dated 15.06.1998, the Deputy Director had informed that out of 50 items 49 items had been checked and the quantum of contribution had been arrived at. It further found that such determination has been made after verification of the entire records relating to the expenses incurred under each of the 49 heads. It informed that respondent's team had verified the records for expenses to the tune of Rs.2,32,49,92,597.78. It informed that the only other expenditure which had not been verified was the work-in-progress and such determination had been done pursuant to its orders in C.M.P.No.256 of 2007 preferred by the respondent towards inspection of records relating thereto and the undisputed determined sum under such head was Rs.1,80,85,69,082/-. Court below found that such sum added to the sum of

Rs.2,32,49,92,597.78 arrived at on verification of records of expenditure under 49 other heads totalling Rs.4,13,35,61,679.78 i.e., the exact figure informed as the other expenditure in Ex.R1, spot inspection report dated 29.03.1993. Court below thus found that the assessment made by the authority in respect of other expenditure covered under 50 heads under orders in No.51-18038 dated 26.05.2004 incorrect. It also held in favour of respondent regards its contention of the assessment of Rs.43,58,35,732.52/- under the head wages being complete informing that Ex.R16, detailed note dated 30.04.1997 on the contribution arrived at head wise informed such figure as the total wages.

3. Heard learned senior counsel for appellant and learned senior counsel for respondent.

4. Learned senior counsel for appellant, taking this Court through the relevant sections of the Employees State Insurance Act, 1948 and the Employees State Insurance (General) Regulations, 1950, towards explaining the manner in which contributions fell due, referred to Section 45-A of the Act which made provision for determination of contributions payable in respect of employees of a factory or establishment, when it failed to effect compliance, on the basis of information available with it. Informing that in the instant case, the period of determination is between 16.01.1977 and 31.10.1992, learned senior counsel explained that second proviso to Section 45-A of the Act which stated that no order could be passed in respect of a period beyond 5 years on the date on which the contribution became payable, was in force only from 01.06.2010. Pursuant to inspection of the respondent establishment, an Inspector of the appellant Corporation had, under notice dated 25.02.1993, pointed out defects, required rectification/compliance as also called for information. On the respondent's request, a team of the appellant Corporation conducted inspection between 12.10.1992 and 25.02.1993. Under communication dated 11.05.1993, appellant Corporation informed various defects, required payment of contributions and also sought particulars. A show cause notice in keeping with Section 45-A(1)(b) of the Act was issued on 23.01.1996. Under communication dated 26.12.1996, respondent inter alia informed of its moving Government for exemption of its establishment from the purview of the ESI scheme from 16.01.1977 to 30.11.1985, its factory already having been exempted upto 30.11.1985, referred to earlier interactions, informed its being ready with statements and connected records and requested inspection thereof by the Deputy Director of the appellant Corporation. It also requested that appellant Corporation may keep in abeyance proposed action. The Deputy Director of the appellant Corporation along with the team caused inspection from

20.01.1997 to 29.04.1997. The note prepared by him on 30.04.1997 informed that the earlier C-18 notice u/s.45-A of the Act was issued in respect of wages in a sum of Rs.43,58,35,730.52 and on the basis of percentages on contribution i.e., 7%, 7.25% and 5.5%. It informed that as such total amount payable had been split up head wise an order u/s.45-A of the Act would be issued in respect of each head separately. The sum of Rs.43,58,35,730.52 reflected two component of wages i.e., annexures 18 to 20, A-1 wages, in a sum of Rs.33,67,92,427.14 and annexures 21 to 22, A3-wages, Rs.9,90,43,303.38. The contributions on actual basis on such total sum of Rs.43,58,35,730.52 had been worked out to Rs.23,42,315. Annexures 23 to 31 related to head office of the respondent and reflected total omitted wages in a sum of Rs.339,63,43,437.15. Under communication dated 26.06.1997, the Deputy Director of the appellant Corporation informed that as the respondent had represented that it was ready with the statements of contributions due and connected records for verification, he visited the respondent establishment as a special case towards verifying the records and ascertaining the actual contributions due and noted that respondent establishment statements were not complete in all respects. Noting the position that contributions actually worked out by him in a sum of Rs.23,42,315/- had not been paid, records produced by respondent were in the major part in relation to wages paid to employees and other records, particularly, those pertaining to casual, temporary, construction and contract workers were not made available nor was the statement of contribution in respect of such employees, that the respondent had repeatedly sought time but failed to effect compliance, the Deputy Director informed that in the circumstances he was left with no other alternative but to pass orders on adhoc basis. Stating so, he afforded respondent a final opportunity to make contributions and also to submit final statement of records, vouchers for verification informing that if he had no confirmation of action by 07.07.1997 he would have no other alternative but to pass orders. This Court, under orders dated 30.10.2003, in W.P.No.16418 of 1998 moved by respondent, has held thus:

> ‘3. The respondent-Corporation was given liberty to determine the contribution payable by the petitioner in accordance with law, of course, after giving due opportunity to the petitioner, in that regard. However, the petitioner now seeks a writ of Mandamus directing the respondent to pass final orders at the earliest under Section 45A in so far as the 52 items in Account in C-18 based on the inspection already made by the team of Officers of the respondent and the records verified thereon without insisting for production of the same records afresh treating the orders dated 20.5.1996, 27.12.1996 and 26.6.1997

requiring payment upto 31.10.1992 as final.

4. In view of the order of this Court dated 1.10.2001, made in Writ Petition No.9 of 1997, suffice it to direct the respondent to take appropriate proceedings for determining the contribution payable by the petitioner in accordance with law, after giving due opportunity to the petitioner and to permit the petitioner to make their objections before the actual contribution payable by them in accordance with law is determined.'

5. The Assistant Director of the appellant Corporation passed an order u/s.45-A of the Act on 26.05.2004 calling for contribution of Rs.31,93,78,088/- for the period between 16.01.1977 and 31.10.1992 informing thus :

'It is very clear that the matter was pending before the Court and the Court had referred back to Corporation for decision. Thus it is clear that Employer should have kept the record ready for verification since the matter was pending before the Court. Hence it is for the Employer to produce records for decision whereas they have intimated that they prefer an appeal against the above order.

Thus in the above circumstances I have no other alternative than to determine the contribution under the provisions of ESI Act based on the Inspection and since the employer has failed to produce complete records during special verification conducted by team of Officers from 20.1.97 to 30.4.97 to determine the actual quantum of contribution the employer vide their letter dated 9.7.97 enclosed a challan dated 9.7.97 for Rs.21,46,135/- and has stated that as per their records contribution due for the period upto 31.10.92 works out to Rs.21,46,125/- after deducting the amount of Rs.9,42,535/- for having paid already as per their record. The correctness of the above payment of contribution could not be confirmed since the employer did not produce complete records for verification.

The Inspector pointed out the above expenditures during the Inspection and Employer was asked to furnish the details of quantum of material involved, labour charges area of operation etc. Employer raised dispute that it includes material, wages, various projects. The employer did not produce complete details till this date without giving any respect to the Hon'ble High Court's verdict. Thus it is evident that they have no intention to produce records to settle the issue, than to precipitate and drag on the issue. Thus by the silence it is presumed that he has no say in the matter.

Thus in the above circumstances in view of the employer's attitude, I have no other alternative than to determine the contribution of Rs.31,93,78,088/- as per the notice dated 23.1.96 after deducting Rs.30,88,660/- which the employer has already remitted.'

6. By way of W.P.No.7952 of 2004, respondent sought a mandamus directing the appellant Corporation to forbear from reopening the already assessed items pertaining to the obligation of the respondent under the Employees State Insurance Act, 1948, taking into account the remittances made by the respondent and issue final order under section 45A only for the left over item under account 2201 for ''work in progress'' for the entire establishment of the respondent. Respondent also moved W.P.No.22890 of 2004 seeking writ of certiorari in relation to Section 45-A notice dated 26.05.2004 as also respondent action consequent thereto. This Court, under common order dated 18.06.2005, disposed of the writ petitions granting liberty to respondent to raise all contentions in the appeal to be filed by it before the appellate authority. Order in W.P.No.22890 of 2004 was challenged in W.A.No.1458 of 2005. Such writ appeal as also other writ appeals raising a common question were decided by a Division Bench of this Court under orders dated 21.02.2006 and eventually in Civil Appeal No.4291 of 2000, the Apex Court, under judgment dated 21.11.2006, passed the following directions:

'(1) The employers shall move the E.S.I. Court within a period of two months, if not already done;

(2) They shall deposit 25% of the amount claimed with the E.S.I. Court along with the application in terms of Sections 75 & 76 of the Act before the E.S.I. Court.

(3) The E.S.I. Court shall determine the quantum of contribution, if any, payable and consider the question as to whether demands were raised within a reasonable period of time or not after considering the question of prejudice, if any, for the delayed action taken by the Corporation.

(4) The approach of the E.S.I. Court and the Authorities should be that of a watch dog and not of a blood hound, even though the legislation is a beneficial one.'

7. Respondent preferred E.I.O.P.No.21 of 2007 on the file of the Employees Insurance Court (Principal Labour Court), Chennai, contending that appellant Corporation was in error in seeking arrears of contribution in a sum of Rs.31,93,78,088/- for the period from 1977 to 1992 as the team of appellant

Corporation headed by its Deputy Director Mr.A.M.Madhava Rao had verified all records in respect of all heads except one i.e. Work-in-Progress, the contributions due in respect of Work-in-Progress having been determined at Rs.40,41,508/-, pursuant to the order of Court below in C.M.P.No.256 of 2007. Court below found that the contention of appellant Corporation of a need to assess the contributions due also in respect of other 49 heads was erroneous and held the respondent liable to pay contribution for the period between 16.01.1977 and 31.10.1992 in a sum of Rs.76,61,492/- i.e., Rs.36,19,984/- as assessed by the team headed by Deputy Director plus Rs.40,41,508/- under the head 'Work-in -progress'. After giving credit to the sum of Rs.30,88,660/- already paid by respondent, Court below required it to pay the balance amount of contribution of Rs.45,72,832/- with statutory interest thereon under orders dated 17.06.2008. Challenging the same, the present Civil Miscellaneous Appeal has been filed.

8. Informing as above, learned senior counsel for appellant Corporation submitted that Court below had erred in its decision and the same was opposed to the finding of this Court in M.P.Nos.1 and 2 of 2008 in C.M.A.No.3703 of 2008 dated 01.12.2008 wherein this Court had informed that prima facie it was unable to accept that the Employees Insurance Court was right in holding that the report filed as Ex.R10 concluded the matter and the Court did not need anything more for the determination of the contribution.

9. Shri.Vijay Narayan, learned senior counsel for respondent, submitted that in keeping with the direction of the Supreme Court, respondent had approached the Court below u/s.75 (1) of the Employees State Insurance Act. Respondent had come out successful in the appeal preferred by it before Court below. There against, the appellant Corporation has preferred the present appeal. Learned senior counsel submitted that the contention of appellant Corporation of non-determination of contribution due under heads other than Work-in-Progress was erroneous and referred this Court to the report of the team led by the Deputy Director wherein it had been informed thus:

(1)	Actual contribution on regular wages as per wage slips for the period from 1977 to 1992. (entire period under consideration)	Rs.	23,42,315.00
(2)	Under the Head A-1. Ledger omitted wages on various heads	Rs.	6,54,771.00
(3)	Under the Head A-3. Ledger omitted wages on various heads	Rs.	3,23,479.00

(4)	Amount of contribution due under the heads A-1.8513 - Rs. 3362.00, A-1.8591 - Rs. 97065.00, A-3.6501 - Rs. 42954.00, A-3.6381 - Rs.156038.00 totalling to Rs.2,99,419.00 but omitted to be shown while communicating to the employer in letter dt. 26.6.97.	Rs.	2,99,419.00
	Total	Rs.	36,19,984.00
	The employer has already furnished the details of the payments made on various dates vide their letter dt.9.7.97 and made a further payment of Rs.21,46,125.00 on 8.7.97.		
	Total Dues as above	Rs.	36,19,984.00
	Total paid	Rs.	30,88,660.00
	Balance to be paid	Rs.	5,31,324.00

10. Learned senior counsel submitted that it was pertinent to note that the Deputy Director, who headed the team, had not termed his report tentative and in fact had accepted the accounts. Where he has not gone into the accounts he has specifically stated so. The report of the Deputy Director concluded thus:

'It may please be seen that the period involved in C-18 Notice is almost 15 years i.e. from 1977 to 1992 covering as many as 50 items which were to be thoroughly examined. The same was done by the undersigned with the assistance of two Insurance Inspectors as ordered by Regional Director. And it was time consuming process, and the amount involved is also heavy. Out of 50 items, 49 items have been checked and the quantum of contribution was also arrived at. Further as advised by Joint Director an interim letter was sent to the employer to pay contribution of Rs.33 lakhs. (approximate). The employer has also paid the same and submitted the challan. The only item that was left is related to code no.2201 - Capital Work in Progress over the said years. As the relevant records were to be retrieved from the godown, the employer sought for further time to procure and produce to us. The employer has come and furnished a statement of accounts showing the bifurcated figures along with a letter dt. 22.8.97 stating that the records are now kept ready. As the undersigned is also now charged with Benefit I & II and Coordination Branches, the work of those branches has also to be attended to, besides much had to be devoted to Regional Board meeting of both Tamil Nadu and Pondicherry, Local Committee meeting. In view of the pressing work at these branches the verification of this lone item for which records are now stated to be ready could not be taken up for verification immediately. However if Regional Director/Joint Director approves, I will be visiting the establishment to conduct verification of the correctness of the statement, with the assistance of Insurance Inspectors and then go head with passing of 45-A order.'

11. Informing that sums as directed by Court below as also this Court, pending this appeal, had been duly deposited and that pursuant to orders of this Court in M.P.Nos.1 and 2 of 2008 in C.M.A.No.3703 of 2008 dated 01.12.2008, a sum of Rs.4,67,60,584/- lay in deposit, learned senior counsel contended that on due appreciation and detailed consideration of the report of the Deputy Director, Court below had arrived at a finding on facts. Learned senior counsel contended that such factual finding was not amenable to appeal u/s.82(2) of Employees State Insurance Act as no substantial question of law arose. In support of such contention, learned senior counsel placed reliance on the decisions of the Apex Court in Employees State Insurance Corporation v. Ameer Hasan [1980 (Supp) SCC 334] and Hotel New Nalanda v. Regional Director, Employees' State Insurance Corporation [2009 (14) SCC 558].

12. By way of reply, learned senior counsel for appellant Corporation submitted that the decision of Court below runs contra the finding of this Court and its order in M.P.Nos.1 and 2 of 2008 in C.M.A.No.3703 of 2008 dated 01.12.2008 and the same raises a substantial question of law.

13. We have considered the rival submissions.

14. We would incorporate hereunder the relevant portions of the report of the Deputy Director dated 15.06.1998:

'As desired by Regional Director, a team consists of the undersigned with Shri N.Gopalan Insurance Inspector (Mount Road Division) and Mrs.P.Sundari Insurance Inspector, R.O. had visited the above establishment from 20.1.97 to 30.4.97 and verified the records like ledger, wage slips and vouchers Bills etc. The team verified the actual wage slips from 20.1.97 to 31.3.97 for the period from 16.1.77 to 30.9.92 which consists of 189 wage slip bundles (volumes). From 1.4.97 to 30.4.97 the team verified ledger and vouchers/Bills for the heads relating to omitted wages.

Under A-1 Ledger, the Inspector has shown omitted wages in respect of 34, head of accounts whereas he has given the serial number as 35 which is incorrect as one serial number has been added wrongly. Similarly in A-3 though the Inspector has furnished omitted wages under 16 head of accounts, whereas he has added the serial number as 17. So the total head of accounts wherein the omitted wages shown is only 50 items and not 52 as serialled by Insurance Inspector in his report. The C-18 Notice was issued based on the Inspector Reports and the amount in respect of all the head of accounts as shown in C-18 Notice tallies.

The total amount of omitted wages is Rs.4,56,94,00,777.30. The entire amount relates to the period from 16.1.77 to 31.10.92 i.e. for 190 months. So monthwise average of wages paid has been taken as Rs.2,40,49,477.77. Thus the amount of wages has been calculated for the period from 16.1.77 to 26.1.85; 27.1.85 to 31.3.92 and 1.4.92 to 31.10.92. The amount so worked out for the respective periods has been shown in column No.5 of para 4 of C-18 Notice dt. 23.1.96 and the contributions have been accordingly proposed at 7%; 7.25% and 5.5% for the respective period.

The employer has produced all the records in respect of all the head of accounts excluding Sl.No.1 under the Capital work in progress Account Code No.2201-under 'A-1' ledger for Rs.1,80,85,69,082.29. When the team visited the establishment, for verification of records, the employer did not keep all the records ready pertaining to this head of account and sought some more time for making the records available and for segregation of amount involved in various sub heads of accounts. The employer has later furnished the statement with the segregation of accounts under various sub heads totalling to Rs.1,80,85,69,082.29 and they also requested for verification of records vide their letter dt. 22.8.97.

However the letter of Inspector dt. 25.2.93 which contains the full details on various accounts and wages paid under each head of account were already furnished to the employer. Since the breakup details were already furnished to the employer, these details on heads of accounts and wages were not supplied again

> in C-18 Notice and therefore for this reason a consolidated C-18 notice was issued.
>
> After verification of records by the team, the following payments were considered for claiming contribution headwise.'

Having explained as above, the team headed by the Deputy Director has, after excluding Item 'Capital Work-in-Progress', has undertaken a detailed exercise in respect of various heads itemised Nos.2 to 50. The report concludes as follows:

> 'I have verified ledgers and vouchers for months of Nov'85, Oct'88, Dec'87, Feb'86, Aug'89, Nov'90, May'90 and May'91. On verification of vouchers/ledger it is seen that the expenses like cost of silver plates / presents charges paid for Radio broad cast, to M/s.Profed Agency; cost of printing and supply 2,50,000 Spic Cytozyme multicrop folders (pamphlets) printing charges, Advertisement charges paid to Dinakaran Press in Chennai, Trichy and Coimbatore have been incurred under this head. On verification of records, I conclude that this only Advertisement charges towards Cytozyme products. This advertisement charges have been paid mainly to radio broadcast, printing of pamphlets, Advertisement charges by newspapers in Fullscap and Halfscap and other sizes. There is no labour involvement.
>
> Moreover the employer was asked to furnish the details of dates of allotment of code nos. in respect of head of accounts at Serial No.7 (7029); 8 (7030); 9 (7031); 11 (7033); 13 (7038) of this report in respect of coded contractors so as to ensure whether the dues have been paid by the contractors prior to the allotment of code nos. for which the employer requested for some more time. This aspect will be verified while the team visits for verification of records for Item No.1-2201-WIP which is pending for verification.'

15. A perusal of the entire report informs that in several instances contentions of the respondent had been accepted and no contributions were found payable while in several other instances, respondent's contentions were not accepted and particular sums payable towards contribution was determined. The period of evaluation is between 1977 and 1992 and in several cases, the random sampling method, a generally accepted statistical mode has been adopted. Therefore, Court below is right in its finding that the entire sums due had been determined. The view expressed by this Court in its order in M.P.Nos.1 and 2 of 2008 in C.M.A.No.3703 of 2008 dated 01.12.2008 was only a prima facie one and with due deference, we

differ. No substantial question of law arises for consideration. The festering wound relating to Employees State Insurance contributions due for the period 1977 to 1992 and left open till 2018 will now close.

The Civil Miscellaneous Appeal shall stand dismissed. No costs. Connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

gm

To
The Presiding officer,
The Employees State Insurance Court,
Principal Labour Court,
Chennai - 104.

+1cc to Mr.AAV PARTNERS, Advocate, S.R.No.28403
+1cc to Mr.S.JAYAKUMARI, Advocate, S.R.No. 27982

judgment in
Civil Miscellaneous Appeal No.3703 of 2008

MG(CO)
TR(25/04/2018)