

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.10.2019

CORAM:

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.Nos.29704, 29585 & 29586 of 2019

W.M.P.Nos.29464, 29465, 29604 of 2019

M/s.Super Spinning Mills Limited (Defunct)
Rep.by its Director-A.R.Balasundaram
Corporate Office 'Elgi Towers'
P.B.No.7113, Green Fields,
Puliakulam Road,
Coimbatore-641 045. ...Petitioner in W.P.No.29704 of 2019

M/s.Sree Anbu Silks
A Partnership Firm
Rep.by its Managing Partner,
Mr.R.Thirumurthi,
Gopichettipalayam-638 452. ...Petitioner in W.P.No.29585 &
29586 of 2019

vs.

1. The Assistant Director,
M/s.Employees State Insurance Corporation
Sub-Regional Office,
1897, Trichy Road,
Ramanathapuram,
Coimbatore-641 045.
2. The Recovery Officer,
M/s.Employees State Insurance Corporation,
Sub-Regional Office,
1897, Trichy Road,
Ramanathapuram,
Coimbatore-641 045. ... R1 & R2 in W.P.No.29704 of 2019
3. The Employees State Insurance Corporation
Rep.by its Deputy Director,
Coimbatore.
- 4.Recovery Officer,
Employees' State Insurance Corporation,
Sub Regional Office
1897, Trichy Road, Pachdeep Bhavan,
Ramanathapuram, Coimbatore-641 045. ...R1 & R2 in
W.P.No.29585 & 29586 of 2019

PRAYER IN W.P.No.29704 of 2019: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records of the Employees State Insurance Court, Coimbatore in I.A.No.2 of 2019 in unnumbered ESIOP and quash its order dated 12.09.2019 and consequently, direct the Employees State Insurance Court, Coimbatore to restore the case in I.A.No.2 of 2019 in unnumbered ESIOP and decide the case on merits.

PRAYER IN W.P.No.29585 of 2019: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records of the Employees State Insurance Court, Coimbatore in ESIOP.No.53 of 2019 and quash its order dated 09.09.2019 and consequentially, direct the Employees State Insurance Court/Principal Labour Court, Coimbatore to restore the case in ESIOP.No.53 of 2019 and decide the said case on merits.

PRAYER IN W.P.No.29586 of 2019: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records of the Employees State Insurance Court, Coimbatore in ESIOP.No.54 of 2019 and quash its order dated 09.09.2019 and consequentially, direct the Employees State Insurance Court/Principal Labour Court, Coimbatore to restore the case in ESIOP.No.54 of 2019 and decide the said case on merits.

For Petitioner : Mr.S.Ravindran
in all W.Ps Senior Counsel
for S.Bazeerahamed

For Respondents : Mr.C.V.Ramachandramurthy
in all W.Ps

C O M M O N O R D E R

The orders dated 12.09.2019 and 09.09.2019 passed by the Employees State Insurance Court, Coimbatore are sought to be quashed in the present writ petitions.

2. The learned Senior Counsel appearing on behalf of the writ petitioner made a submission that the writ petitioner/Mill was already closed on 01.06.2007. On 23.05.2015, the first respondent passed an order determining the contribution from the writ petitioner company at Rs.2,70,250/-, for the period from April 2011 to March 2013. Therefore, the writ petitioner filed a petition under Section 75 of the ESI Act on 25.04.2019 before the ESI Court, Coimbatore along with I.A.No.2 of 2019, to condone the delay of 399 days in filing a petition.

3. The ESI Court, without deciding the issues on merits, suo motu raised the question of maintainability under Section 75 of the ESI Act and arrived at a conclusion that the petitioner has to exhaust the appeal remedy contemplated under Section 45AA of the ESI Act. Therefore, the petition under Section 75 of the ESI Act is not maintainable, without exhausting the appeal remedy under Section 45 AA of the ESI Act.

4. The learned Senior Counsel made a submission that suo motu decision of the ESI Court regarding the maintainability of the petition under Section 75 of the ESI Act, prompted the writ petitioner to file a writ petition under Article 226 of the Constitution of India. Therefore, interpretation or challenge under the provisions of the ESI Act, is to be made only by way of a writ petition filed under Article 226 of the Constitution of India. The learned Senior Counsel further stated that he is aware of the appeal provision provided under Section 82 of the Act, by way of filing a Civil Miscellaneous Appeal before the High Court. However, the Civil Miscellaneous Appeal under Section 82 of the ESI Act can be filed, only if the ESI Court passed an order on merits and as per law. However, in the present case, no such order was passed on merits. Contrarily, the ESI Court has taken a suo motu decision on the maintainability of the petition and rejected the appeal filed by the writ petitioner, mainly on the ground that the petition under Section 75 of the Act is not maintainable and the petitioner has to exhaust the appeal remedy under Section 45AA of the ESI Act. Thus, the writ petition is to be decided, with reference to Section 45AA and 75 and also Section 45A of the ESI Act. Such interpretations as well as the constitutional validity of such appeal provisions, with reference to various provisions are to be decided only under Article 226 of the Constitution of India and therefore, the regular appeal contemplated under Section 82 of the Act may not be an appropriate remedy, as far as the order of the ESI Court which is impugned in the present writ petition is concerned.

5. The learned Senior Counsel reiterated that the language used in Section 45 AA of the ESI Act is "may". Section 45AA stipulates the appellate authority that "if an employer is not satisfied with the order referred to in Section 45-A, "he may" prefer an appeal to an appellate authority as "may be" provided by regulation, within sixty days of the date of such order after depositing 25%".

6. Relying on the above language incorporated in Section 45AA of the Act, the learned Senior Counsel is of the opinion that the word "may" employed in the provision is to be understood in normal context and therefore, the effect of the word shall not be provided, so as to compel the person to

exhaust the appeal remedy under Section 45 AA of the Act.

7. Relying on the said language employed in Section 45AA of the Act, the learned Senior Counsel made a submission that the Labour Court committed an error in providing an interpretation, more specifically, the word "may" employed in Section 45AA of the Act. It cannot give a meaning as it is used in the statute and the Labour Court has adopted "may" to be a meaning, so as to arrive at a conclusion that Section 75 of the petition cannot be entertained, without exhausting the appeal remedy contemplated under Section 45AA of the Act. Such an interpretation is in violation of the Rule itself.

8. The learned Senior Counsel contends that the second report of the Standing Committee on Labour (2009-10) thought it fit to insert Section 45AA, enabling the employer to redress his grievances against the order passed by the assessing Officer. The said provision is an option to the employer, as his earlier remedy was to approach only ESI Court. The provision was aimed at to reducing the litigation in the Court. The Amendment Act, 18 of 2010, which followed the report of the Standing Committee on Labour, inserted many provisions and also made amendments with the existing provisions. Many provisions used the expression "shall" and few provisions used the expression "may". The reading of the provisions which used the expression "shall" shows that it was mandatory and provisions which used the expression "may" shows that it was discretionary. In the above context, Section 45AA of the ESI Act used the expression "may" as an option to the employer. This option can be waived by the employer and he can approach the ESI Court under Section 75 of the Act, without exhausting the appeal remedy under Section 45AA of the Act. Even after introduction of Section 45AA of the Act, the right of the employer to challenge an assessment before the ESI Court under Section 75 of the Act remains intact. Therefore, the order of the ESI Court is perverse and contrary to the very intent of the legislation itself.

9. The ESI Court referred the judgment of this Court dated 14.06.2018 in W.P.No.27836 of 2017, in the case of M/s.Giriguja Publications Private Limited v. The Regional Director, Employees State Insurance Corporation. In the said judgment, this Court held that the writ petitioner is at liberty to approach the Appellate Authority either under Section 45AA or under Section 75 of the Act, before the ESI Court. Even in paragraph No.4 of the said order, this Court held that with reference to the order passed under Section 45-A, the aggrieved person is at liberty to approach the Appellate Authority or ESI Court, on account of the fact that the language employed in Section 45AA is "may". Thus, option is provided to the employer to approach the Appellate Authority or ESI Court under Section 45AA of the ESI Act. Such

a right is to ensure that the statute cannot be otherwise interpreted by the ESI Court, compelling the employee to approach the Appellate Authority under Section 45AA, before filing a petition under Section 75 of the Act.

10. The ESI Court in its order referred the judgment of the India Pistons case. The case decided by the Madras High Court reported in 2010(20) CTCOL 453 (Mad.), was with reference to the above judgment, which was followed by the ESI Court for rejecting the appeal filed by the petitioner under Section 75 of the Act. The learned Presiding Officer of the ESI Court has committed an error in applying the said principle, with reference to the option granted to the employer under Section 45AA and Section 75 of the Act. In this regard, the learned Senior Counsel distinguished the facts by stating that the judgment of Madras High Court, in the case of India Pistons merely dealt with a factual situation, where a writ petition is filed, challenging the order of ESI Corporation dated 04.06.2010 passed under Section 45AA of the Act, which was disposed of with a direction to ESI Authorities to rehear the matter on merits. In the above context, the judgment dealt with introduction of Section 45AA of the Act, which is an appeal remedy available to the Management.

11. This Court independently perused the judgment rendered in the case of India Pistons cited supra, in paragraph No.8 of the Judgment, the Supreme Court observed that "the Act itself now provided under Section 45AA of the amended ESI Act, to go before the Appellate Authority". Admittedly, the orders impugned in these writ petitions came to be made on 04.06.2010. Therefore, the petitioner can have the benefit of amended provision and obviously the Appellate Authority have not been notified under the regulations, and in terms of Section 45AA of the Act, the petitioner can very well approach this Court.

12. On a reading of the entire orders in India Pistons case, the court, at not point of time, had decided the language admitted in Section 45AA of the Act, with reference to the right of the employer to file a petition under Section 75 of the ESI Act. Undoubtedly, both the provisions are providing right to the employer to prefer an appeal/petition.

13. Let us now look into the intent of Section 75 of the ESI Act. The said Section is not an appeal or revision or review. Section 75 is a special provision, constituted in respect of the matters to be decided by the Employees State Insurance Court itself. However, Section 75AA speaks about the Appellate Authority. Section 75AA is a choice granted to the employer. In the event of not satisfying with the order passed under Section 45A, the employer may prefer an appeal to the Appellate Authority. Thus, it is only an option, which can be

exercised at the choice of the employer. The ESI Court cannot compel an employer that the petition under Section 75 of the Act will not be entertained, in the event of not exhausting the appeal remedy contemplated under Section 45AA of the ESI Act. Such an interpretation provided by the ESI Court, is in violation of the intent of the provisions itself and when the Act in various other provisions used word "shall" and in certain provisions, the used word "may", then the Court must be concerned with the language used to be circumstances, and that they have defined intention as well as meaning, which is to be interpreted with reference to the word used and not at the choice of the Courts.

14. The another decision referred by the ESI Court, has also no application in respect of maintainability of ESIOP filed by the writ petitioner. In the case of the Government of Tamil Nadu vs. National Green Tribunal, South Zone and others reported in 2019-3-LW865, the Division Bench of this Court decided whether the writ petition filed by the Government of Tamil Nadu was maintainable, when an appeal remedy is provided under Section 22 of the National Green Tribunal Act, 2010, in respect of the order passed by the tribunal. The Division Bench held that when an appeal remedy is available, the writ petition filed by the Government of Tamil Nadu was not maintainable.

15. With reference to the above judgment of the Hon'ble Division Bench of this Court, when the general principles regarding exhausting the appeal remedy is decided, it has no relevance with reference to the specific provisions of the ESI Act. In respect of general proposition, the aggrieved person has to approach the competent authority at the first instance for redressing their grievances or otherwise. Exhaust is the rule and entertaining a writ petition before the Court is an exception by granting waiver of appeal remedy. This being the general rule, the said decision cannot be relied for the purpose of interpretation under Section 45AA.

16. The ESI Court may be a right in following the judgment of the Division Bench, compelling the employee to exhaust the appeal remedy, if the language used in Section 45AA is "shall". Since the word used in Section is "may", the decision of the Division Bench, directing the party to exhaust the appeal remedy cannot have any relief at all.

17. In the case of Union of India vs. A.K.Pandey reported in 2009 (10) SCC 552, it has been held as follows:

" 16. The construction of Mandatory words as Directory and Directory words as Mandatory should not be lightly adopted. The opposite meaning should be

unequivocally evidenced before it is accepted as the true meaning; otherwise there is considerable danger that the legislative intent will be wholly or partially defeated

22. The principle seems to be fairly well settled that prohibitive or negative words are ordinarily indicative of mandatory nature of the provision; although not conclusive. The Court has to examine carefully the purpose of such provision and the consequences that may follow from non-observance thereof."

18. Regarding the interpretation of the statutes, the Supreme Court of India in the case of Union of India vs. Tata Chemicals reported in 2014 (6) SCC 335, it is held as follows:

"It is cardinal principle of interpretation of Statutes that the words of a Statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning unless such construction leads to some absurdity or unless there is something in the context or in the object of the Statute to the contrary. The golden rule is that the words of a Statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of a Statute are clear, plain and unambiguous, then the Courts are bound to give effect to that meaning irrespective of the consequences. It is said that the words themselves best declare the intention of the law given. The Courts have adhered to the principle that efforts should be made to give meaning to each and every word used by the legislature and it is not a sound principle of construction to brush aside words in a Statute as being inapposite surpluses, if they can have proper application in circumstances conceivable within the contemplation of the Statute (See Gurudevdatla VKSSS Maryadit v.State of Maharashtra MANU/SC/0191/2001:[2001]4 SCC 534).

23. It is also well settled principle that the Courts must interpret the provisions of the Statute upon ascertaining the object of the legislation through the medium or authoritative forms in which it is expressed. It is well settled that the Court should, while interpreting the provisions of the Statute, assign its ordinary meaning."

19. The ESI Corporation itself issued a clarification note in letter dated 07.08.2019, which reads as follows:

"Either the employer can appeal under Section 45AA of the ESI Act or he can directly approach EI Court. No provision either in the Act or in the Rules and Regulations makes it mandatory for an employer to exhaust the appeal provision under Section 45AA prior to filing of an application under Section 75/78 of the ESI Act, 1948. Had it been the legislative intent it would have been specifically been provided for. In absence there of the arguments if any made that only after exhausting the option under Section 45AA can any application be filed in EI Court cannot be accepted".

20. The ESI Court passed an order in an Interlocutory application in unnumbered ESIOP. The point of maintainability of the petition under Section 75 of the Act was taken up suo motu and the ESI Court arrived at a conclusion that the writ petitioner/employer has to exhaust the appeal remedy contemplated under Section 45AA of the ESI Act.

21. The learned counsel appearing on behalf of the respondent/ESI Corporation, though not adjudicated the matter raised in the present writ petition, contended that the writ petitioner has to file a Civil Miscellaneous Appeal under Section 82 of the Act, which would be an appropriate remedy contemplated under the Act itself. Thus, the present writ petition itself is not maintainable.

22. Secondly, the appeal remedy is provided under Section 45AA of the Act. There is nothing wrong in preferring an appeal by the writ petitioner under Section 45AA of the Act. Therefore, the ESI Court has not committed any serious mistake in compelling the petitioner to approach the competent authority under Section 45AA of the Act.

23. With reference to the above contention, this Court has already made an observation that the issue regarding the maintainability and interpretation under Section 45AA and with reference to Section 75 of the Act was taken up suo motu by the ESI Court and therefore, the petitioner has chosen to file a writ petition under Article 226 of the Constitution of India. When the validity or interpretation of the provisions of the very same Act is raised by way of a issue in writ petition, then the High Court cannot direct the parties to prefer an appeal under the very same Act. Only in the event of deciding the issues on merits, the High Court can direct the parties to prefer an appeal under the Act and not otherwise. In respect of challenge made regarding the validity as well as the interpretation of a particular provision, the same need not be filed under the provisions of the Act itself. Contrarily, such issues can be decided in a writ petition filed under Article 226 of the Constitution of India. It is not as if High Court cannot decide such issues under Section

82 of the Act. However, there is no prohibition to entertain such writ petition filed under Article 226 of the Constitution of India.

24. This being the principles to be followed, there is no bar for entertaining the writ petition, for the purpose of interpreting the provisions of the Act so as to ascertain the rights of the parties with reference to the provisions. However, the ESI Court itself has not decided the issues on merits, with reference to the facts placed before this Court. Contrarily, the ESI Court has decided the maintainability of the petition by interpreting the provisions of the Act. Therefore, this Court has to clarify and provide correct interpretation for the purpose of entertaining a petition under Section 75 of the Act.

25. In view of the fact that the language adopted under Section 45AA is "may", this Court is of the undoubted opinion that it is only an option to the employer to prefer an appeal under Section 45AA of the Act. Section 75 of the Act contemplates that if any question or dispute arise,

(a) whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution, or

(b) the rate of wages or average daily wages of an employee for the purposes of this Act.

If so, the person aggrieved is entitled to file a petition. Thus, the right conferred under Section 75 is an absolute one and the right provided under Section 45AA is an optional one, where the employee can just go before the appellate authority under Section 45AA of the Act or directly file an application before the ESI Court under Section 75 of the Act.

26. This being the interpretation to be provided with reference to Section 45AA and 75 of the Act, all the ESI Courts across the State of Tamil Nadu and Union Territory of Puducherry, are bound to entertain the petitions filed under Section 75 of the Act, without exhausting the appeal remedy contemplated under Section 45AA of the Act. In other words, the appeal contemplated under Section 45AA of the Act is an optional one and all petitions filed under Section 75 of the Act is to be entertained, numbered, and adjudicated on merits and in accordance with law, without directing the parties to exhaust the appeal remedy provided under Section 45AA of the Act. Therefore, this Court has no hesitation in coming to a conclusion that the impugned order passed by the ESI Court dated 12.09.2019 in I.A.No.2 of 2019 in unnumbered ESIOP is perverse. Therefore, the impugned orders stand quashed. The ESI Court, Coimbatore is directed to entertain the

interlocutory application as well as the appeal, and decide the matters on merits and in accordance with law.

27. The Registry is directed to communicate the order of this Court to all ESI Court, State Insurance Court across the State of Tamil Nadu as well as Union Territory of Puducherry, enabling the Presiding Officer to entertain the appeal in an uniform manner for the purpose of deciding the matter. The Copy of this Order is directed to be communicated to the Original Directors, ESI Courts, Stalin Road, Chennai-34. The writ petitions stand allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

ssb
To

1. The Assistant Director,
M/s.Employees State Insurance Corporation
Sub-Regional Office,
1897, Trichy Road,
Ramanathapuram,
Coimbatore-641 045.
2. The Recovery Officer,
M/s.Employees State Insurance Corporation,
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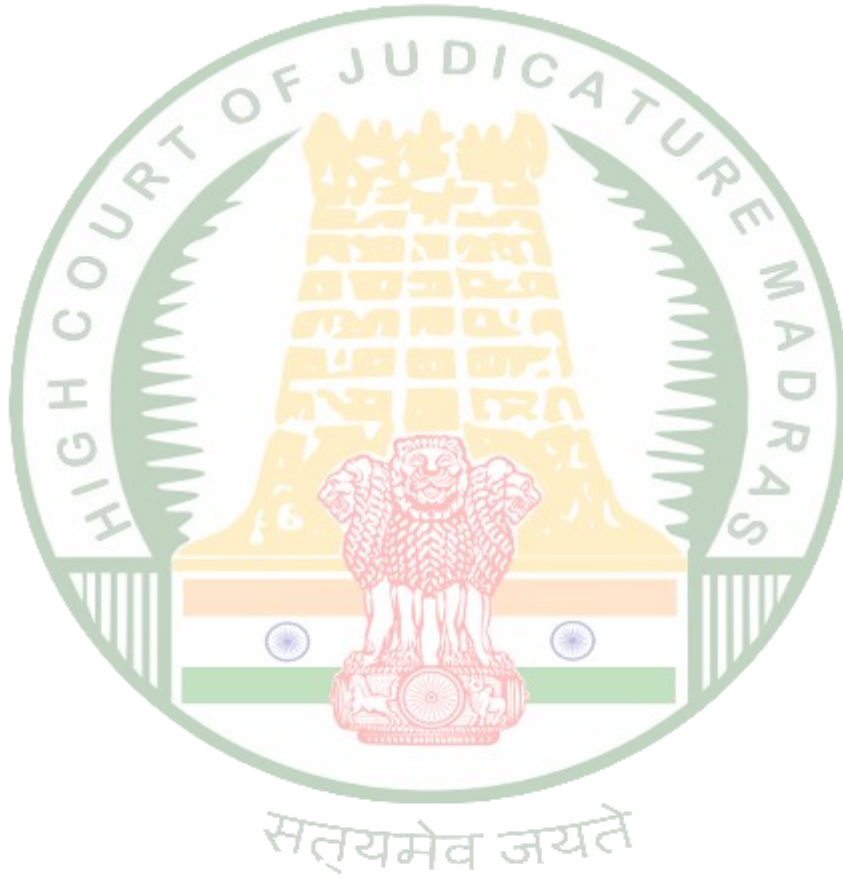
Copy to: The Section Officer
F-Section,
High Court, Madras-104.

(For follow up action Reg. Instructions issued by this court to this Registry in para 27)

+3cc to Mr.S.Bazeer Ahamed, Advocate SR.89084,89085

W.P.No.29704, 29585 & 29586 of 2019
W.M.P.Nos.29464, 29465, 29604 of 2019

NR (CO)
CB (30/12/2019)



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