

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.12.2020

CORAM:

THE HONOURABLE MR.JUSTICE T. RAJA

C.M.A.No.2054 of 2012 and M.P.No.1 of 2012

M/s.Rathinam Blue Metals

Thirisoolam,

Chennai - 600 043.

Represented by its Partner,

R.Sundarajan

... Appellant/Petitioner

Vs

1.The Deputy Director,
Employee State Insurance Corporation,
143, Sterling Road,
Nungambakkam, Chennai - 600 034.

2.The Recovery Officer,
Employee State Insurance Corporation,
143, Sterling Road,
Nungambakkam,
Chennai - 600 034.

... Respondents/Respondents

Prayer: Civil Miscellaneous Appeal filed under Section 32 of the Employees State Insurance Act, 1948 against the Order and Decree dated 28.04.2011 passed in E.I.O.P.165 of 2003 on the file of the Employees State Insurance Court (Principal Labour Court), Chennai.

For Appellant : Mr.S.Ravi

For Respondents: Mr.K.Prabakar for R1 & R2

JUDGMENT

This Civil Miscellaneous Appeal has been filed by the appellant against the Order and Decree dated 28.04.2011 passed in E.I.O.P.165 of 2003 on the file of the ESI Court (Principal Labour Court), Chennai.

2. The brief facts of the case is as follows:

(a) The petitioner/appellant herein is a partnership firm, engaged in crushing boulders into Blue Metals in various sizes and supplying to the parties who require them for the

construction purpose. As such, it employs a maximum of not more than 7 persons for wages at any point of time ever since its inception and it therefore, does not come under the purview of the Employees State Insurance Act, 1948. However, the respondent Employees State Insurance Corporation, by Communication dated 8.2.1994, all of a sudden, intimated that on the basis of the inspection conducted, the petitioner is covered under the Employees State Insurance Act (hereinafter referred to as, "the Act") w.e.f. 23.11.1993. The above intimation was given without providing any opportunity to the petitioner in order to ascertain whether the factory is covered under the Act or not.

(b) The above intimation was followed by a Notice bearing No.TN/INS.VIII.51.57919.43, dated 4.4.2001 demanding contributions from the petitioner/appellant herein for the period from 23.11.1993 to 09/2000 assuming that the petitioner had employed 15 persons. The notice was addressed to the factory which was not received by the appellant and the same has also been sent to one Mr.Rathinam, purported to be Proprietor. By letter dated 24.04.2001, the said Rathinam has intimated the 1st respondent that he has absolutely no connection with the above factory. Therefore, it is obvious that the notice has been served on a wrong person.

(c) While so, the 1st respondent passed an order dated 13.6.2003, purported to be under Section 45A of the Act determining the contribution as Rs.2,07,582/- for the period from 23.11.1993 to 30.09.2000 and sent the same to the said Rathinam. However, as the order was sent to the Factory, the same was received by the petitioner. Since the order was passed without serving any notice on the petitioner, he filed W.P.No.29795/2003 on behalf of Thirusoolam Small Scale Industries Blue Metal Machine Jelly Manufacturers Welfare Association and the same was disposed of with a direction. Following the same, the 2nd respondent initiated distraint proceedings vide order dated 22.09.2003. Therefore, challenging the order dated 13.06.2003 passed under Section 45A of the Employees State Insurance Act, the appellant herein/petitioner filed E.I.O.P.No.165/2003 before the Employees Insurance Court (Principal Labour Court), Chennai. The ESI Court by its order dated 28.04.2011 dismissed the claim of the appellant herein. Aggrieved over the same, the appellant herein is before this Court with this Civil Miscellaneous Appeal.

3. The appellant has raised the following substantial questions of law for consideration in this appeal:

a. Whether the order of the ESI Court is correct in law in calling upon the appellant to pay contribution for the period from 23.11.1993 to 13.9.2000 when the Act itself was not applicable to the appellant?;

b. Whether the ESI Court has committed a grievous error of law in ignoring Ex.P.9 to Ex.P.11 and Ex.P.3, Ex.P.6 and Ex.P.7 filed by the appellant which clearly prove that the appellant was a Partnership Firm and Rathinam had nothing to do with the appellant and only four employees were engaged at that point of time?;

c. Whether the ESI Court has committed an error of law by placing the burden on the appellant to prove that the Act is not applicable to the appellant and that they are not liable to pay contribution as demanded by the respondents?; and

d. Whether the appellant is liable to pay contribution as demanded by the ESI Corporation even if the Act does not apply to the appellant?

4. Mr.S.Ravi, learned Counsel appearing for the appellant drawing the attention of this Court to notice under Section 2 (12) of the ESI Act restated what is the meaning of "Factory". As per the Section 2(12) of the Act, 'Factory' means any premises including the precincts thereof (a) whereon ten or more persons are employed or were employed for wages on any day of the preceding twelve months. Therefore, only when ten or more persons were employed on any day of the preceding twelve months, the Employees State Insurance Corporation establishing this fact can raise the contribution issue. In the present case, when the Inspection Report dated 23.11.1993 simply mentions only 15 employees on the date of inspection, namely, 23.11.1993 nowhere they have mentioned the names of the employees either casual or permanent.

5. On the other hand, when the appellant has also made it clear that they have never employed more than 7 persons, atleast on the categorical denial made by the appellant, it is the bounden duty of the Employees State Insurance Corporation to give the list of the names of the employees, who according to them, are more than 10 persons to bring the appellant factory under the coverage by virtue of Section 2(12) of the Act. When there is a denial right from the date of inspection made by the respondent-Employees State Insurance Corporation, the learned ESI Court while being approached by the appellant against the order passed under Section 45A of the ESI Act dated 13.06.2003,

should have adjudicated the applicability of the Act on the appellant's factory in terms as per Section 2(12) of the Act. On the contrary, the learned ESI Court has also gravely erred to reach any conclusion on that aspect.

6. Learned Counsel for the appellant further submitted that the learned ESI Court ought to have adjudicated on the applicability of the provisions of the Act which has not been done. It is also pleaded that even assuming for a moment that the appellant factory is covered by the Act for the purpose of making contribution, the learned ESI Court should have decided how much would be the contribution payable by the appellant from 23.11.1993 to September, 2000, sadly, that aspect also has been completely left out. Therefore, for proper adjudication, the matter may be remanded back to the learned ESI Court, he pleaded.

7. Mr.K.Prabhakar, learned counsel appearing for the respondents-State Insurance Corporation heavily objecting the said argument drawing the attention of this Court to page No.7 of the appellant's typed set argued that the question of applicability of the provisions of Employees State Insurance Act, 1948 on the appellant's factory has already been decided and became concluded by the order of the Regional Director, Employees' State Insurance Corporation, dated 08.02.1994. Therefore, the arguments advanced by the learned counsel for the appellant that the ESI Court has gravely erred in not deciding the issue as to whether the appellant's factory has been covered is far from acceptance.

8. But, this Court is unable to accept the submissions of the learned Counsel for the ESI Corporation Respondent. The reason being that the letter dated 30.06.2003 given by the appellant to the Deputy Director, Employees State Insurance Corporation never says that the appellant has admitted the coverage. Secondly, another proceedings dated 08.02.1994 passed by the Regional Director, Employee State Insurance Corporation cannot be taken as a proof to nonsuit the argument of the appellant that the appellant factory was covered by the provisions of ESI Act . Even if the order dated 08.02.1994 passed by the Regional Director of the Employee State Insurance Corporation stating that the appellant's factory has been covered, the respondents should have placed before Employees State Insurance Court, the number of employees employed by the appellant on the date of inspection with proper identification, namely, the names of the employees and their father names and other relevant particulars. Further, though the preliminary Inspection Report dated 23.11.1993 issued by the Inspector simply mentions only 15 employees were working on the date of inspection, the Employees State Insurance Corporation has not placed before ESI Court the names of the employees with

requisite particulars, on the relevant date, therefore, as rightly canvassed by Mr.S.Ravi, the learned counsel appearing for the appellant that it became the bounden duty of the ESI Court to go into the applicability of the provisions on the appellant's factory which has not been done in my considered opinion, the ESI Court failed to address this core issue. That apart, the Employees' State Insurance Corporation ought to have placed the final order passed against the appellant with regard to the coverage of provisions of the Employees State Insurance Act before the ESI Court that exercise also has not been done.

9. In view of all the above, the matter is remanded back to the Employees State Insurance Court (Principal Labour Court), Chennai, to decide whether the appellant factory on the relevant point of time has employed more than 10 persons as required under Section 2(12) of the ESI Act and to give a fresh disposal. The above exercise shall be done within a period of six months from the date of receipt of a copy of this judgment. Needless to mention that since the matter pertains to the year 2003, the learned ESI Court shall give top priority to the matter while giving disposal.

10. With the above observation and direction, the Civil Miscellaneous Appeal is disposed of. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

pam/tsi

To

The Employees State Insurance Court,
(Principal Labour Court), Chennai.

+1cc to Mr.K.Prabakaran, Advocate Sr.39709
+1cc to M/s.Gupta & Ravi, Advocate Sr.39865

C.M.A.No.2054 of 2012

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srg 16/03/2021