

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.12.2020

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THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A.Nos.1261, 1263 and 1851 of 2020

M/s.Measureall Engineering Company (P) Ltd. (Defunct),
Rep. By its then Director Mr.B.Jayachandran,
No.184, Aerodrome Road, Singanallur,
Coimbatore - 641 005. .. Appellant in all CMAs/Petitioner

Versus

The Recovery Officer,
The Employee's State Insurance Corporation,
Sub Regional Officer,
No.1897, Trichy Road, Ramanathapuram,
Coimbatore - 641 045. .. Respondent in all CMAs/Respondent

Prayer in C.M.A.No.1261 of 2020: Civil Miscellaneous Appeal has been filed under Section 82 of the Employees State Insurance Act against the order dated 07.02.2020 made in E.S.I.O.P.No.8 of 2016 on the file of Employees State Insurance Court, Coimbatore, confirming the order dated 04.02.2010 relating to the alleged interest mentioned in annexure in Sl.Nos.7, 8, 10, 11, 13 & 15 respectively alone in CR. Nos.477, 564, 679, 680, 1283 & 3724 respectively.

Prayer in C.M.A.No.1263 of 2020: Civil Miscellaneous Appeal has been filed under Section 82 of the Employees State Insurance Act against the order dated 07.02.2020 made in E.S.I.O.P.No.7 of 2016 on the file of Employees State Insurance Court, Coimbatore, confirming the order dated 04.02.2010 relating to the alleged damages mentioned in annexure in Sl.Nos.12 & 14 respectively in CR.Nos.900 and 3451 respectively.

Prayer in C.M.A.No.1851 of 2020: Civil Miscellaneous Appeal has been filed under Section 82 of the Employees State Insurance Act against the order dated 07.02.2020 made in E.S.I.O.P.No.6 of 2016 on the file of Employees State Insurance Court, Coimbatore, confirming the order dated 04.02.2010 relating to the alleged contribution mentioned in annexure in Sl.Nos.10, 13 & 15 respectively in CR.Nos.679, 1283 & 3724 respectively.

For Appellant : Mr.N.Ishtiaq Ahmed
For Respondent : Mr.S.P.Srinivasan

COMMON JUDGMENT

Heard the learned counsel appearing for the parties through Video Conferencing, due to COVID-19 pandemic.

2. Since the facts involved in all these Civil Miscellaneous Appeals are one and the same, they are disposed of by this common judgment.

3. M/s.Measureall Engineering Company (P) Ltd. (Defunct), represented by its then Director Mr.B.Jayachandran, Coimbatore, has filed these Civil Miscellaneous Appeals, challenging the order passed under Section 75(1)(g) of the Employees' State Insurance Act, 1948 (in short "the ESI Act") by the learned Employees State Insurance Court (ESI Court), Coimbatore, in ESIOP.Nos.8, 7 and 6 of 2016, dated 07.02.2020, confirming the order dated 04.02.2010 passed by the respondent/Recovery Officer, Employees' State Insurance Corporation, Coimbatore, under Section 45(C)(1)(2) of the ESI Act, directing the appellant Company to pay towards interest, certified damages and contribution respectively.

4. Mr.N.Ishtiaq Ahmed, learned counsel for the appellant submitted that on the earlier occasion, the appellant had filed EIOP.No.5 of 2012 on 19.04.2012 without making payment towards mandatory deposit as required under the law. Before the learned ESI Court, when the same was subjected to by other side, as the non-deposit of the mandatory deposit is only a curable, the above said EIOP was withdrawn as not pressed on 05.08.2015. Subsequently, the very next day i.e. on 06.08.2015 itself, after paying mandatory deposit, fresh ESIOP.Nos.6 to 8 of 2016 were filed.

5. When the matter was taken up, learned ESI Court negatived the fresh petitions filed in ESIOP.Nos.6 to 8 of 2016 holding that since EIOP.No.5 of 2012 filed by the appellant herein on the earlier occasion against the very same subject matter was withdrawn on 05.08.2015 without seeking permission/liberty to institute a fresh claim from the Court, it was rejected stating that allowing the appellant herein to contest the claim on the same subject afresh in a fresh petition is barred under Order 23 Rule 1(4) CPC.

6. Learned counsel for the appellant relying on the judgment of the Hon'ble Apex Court in the case of Kandapazha Nadar and others Vs. Chitraganiammal and others [2007 7 SCC 65] submitted that when the Court allows the suit to be withdrawn without liberty to file a fresh suit, without any adjudication, such order allowing withdrawal cannot constitute a decree and therefore, it cannot debar the appellant herein from taking the defence in the second round of litigation, because, the order of the allowing such such withdrawal does not

constitute a decree under Section 2(2) of the Code. Therefore, it would not preclude the appellant herein from raising the plea on the same cause of action.

7. However, Mr.S.P.Srinivasan, learned counsel for the respondent, objecting to the maintainability of the petition on the ground of limitation by virtue of Section 77(1A) of the ESI Act, urged this Court to dismiss the appeals on the ground that every application has to be made within three years from the date of cause action, but, in the present case, although the respondent/Recovery Officer passed an order dated 04.02.2010 for recovery of dues towards interest, damages, contribution, the appellant Company has filed the fresh ESIOP.Nos.6 to 8 of 2016 only on 06.08.2015, which is admittedly beyond the period of 3 years and therefore, it is barred by period of limitation as adumbrated under Section 77(1A) of the Act. Moreover, the order dated 04.02.2010 passed by the Recovery Officer/respondent is only a consequential order to the original determination order passed under Section 45A of the ESI Act. Thus, consequential order of recovery cannot be challenged unless the determination order made under Section 45A of the ESI Act is challenged.

8. In the present case, as pleaded by the learned counsel for the appellant, when the appellant had already filed EIOP.No.5 of 2012 on 19.04.2012, which was admittedly within three years from the date of order dated 04.02.2010 passed by the respondent as per Section 77 (1A) of the ESI Act, since they had withdrawn the above said EIOP on 05.08.2015, they should have filed the petition afresh well within the period of three years limitation, namely, 03.02.2013. But, in the present case, subsequent ESIOP.Nos.6 to 8 of 2016 were filed only on 06.08.2015 and therefore, the said fresh petitions filed by the appellant are hit by Section 77(1A) of the ESI Act, which is reproduced hereunder:-

Section 77 --- Commencement of Proceedings ---

(1) The proceedings before an Employees' Insurance Court shall be commenced by application.

(1A) Every such application shall be made within a period of three years from the date on which the cause of action arose.

9. It is not in dispute that the first respondent has passed impugned recovery order on 04.02.2010 and therefore, as per the above said provision, the appellant should have filed fresh petitions within the period of three years i.e. on or before 03.02.2013. But, although first EIOP No.5 of 2012 was filed on 19.04.2012, the same was withdrawn by the appellant Company on 05.08.2015 itself without leave of the Court. Even assuming it was withdrawn with the leave of the Court, since fresh petitions were filed and thereby fresh numbers were assigned on 06.08.2015, namely, ESIOP.Nos.6 to 8 of 2016, beyond the period of 3 years, such filing of fresh petitions challenging the recovery order dated 04.02.2010 passed by the respondent are

clearly barred by limitation as per Section 77(1A) of the ESI Act. Thus, on this count, the Civil Miscellaneous Appeals fail and they are dismissed accordingly. No Costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CO)

/TRUE COPY/

Sub-Assistant Registrar

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To

1.The Employees State Insurance Judge,
Employees' State Insurance Court, Coimbatore.

2.The Recovery Officer,
The Employee's State Insurance Corporation,
Sub Regional Officer,
No.1897, Trichy Road, Ramanathapuram,
Coimbatore - 641 045.

3.The Section officer
V.R. Section, High Court, Madras.

+3CCs to Mr. N.Ishtiaq Ahmed Advocate, SR.NOs 40482, 40483 & 40484.

+2CCs to Mr. SP.Srinivasan Advocate, SR.NOs 40334 & 40335.

C.M.A.Nos.1261, 1263 and
1851 of 2020

BR (CO)
NRA(17/03/2021)

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