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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.08.2021

CORAM :

THE HON'BLE MR.JUSTICE T.RAJA
AND
THE HON'BLE MR.JUSTICE V.SIVAGNANAM

W.A.NO.1753 OF 2012

1. The Additional Commissioner,
ESI Corporation, 143, Sterling Road,
Nungambakkam, Chennai - 600 034.
2. The Recovery Officer,
ESI Corporation, 143, Sterling Road,
Nungambakkam, Chennai - 600 034.

... Appellants

vs

1. Indo-Korea Sportswear(EOU),
26-27, Morrison I Street,
Alandur, Chennai - 600 016
Rep by its Partner Dr.S.K.Gupta
2. The Manager,
State Bank of India,
Nungambakkam, Chennai - 600 034.

... Respondents

Writ Appeal filed under Clause 15 of Letters of Patent against the order of the learned Single Judge passed in W.P.No.23108 of 2010 dated 09.04.2011.

Prayer in W.P.No.23108 of 2010: Writ Petition is preferred under Article 226 of the Constitution of India praying for the issue of a Writ of Mandamus, to direct the first respondent to permit the petitioner to draw the amount lying in the ESI Fund Account No.1 of the Respondent Corporation in State Bank of India, Nungambakkam High Road Branch, Chennai.



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For appellant : Mr.C.K.Chandrasekar
for Mr.G.Bharadwaj
For 1st respondent : Mr.A.Paramasivam
For 2nd respondent : Ms.S.S.Jayanthi

JUDGMENT

(Judgment of the Court was pronounced by T.RAJA, J.,)

The present Writ Appeal is directed against the Order passed by the learned Single Judge in W.P.No.23108 of 2010 dated 09.04.2011, whereby, the learned Single Judge issued the following two directions:-

" i) The petitioner shall create a bank guarantee in favour of the first respondent ESI Corporation to a sum of Rs.1,93,699/- and continue to renew the Bank guarantee till the disposal of the Special Leave to Appeal (Civil) No.7224/2008 pending before the Supreme Court between the ESI Corporation and Bethal Engineering.

ii) On such creation of Bank guarantee, the first respondent shall refund the amount of Rs.1,93,699/- within two weeks from the date of bank guarantee stipulating that it was refunded without prejudice to the outcome of the case pending before the Supreme Court.

Aggrieved by the same, the Additional Commissioner, ESI Corporation has preferred the present writ appeal.

2. Mr.C.K.Chandrasekar, learned counsel for the appellants, assailing the impugned order on various grounds, has argued that when the ESI Corporation had passed the order originally under Section 45-A of the Employees' State Insurance Act, 1948 (hereinafter referred to as "Act") demanding contribution of Rs.3,00,037/- from the first respondent on 16.12.2004, the first respondent filed a writ petition in W.P.No.4212 of 2005, without even taking the matter before Employees' State Insurance Court under Section 75 of the Act which says that if any question or dispute arises as to the person who is or was the principal employer in respect of any employee, such question or dispute, subject to the provisions of sub-section (2-A) shall be decided



by the Employees' Insurance Court in accordance with the provisions of the Act.

3. However, considering the violation of principles of natural justice, the said writ petition was taken up and disposed of on 31.03.2005 by setting aside the order dated 16.12.2004 passed under Section 45-A of the Act and the matter was remanded to the Employees State Insurance Authority for fresh consideration with a condition that the first respondent/writ petitioner pays a sum of Rs.1,15,000/- towards contribution.

4. Accordingly, the first respondent/writ petitioner paid a sum of Rs.1,15,000/- by cheque dated 31.03.2005. On compliance of the direction given by this Court, fresh opportunity of hearing was given and a reasoned order was passed again under Section 45-A of the Act on 22.07.2005 directing the first respondent to pay a sum of Rs.1,93,699/- instead of Rs.3,00,037, which was originally demanded by order dated 16.12.2004.

5. Learned counsel further pleaded that in compliance of the order dated 22.07.2005, passed under Section 45-A of the Act, the first respondent paid the balance amount of Rs.78,699/- on 03.08.2005. As a result, the order passed under Section-45A of the Act, pursuant to the direction given by this Court in W.P.No.4212/2005 dated 11.03.2005, has become final.

6. Thereafter, sleeping over the same for about five long years, the first respondent again filed a writ petition in W.P.No.23108 of 2018 on 29.09.2010, seeking for issuance of a writ of mandamus directing the appellants to permit him to withdraw the amount lying in the ESI Fund Account No.1 of the ESI Corporation in State Bank of India, Nungambakkam High Road Branch, Chennai.

7. Secondly, Mr.C.K.Chandrasekar, learned counsel pleaded that whether the first respondent/writ petitioner can be construed as an outside establishment and not immediate employer as per Section 2(13) of the Act is to be decided by adducing oral and documentary evidence before the ESI Court. Section 75 (1)(d) of the Act clearly says that if any question or dispute arises as to the person who is or was the principal employer in respect of any employee, such question or dispute shall be decided by the Employees Insurance Court.

8. Now, when the writ petitions in W.P.Nos.4325 and 4334 of 2007 (M/s Tamil Nadu Petro Products Limited vs Employees' State Insurance Corporation) have been filed, overlooking the statutory remedy available under Section 75 of the Act, the very



same learned Single Judge by order dated 22.12.2010 has held that "if the provisions of Section 45-A are read with Section 45-B of the Act, then the determination made by the Corporation is concerned and it may not be final so far as the employer is concerned, if he chooses to challenge it by filing an application under Section 75 of the Act. If the employer fails to challenge the said determination under Section 75 of the Act before the Court, then the determination under Section 45-A becomes final against the authorities."

9. Therefore, the learned Single Judge, who has passed the impugned order dated 09.04.2011, contrary to his own order dated 22.12.2010, has committed an error and has passed two diametric opposite orders that will lead to multiplicity of proceedings which have to be kicked out.

10. Learned Counsel further argued that the learned Single Judge by order dated 11.03.2005 in W.P.No.4212 of 2005, remanded the matter for fresh consideration and if the writ petitioner is aggrieved, he has to go only before the ESI Court under Section 75 of the Act.

11. Finally, the issue raised by the writ petitioner is that he is not an immediate employer because of the outside establishment as contemplated under Section 2(13) of the Act. When the Apex Court in the case of ESI Corporation represented by its Regional Director vs Bethal Engineering Company, has left the case open, the writ petitioner/first respondent has wrongly approached this Court under Article 226 of the Constitution of India seeking a direction to permit him to withdraw the amount lying in the ESI Fund.

12. Learned counsel submitted that neither the Full Bench in the Case of ESI Corporation represented by its Regional Director vs Bethal Engineering Company reported in 2007(4) CTC 529 (FB) has decided the issue nor the Apex Court has given any authoritative finding. Since the Apex Court has left the issue open, the disputed question of fact has to be decided by the ESI Court under Section 75 of the Act and hence the impugned order is liable to be set aside.

13. In support of his submission, the learned counsel heavily relied on the judgment of the Division Bench of this Court in the case of The Tuticorin Thermal Power Station Industrial Co-op Society Ltd vs The Deputy Regional Director, Sub Regional Office, ESI Corporation and others (W.A.No.828 of 2005) reported in (2005) Writ LR 332 and submitted that in an identical situation, a writ petition was filed challenging the demand notice issued under Section 45(B) of the Act. The writ



petition was allowed. Aggrieved by the same, writ appeal was filed. In the appeal, the Division Bench has held that when the writ petitioner has a clear alternative remedy of filing an application under Section 75 of the Employees State Insurance Act before the Employees State Insurance Court, the action of the writ petitioner by filing the writ petition cannot be approved for the simple reason because it is a settled legal principle that when an alternative remedy is available the same must be availed first.

14. The learned Counsel also relied on the judgment of the Apex Court in the case of ESIC vs C.C.Santhakumar reported in (2007) 1 SCC 584, wherein, the Apex Court has held that if the employer disputes the correctness of the order under Section 45-A, he could challenge the same under Section 75 of the Act before the ESI Court.

15. On the contrary, the learned counsel for the first respondent submits that the ESI Corporation has passed an order under Section 45-A of the Act demanding contribution of Rs.3,00,037/- from the first respondent on 16.12.2004 without giving any reasonable opportunity of being heard. The first respondent filed the writ petition in W.P.No.4212 of 2005. The learned Single Judge by order dated 11.03.2005 remanded the matter to ESI authorities for fresh consideration. The first respondent complied with the condition and again has taken up the issue and a detailed order was passed on 22.07.2005. The first respondent paid a sum of Rs.78,699/- on 03.08.2005 for the period from 1996-97 to 1997-98, in compliance of the order dated 22.07.2005.

16. The issue involved in the present case is that outside establishments are not immediate employer as per Section 2(13) of ESI Act. Learned counsel submits that they are not liable to pay any ESI contribution since they are covered under Section 2 (13) of the ESI Act. However, the issue has not been properly dealt with by ESI authorities while passing the order under Section 45-A of the Act on 16.12.2004, and also subsequently on 22.07.2005.

17. Similar issue was pending before the Full Bench and SLP is also pending. In the meanwhile, Employees' State Insurance Court vide letter dated 30.10.2007 has stated that since the Single Bench had referred the case to larger Bench vide order dated 05.01.2007 and now the larger Bench had directed the Registry to place the papers before Single Judge vide order dated 24.07.2007, the refund of payment made will be considered after the outcome of the case.



18. The appellants filed a counter affidavit in W.P.No.23108 of 2010,. In the said counter, they have taken a stand that the refund of payment to the writ petitioner will be considered after the outcome of the Special Leave to appeal (Civil) No.7224 of 2008 (ESI Corporation and Bethal Engineering).

19. When the writ petition was taken up by the learned Single Judge, taking note of the fact that the Full Bench has answered the issue in favour of the first respondent, the learned Single Judge by order dated 09.04.2011 allowed the writ petition directing the writ petitioner to create a bank guarantee in favour of the appellant Corporation to a sum of Rs.1,93,699/- and to continue to renew the bank guarantee till the disposal of the Special Leave to Appeal (Civil) No.7224/2008 pending before the Apex Court and on such creation of Bank guarantee, the ESI authorities shall refund the amount of Rs.1,93,699/-. Therefore, no error can be found with the impugned order and accordingly, prayed for dismissal of the appeal.

20. We are not impressed by the submissions made by the learned counsel for the first respondent. When an order which was passed under Section 45-A of the Act directing the writ petitioner to pay a sum of Rs.3,00,037/- was challenged by way of writ petition in W.P.No.4212 of 2005 on the ground that he was not heard before passing the order, this Court, by order dated 11.03.2005, set aside the order dated 16.12.2004 passed under Section 45-A of the Act and remanded the matter for fresh consideration with a condition that the first respondent/writ petitioner pays a sum of Rs.1,15,000/- towards contribution. Accordingly, the first respondent/writ petitioner paid a sum of Rs.1,15,000/- by cheque dated 31.03.2005. On compliance of the direction given by this Court, fresh opportunity of hearing was given and a reasoned order was passed again under Section 45-A of the Act on 22.07.2005 directing the first respondent to pay a sum of Rs.1,93,699/- instead of Rs.3,00,037, which was originally demanded by order dated 16.12.2004.

21. If the respondent/writ petitioner is still aggrieved, the remedy available to him is under Section 75 of the ESI Court which is extracted herein under:-

- " 75. Matters to be decided by Employees' Insurance Court
- (1) If any question or dispute arises as to
 - (a)
 - (b)....
 - (c)....
 - (d) the person who is or was the principal employer in respect of any employee, or



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such question or dispute (subject to the provisions of sub-section (2-A) shall be decided by the Employees' Insurance Court in accordance with the provisions of this Act.

22. At this juncture, Mr.A.Paramasivam, learned counsel for the first respondent also has drawn our attention to Section 45-AA of the Act, that came into force w.e.f. 01.06.2010, to say that statutory appeal provision is available. The above provision states 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" .

23. Therefore, in the light of the above provision, the question of approaching ESI Court would arise only after exhausting the available remedy provided under Section 45-AA of the Act.

24. Section 75 (1)(a)(d) clearly says that " if any question or dispute arises as to the person who is or was the principal employer in respect of any employee, such question or dispute shall be decided by the ESI Court in accordance with the provisions of the Act.

25. As rightly canvassed by the learned counsel for the appellant, it is a vexatious and complex issue, therefore, we are of the considered view that the matter needs to be decided by the Appellate Authority but not under Article 226 of the Constitution of India.

26. We have reached this conclusion for the reason that the learned Single Judge by order dated 22.12.2010 in WP Nos.4325 and 4334 of 2007 has held as follows:

" 30..... Therefore, if the provisions of Section 45-A are read with Section 45-B of the Act, then, the determination made by the Corporation is concerned It may not be final so far as the employer is concerned, if he chooses to challenge it by filing an application under Section 75 of the Act. If the employer fails to challenge the said determination under Section 75 of the Act before the Court, then the determination under Section 45-A becomes final against the employer as well. As such, there is no hurdle for recovery of the amount determined



under section 45-B of the Act, by invoking the mode of recovery, as contemplated in Sections 45-C to 45-I.

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27. The above observation shows that the learned single Judge overlooked Section 45-AA which is statutory appellate authority.

28. The learned counsel for the first respondent has also justified his approaching this Court by way of writ petition on the ground that since the appellants have also admitted the request of the first respondent for refund of the amount after the result of the SLP, the said writ petition is filed only after the result of SLP. But, we are unable to find any merit in his submissions. The reason is that whether the outside establishments are not immediate employers under Section 2(13) of the Act has not reached any quietus.

29. In the earlier order dated 26.04.2005 in W.A.No.828 of 2005 (The Tuticorin Thermal Power Station vs The Deputy Regional Director and three others), the Division Bench has held as follows:

" 4. If the appellant files an application under Section 75 of the Act within one month from today, the same will be entertained by the ESI Court without raising any objection as to limitation and shall be decided expeditiously thereafter in accordance with law after hearing the parties concerned without being influenced by the judgment of the learned Single Judge. Consequently, WAMP No.1570 of 2005 is also dismissed."

30. Accordingly, the matter is remitted back to the appellate authority under Section 45-AA of the Act.

31. Following the observations made by the Division Bench extracted above in paragraph No.4, one month time is given to the first respondent/writ petitioner to file an appeal under Section 45-AA of the Act along with necessary documents. On receipt of the same, as this matter is pending from 2005, the appellate authority is directed to take up the issue, after giving opportunity to both sides, and decide the issue on merits and in accordance with law within a period of one month from the date of receipt of a copy of this order.



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32. With the above direction, the writ appeal is disposed of. No costs.

Sd/-
Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

sr

To

1. The Manager,
State Bank of India,
Nungambakkam, Chennai - 600 034.
2. The Additional Commissioner,
ESI Corporation, 143, Sterling Road,
Nungambakkam, Chennai - 600 034.
3. The Recovery Officer,
ESI Corporation, 143, Sterling Road,
Nungambakkam, Chennai - 600 034.

+1cc to Mr.A.Paramasivam, Advocate, S.R.No.39880

+1cc to Mr.G.Bharadwaj, Advocate, S.R.No.39865

W.A.No.1753 of 2012

AD(CO)
RLP(12/01/2022)