

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.09.2021

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

C.M.A.No.1573 of 2018

The Management of
Madras Gymkhana Club,
Island Grounds, Anna Salai,
Chennai – 600 002,
Rep. By its Secretary ..Appellant

Vs

Employees State Insurance Corporation
Tamil Nadu Regional Office,
143, Sterling Road,
Chennai – 600 034.
Rep. By Regional Director. ...Respondent

Appeal filed under Section 82(3) of the Employees State Insurance Act, 1948 against the order in the Employees Insurance Court/Principal Labour Court, Chennai dated 16.11.2017 made in E.I.O.P.No.274 of 2004.

For Appellant : Mr.Shivathanu Mohan
for M/s.S.Ramasubramaniam
and Associates

For Respondent : Mr.S.P.Srinivasan

JUDGMENT

This appeal has been filed under Section 82 of the Employees State Insurance Act, 1948, challenging the impugned order passed by the Employees Insurance Court (Principal Labour Court), Chennai, dated 16.11.2017 made in E.I.O.P.No.274 of 2004, which has confirmed the order passed by the Original Authority under Section 45-A of the Employees State Insurance Act dated 11.04.2004. At the time of admission of this appeal on 26.07.2018, the following substantial questions of law were formulated by this Court:-

"1.Whether the ESI Court was justified in allowing the claim of the first respondent Corporation by taking 60% of bill amount of the contractor as basic wages, which includes the cost of material, as a basis for determination of contribution?"

2.Whether the ESI Court was justified in dismissing the petition filed by the appellant, when it is the specific plea of the appellant that the contribution claimed by the first respondent Corporation include the contribution payable by Coded Contractors also, which are to be remitted by the contractors?"

2. The only point for consideration in this appeal is whether the ESI Court was justified in accepting the contention of the respondent Corporation that 60 per cent of the bill amount of the appellant will have to be taken into consideration for the purpose of determining the ESI contribution payable by the appellant.

3. Admittedly, as seen from the order dated 11.04.2004 passed by the Original Authority under Section 45-A of the ESI Act, no finding has been given that the appellant is a labour contractor. The appellant is a registered Club and they have been remitting the ESI contributions by engaging the service of contractors to carry out the works in their Club. Before the Original Authority as well as before the ESI Court, the letter dated 24.10.2002 issued by the petitioner Club to the Deputy Director, Regional Office - Tamil Nadu, Employees State Insurance Corporation was very much available which gave the break-up details of the payments made to various contractors by the petitioner Club. The break-up details for the total expenditure of Rs.62,67,117/- was given in the said letter, which includes material and labour cost. However, in the order dated 11.04.2004 passed by the respondent under Section 45-A of the ESI Act, the respondent/Corporation has observed that the appellant Club has not given the details of the contractor

records and hence they are liable to pay the ESI contribution at 60 per cent of the total bill amount.

4. It is the contention of the learned counsel appearing for the appellant that as per the Circular issued by the respondent Corporation on 26.05.2003, the determination of contribution in respect of employees employed through immediate employers for capital construction, repair and maintenance of building of factory/establishment including repairs to machinery, repairs of furniture, packing charges, the ESI contribution payable by the employer will have to be determined only at 25 per cent when segregation of material and labour cost is not possible. He would submit that only in case of labour supply contractors where the principal employer is unable to produce full record of the contractors to determine wage component, 60 per cent gets attracted. He would submit that the appellant comes under the first category of the Circular dated 26.05.2003 and, therefore, only 25 per cent of the total bill amount will have to be taken into consideration for the purpose of determining the ESI contribution.

5. Learned counsel for the appellant drew the attention of the Court to the findings of the first respondent in its order dated

11.04.2004 passed under Section 45-A of the ESI Act as well as the impugned order passed by the ESI Court under Section 75 of the ESI Act and would submit that when there is no finding that the appellant Club is a labour supply contractor, the Original Authority as well as the ESI Court by total non-application of mind has erroneously held that the ESI contribution will have to be determined at 60 per cent of the total bill amount.

6. Learned counsel appearing for the appellant also submitted that in the bill amount, it is not possible to segregate the material and the labour cost, therefore, he would submit that only 25 per cent of the bill amount has to be taken into consideration for the purpose of determining the ESI contribution. In support of his submissions, learned counsel for the appellant drew the attention of this Court to the following authorities: (a) Single Bench judgment of this Court in the case of *Sree Sivakami Mills Ltd vs. Employees' State Insurance Corporation* reported in (2001) 1 LLJ 1512 Mad and (b) Single Bench judgment of the Bombay High Court in the case of *Regional Director, E.S.I. Corporation v. Farmacia Ananta* reported in 2013 LLR 916.

7. Learned counsel appearing for the appellant after relying upon the aforementioned authorities would submit that in those cases also the employer was unable to give details of payment made towards labour charges and cost of materials separately. In both the decisions, it was held that the determination of the ESI contribution at 25 per cent of the total bill amount was correct.

8. However, the learned counsel appearing for the respondent/Corporation drew the attention of this Court to the order of the Original Authority dated 11.04.2004 passed under Section 45-A of the ESI Act and, in particular, he drew the attention to page 5 of the said order which deals with '*Wages paid on various contractors*' and would submit that despite opportunity having been given to the appellant to give details of the claim on which contribution has been claimed, the employer failed to make use of the opportunity and did not produce the records of the contractors, which will disclose the wages component. Hence, according to him, the Original Authority was right in determining the ESI contribution payable by the appellant at 60 per cent of the bill amount in accordance with the Circular dated 26.05.2003. A circular dated 26.05.2003 issued by the Employees State Insurance Corporation reads as follows:-

"Employees State Insurance Corporation

Panchdeep Bhawan Kotla Road New Delhi

No.P.11/13/97-Ins.IV

Dated:26.05.2003

To
The Regional Director/Director/
Joint Director I/c,
Regional Office/Sub-Regional Office,
ESI Corporation

Sub: Payment of contribution on the amount paid to the contractor for which the employer is not a position to segregate the "labour charges" vis-a-vis material charges, etc.

Sir,

I am directed to invite your attention to the following instructions:-

- 1) Instruction No.9/82 vide letter No.P.11/14/41/79-Ins.IV dated 26.6.82 and Instruction No.5/85 vide letter No.P.11/14/5/85-Ins.IV dated 17.7.85.
- 2) Instruction issued vide letter No.S-11/12/2/2000-Col.I-Ins.IV dated 9.6.02.

The two instructions referred under item 1 above dealt with determination of contribution in respect of employees employed through immediate employers for capital construction, repair and maintenance of building of factory/establishment including repairs to machinery, repair of furniture, packing charges, etc., advising to take 25% of the total amount paid as labour charges and determine contribution accordingly where segregation of material and labour is not possible and RD is satisfied about the bonafide of the case and satisfied that the payment reflected is only on account of these expenses and in fact include material and labour.

The instruction dated 9.8.2002 referred under item No.1 dealt with other kind of labour supply contractors, where the principal employer fail to produce full record of the contractor to determine wage component advising that in such situation, 60% of the total payment booked may be taken as wage assuming the balance to be element of profit, other statutory dues etc. In this instruction, it was made clear that this formula will not apply for a second and subsequent occasion.

On reference received from the RDs and some of

the Employer's Association, it has been made clear that the statutory requirement under Sec.88 of the ESI Act read with Sec.41(1-A) thereof and Regulation 32 (1-A) of ESI (General)Regulation, will have to be followed wherever employees are engaged through the immediate employers (contractors) for any of the work, preliminary, connected, incidental or ancillary to the work of the factory or establishment inside the premises, or with supervision of principal employer if work is done outside the premises. These provisions are similar to the provisions in Contract Labour (Regulation and Abolition)Act which also requires record of wage distribution and its deposit to principal employer and retention etc. The method of adhoc determination, allowed as above for the situations, is only an exception as a special case when the following situations exist:-

- When the employer during proceeding under Sec.45-A expresses inability to make segregation of labour and other component, and the ESIC is also not able to make the segregation.
- The Authority exercising power under Sec.45-A is satisfied about the bonafide and also satisfied that no other payment of wage is included in the head and these are strictly payment made to the contractors including cost of material, as well as other expenses.

In cases, where determination under Sec.45-A is made using the above formula, the 45-A order should also state that this formula is followed as a special case and employer will have to comply in future with statutory provisions contained in Sec.38 read with Sec.40/41(1A) of ESI Act and Regulation 32(1A) of ESI (General)Regulations and that this facility will not be extended for a second occasion.

As mentioned in the case of instruction issued under Item No.2 above, this facility of taking 25% as labour charges in case of capital construction, repair and maintenance etc., or 60% as wage in case of labour supplying contractors, including security contractor, should not normally be extended to the same employer for a 2nd occasion and in all cases the 45-A order should clearly indicate this fact and the requirement of complying with the above referred statutory provisions. In addition to stating this in the 45-A order the employer should also be separately addressed on these lines with a copy to the inspector concerned.

However, the RDs etc., may use their discretion to adopt this procedure of adhoc assessment on a

second or subsequent occasion in only special circumstances where they are satisfied regarding the genuineness of the case. Whenever this procedure is adopted for the second or subsequent occasions, the reasons for the same should be recorded on the file and got approved by the R.D.

The instruction No.9/82 dated 26.6.82, and 5/85 dated 17.7.85 stand modified to the extent mentioned above.

This issue with the approval of I.C.

Hindi version will follow.

Please acknowledge receipt.

*Yours faithfully
Sd/-
Joint Director(Rev.) "*

9. Learned counsel appearing for the respondent/Corporation further would submit that the Original Authority as well as the ESI Court, only based on the evidence available on record and in accordance with the Circular, has determined the ESI contribution based on 60 per cent of the total bill amount and has rightly levied a sum of Rs.2,03,381/- as the ESI contribution payable by the appellant.

Discussion:

10. Admittedly, as seen from the evidence available on record, and as seen from the written statement filed by the respondent/Corporation before the Original Authority, the appellant has not been treated as a pure labour contractor by the respondent/Corporation. Admittedly, the appellant is a registered

Club carrying its activities for the past several decades. They have been regularly making ESI contributions. They have been regularly engaging the services of the contractors for the purpose of carrying the works inside their club premises. A consistent stand has been taken by the appellant Club both before the Original Authority as well as the ESI Court that the respondent/Corporation ought not to have taken into consideration 60 per cent of the bill amount for the purpose of determining the ESI contribution payable by the appellant as according to them, the labour charges in the bill amount includes the material cost also and segregation of material and labour cost is also not possible. In the letter dated 24.10.2002 to the respondent/Corporation, the appellant has given the break-up details of the labour and the material cost for the total bill amount of Rs.62,67,117/- which is the subject-matter of this appeal. They have also given the details of the names of the contractors. Both the Original Authority as well as the ESI Court has not taken into consideration the said letter where particulars were given. However, by total non-application of mind to the respondent's own Circular dated 26.05.2003, the respondent/Corporation has determined the ESI contribution payable by the appellant at 60 per cent of the total bill amount despite the fact that the appellant is not a labour contractor but is

only a Club which needs to engage the services of various contractors for doing construction works, repair works, etc., inside the Club premises for the benefit of their Members.

11. Hence, this Court is of the considered view that the ESI contribution payable by the appellant will have to be determined by the respondent/Corporation only at 25 per cent of the bill amount and not at 60 per cent as erroneously held under the impugned orders. The judgment relied upon by the learned counsel for the appellant, referred to supra, also supports the case of the appellant.

12. In the case of *Sree Sivakami Mills Ltd vs. Employees' State Insurance Corporation* reported in (2001) 1 LLJ 1512 Mad, the relevant paragraph of the said order reads as follows:-

"Item (5) relates to the wages paid to the building workers. It is found that the omitted wages comes to Rs.1,12,020.25 and so the appellant is liable to pay contribution in respect of item (5). Learned counsel for the appellant has submitted that this amount of 1,12,020.25 is not the wages exclusively paid to the workers and this amount also includes the cost of machinery, and other materials and so the entire amount of Rs.1,12,020.25 does not come under the wages and the appellant is not liable to pay contribution for the entire amount. He also fairly conceded that no material is available to substantiate his contention with

regard to the cost of machinery and other materials and he further stated that in case of non-submission of many particulars with regard to the purchase of materials and machineries, 75 per cent deduction can be given in respect of those items and 25 per cent can be taken as wages in the light of the guidelines issued by the department. Learned counsel, for the respondent also conceded that there is such guidelines issued by the department stating that if any breakup figures are not given for the materials and wages, 25 per cent of the total amount can be treated as wages. In the light of submissions made by both parties, I hold that out of the amount of Rs.1,12,020.25 only 25 per cent can be taken as wages and the appellant is liable to pay contribution for this 25 per cent of Rs.1,12,020.25 in respect of item (5)."

13. In the case of *Regional Director, E.S.I. Corporation v. Farmacia Ananta* reported in 2013 LLR 916, the relevant paragraph of the judgment rendered by the Bombay High Court is extracted hereunder:-

"7. As regards the demand made by the appellant of contribution on repairs and maintenance charges, I find no infirmity in the view taken by the ESI Court. It refers to the memorandum No.P-11/14/41/79-Ins. IV, Instruction No.17 of 1981 dated 16th November, 1981 from the Employees' State Insurance Corporation directing that in cases where the employer is unable to give details for payment made towards labour charges, cost of material relating to repairs or maintenance the Regional Director could fairly determine the contribution of 25% of the total amount of bills. The ESI Court found that the Regional Director had, contrary to the memorandum, assumed

the total amount of bills for recovery of contribution. This part of the order being non-speaking order the ESI Court did not support it and set it aside with liberty to the appellant to pass a fresh order of determination of claim under Section 45A of the ESI Act by taking into account the circular dated 16th November, 1981. For the reasons stated above, the appeal is partly allowed. The order dated 23rd April, 2007 passed by the ESI Court is set aside to the extent of the contribution towards coolies/freight charges and the order of the Regional Director, ESI Corporation thereon is confirmed."

14. In both the aforesaid decisions, the facts of the case are identical to the case on hand and in both the cases, ESI contribution was determined at 25 per cent of the total bill amount.

15. For the foregoing reasons, this Court is of the considered view that the impugned orders passed by the ESI Court as well as the Original Authority have been passed by total non-application of mind to the pleadings and evidence available on record as well as the Circular dated 26.05.2003 passed by the respondent/Corporation and hence, the substantial questions of law formulated by this Court at the time of admission of this appeal are to be answered in favour of the appellant and the appeal will have to be allowed.

16. Accordingly, this appeal is allowed insofar as the heading

'Wages paid to various contractors' wherein the contribution as payable by the appellant has been determined at Rs.2,03,281/- is set aside and similarly, the impugned order dated 16.11.2017 passed by the Employees Insurance Court (Principal Labour Court, Chennai) in E.I.O.P.No.274 of 2004 is also set aside. No costs. Consequently, connected C.M.P.No.12468 of 2018 is closed.

17. Since the order dated 11.04.2004 passed by the respondent/Corporation under Section 45-A of the Employees State Insurance Act has been set aside insofar as the aforementioned item, the appellant is permitted to seek re-fund of the deposited amount by filing appropriate application before the respondent/Corporation.

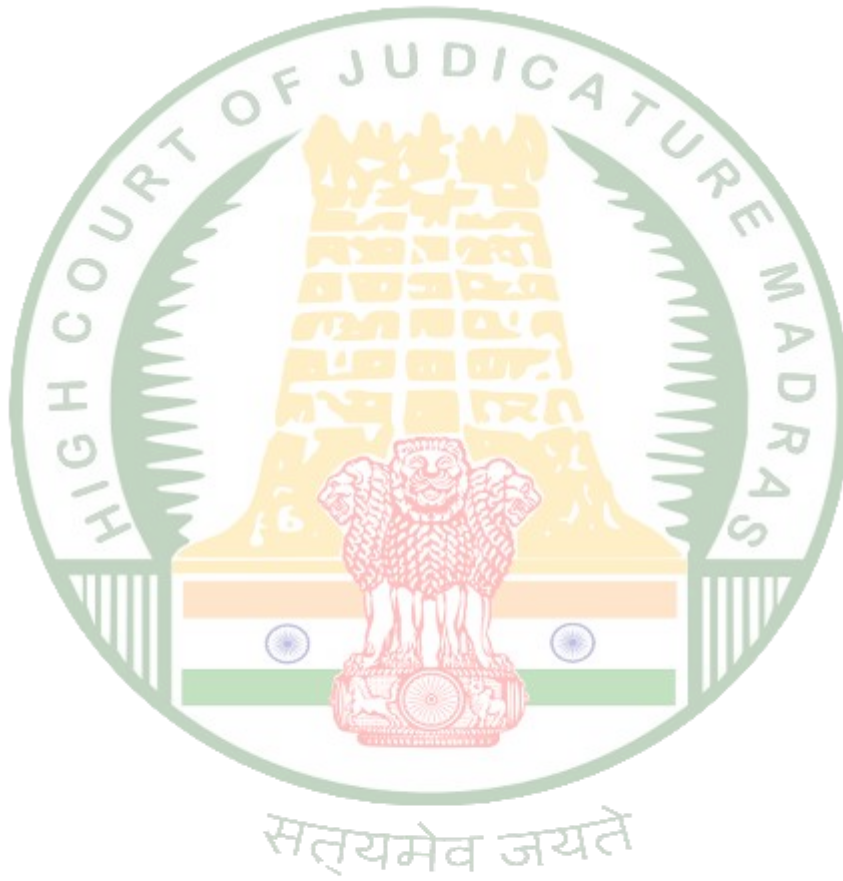
02.09.2021

Index: Yes/No
ssm

To

1.The Regional Director,
Employees State Insurance Corporation
Tamil Nadu Regional Office,
143, Sterling Road,
Chennai – 600 034.

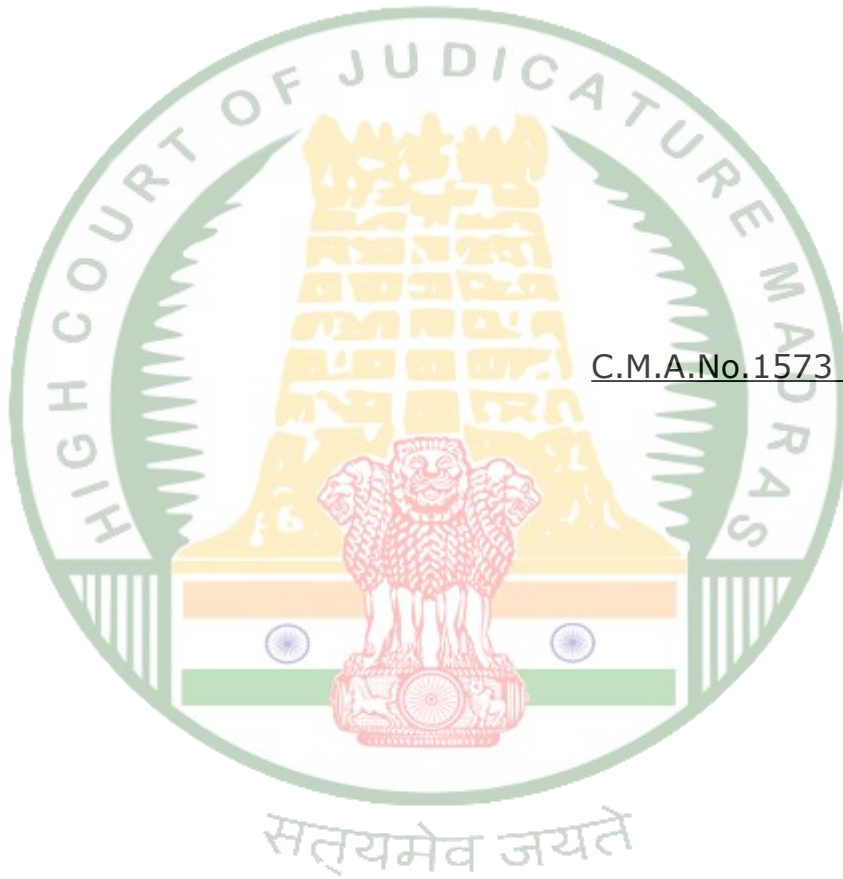
2.The Employees Insurance Court
/Principal Labour Court, Chennai.



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ABDUL QUDDHOSE, J.

(ssm)



C.M.A.No.1573 of 2018

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