

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.02.2021

C O R A M

THE HON'BLE MR. JUSTICE **KRISHNAN RAMASAMY**

C.R.P.(NPD).No.741 of 2018
and C.M.P.No.3781 of 2018

1.Food Corporation of India Workers Union,
Tamil Nadu Region,
Rep. by its Vice President, I.Selvaraj

2.Food Corporation of India Workers Union,
Rep. by its President,
Vanarapet, Puducherry.

3.Food Corporation of India Workers Union,
Rep. by its President,
Kovilpathu, Karaikal,
Puducherry.

4.Food Corporation of India Workers Union,
Rep by its President,
Thiruvandarkoil, Puducherry.

...Petitioners

Vs

1.Food Corporation of India,
Public Sector Undertaking,
Food Storage Depot, Puducherry
Rep by its Area Manager K.Sathya Kumar,

2. Employees State Insurance Corporation,
Puducherry.

... Respondents

Prayer Civil Revision Petition filed under Article 227 of Constitution of India, prayed, to set aside the order dated 27.01.2016 of the Employee's Insurance Court, Puducherry in I.A.No.4 of 2015 in unnumbered ESI OP of 2015 to restore the same.

For Petitioners : Mr.R.Srinivas

For R1 : Mr.S.Vijayakumar

For R2 : Mr.S.P.Srinivasan

ORDER

This Civil Revision Petition has been filed against the order dated 27.01.2016 made in I.A.No.4 of 2015 in unnumbered ESIOP of 2015 on the file of the Employee's Insurance Court, Puducherry.

2.The Court below has passed the following order in the said IA:

“This is a petition filed under Section 75(2-B) of the ESI Act, 1948 read with Section 151 of C.P.C praying an order for waiving or substantially reducing the amount to be deposited in terms of the provisions of the Section 75(2-B) of the ESI Act, for filing the original petition.

2.Today when the petition came by for hearing, in view if the endorsement made by petitioner's counsel, this IA is dismissed as not pressed. No costs”

3.The learned counsel for the petitioners submitted the 1st respondent appeared before the Court below and made an endorsement for withdrawing the said IA. The Court below also permitted to withdraw the same without hearing the Workers Union. He further submitted that since ESIOP was filed seeking prayer to hold that the labourers employed by the 1st respondent, in respect of whom the impugned order has been issued, are not coverable under the ESI Act 1948 and to set aside the order bearing No.TN/INS/VI/51-51-102876-001-0099/C19 dated 04.09.2014 for a sum of Rs.8,26,821 for a period from 01.01.2011 to 31.03.2014, the petitioners herein ought to have heard before dismissing the said IA.

4.The learned counsel further submitted that the employees of the Workers Union are NWNP (No Work No Pay) employees and these workers are not a casual or a contract labour to qualify and avail benefits under the ESI Act. These workers are provided Provident Fund, Gratuity, Bonus and Pensions

benefits and they are entitled for the weekly off etc. Therefore, they are not at all the casual labour and ESI Act will not be applicable for them. Hence, the withdrawal of the said I.A.No.4 of 2015 is a direct bearing on the interest of the NWNP workers since the challenge was made against the impugned order dated 04.09.2014 issued by the ESI Corporation, whereby directing the Food Corporation of India to deposit a sum of Rs.8,26,821 for a period from 01.01.2011 to 31.03.2014. When the stand of the revision petitioners herein is that the ESI Act itself does not applicable for these employees, then the question of deposit does not arise at all and therefore, the Workers Union ought to have been heard and without hearing them the Court below permitted the Food Corporation of India to withdraw the said IA, which is against the principles of natural justice, and law laid down by the Hon'ble Apex Court.

5.The learned counsel further submitted that the Madurai Bench of this Court in C.M.A.(MD).No.534 of 2017 dated 06.11.2017 held that NWNP workers are not casual or contract workers, they are regular workers with benefits such as Provident Fund, Gratuity, Bonus, Production linked incentives, Leave etc., The Hon'ble Supreme Court vide order dated 19.11.2019 in Civil

Appeal No.8841 to 8842 of 2019 upheld the judgment of this Court made in C.M.A.(MD).No.534 of 2017 dated 06.11.2017.

6.Further, he referred the Paragraph No.8 of the judgment of the Hon'ble Supreme Court in the case of ***ESI Corporation vs Bhakra Beas Management Board*** reported in ***2009 10 SCC 671***, which is extracted hereunder:

“8.In our opinion, wherever any petition is filed by an employer under Section 75 of the Act, the employer has not only to implead ESIC but has also to implead at least some of the workers concerned (in a representative capacity if there are a large number of workers) or the trade union representing the said workers. If that is not done, and a decision is given in favour of the employer, the same will be in violation of the rules of natural justice. After all, the real parties concerned in labour matters are the employer and the workers, ESI Corporation will not be in any way affected if the demand notice sent by it under Sections 45-A/45-B is quashed.”

By referring above, he submitted that it is just and necessary to implead the workers or their union and they have to be heard. In the present case, when

the interest of NWNP workers are going to be affected by the withdrawal of the I.A.No.4 of 2015 and ESI OP, the Court below ought to have heard the workers union, as such they have not been heard by the Court below therefore, he submitted that order in the said IA is liable to be set aside and prayed to allow the Civil Revision Petition.

7.Mr.S.Vijayakumar, the learned counsel for the first respondent fairly submitted that NWNP workers are regular employees, they are not at all casual or contract workers. The learned counsel referred paragraph No.17 of the judgment dated 16.11.2017 made in C.M.A.(MD).No.534 of 2017, which is extracted hereunder:

“17.Shri.Vijayakumar, learned counsel for the Food Corporation of India fairly admitted that DPS employees cannot be termed as casual labour or contract workers. A casual worker in the very nature of things is employed for the day. There is no permanency attached to his status. They are conferred with a number of benefits such as Gratuity, Bonus, Production linked incentives, leaves etc., More than anything else, there is even a scheme for compassionate appointments. In other words, if a DPS employee dies in harness, his dependent is given

appointment on compassionate grounds. Therefore, by no stretch of imagination can he be called as casual or contract labour.”

By referring the above judgment, he confirms his stand that the NWNP workers are permanent workers. Further he reiterated that ESI notification dated 20.07.2009, and submitted that as per the said notification only casual or contract laboures are alone covered under ESI Act. He further submitted that the Food Corporation of India have been providing better facilities than the facilities provided under ESI, to NWNP workers. At any cost, the interest of its employees will not be affected in any way as they have been protected with better facilities. Therefore, he submitted that NWNP workers cannot be covered under ESI.

8.The learned counsel for the second respondent strongly opposed the submissions made by the learned counsel for the petitioner and the 1st respondent and submitted that these workers are covered under ESI and by referring the bipartite agreement dated 02.09.2011, he submitted that the bipartite agreement was made to cover the NWNP Workers under ESI Act. He further referred the notes issued by Food Corporation on various labours system

in FCI depots and submitted that DPS workers had been given benefits of CPF in addition to the benefits of Ex-Gratia / Gratuity / Workmen's Compensation, Paid Weekly off, National Holidays, Sick Leave, Medical First Aid and Medical Facility (Indoor/Outdoor) under ESI Act. Therefore, the NWNP workers of Food Corporation of India are covered under ESI. Further the said I.A., was filed by the Food Corporation of India and they are entitled to withdraw the same. He further submitted that the Circular No.14 of 2011 is not at all referred in the judgment passed by Madurai Bench of this Court in C.M.A.(MD).No.534 of 2017 as well as in the judgment of the Hon'ble Apex Court in Civil Appeal No.8841 to 8842 of 2019. Hence, the Civil Revision Petition is liable to be dismissed.

9.Heard the learned counsel for the petitioners as well as the respondents and perused the materials

10.This Civil Revision Petition filed challenging the order passed in I.A.No.4 of 2015. A perusal of the notification dated 20.07.2009 of the ESI would show that ESI Act will apply to all the casual or contract labours of the

Food corporation of India. In the present case, the issue has to be decided is as to whether NWNP employees comes under the category of either under casual or contract labour. In this regard, this Court already has taken a decision in a similar case filed by FCI Workers Union, wherein this Court held that NWNP workers are the regular workers and they are not casual or contract workers.

11.As contended by the learned counsel for the petitioners the Madurai Bench of this Court in C.M.A.(MD).No.534 of 2017 dated 06.11.2017 held that NWNP workers are not casual or contract workers, they are regular workers with benefits such as Provident Fund, Gratuity, Bonus, Production linked incentives, Leave etc., The Hon'ble Supreme Court vide order dated 19.11.2019 in Civil Appeal No.8841 to 8842 of 2019 upheld the judgment of this Court made in C.M.A.(MD).No.534 of 2017 dated 06.11.2017.

12.The learned counsel for the first respondent, the Food Corporation of India also stated that NWNP workers are the regular workers and they are to be provided benefits such as Provident Fund, Gratuity, Weekly Holidays and all other Pensionary benefits. That apart, they are also provided compassionate

appointment to the dependent family members of the workers in case of any harness and therefore he submitted that they are only regular workers.

13.The Madurai Bench of this Court as well as the Hon'ble Apex Court has taken a view that NWNP workers are the regular workers but not the causal or contract labours, when such a view has already been taken in a similar situation against the NWNP workers of the Food Corporation of India, Tuticorin, this Court cannot take a different view on that score.

14.The learned counsel for the Second respondent submitted that the Circular No.14 of 2011 dated 02.09.2011 issued by the Food Corporation of India was not brought in to the knowledge of the Court when C.M.A.(MD).No.534 of 2017 was heard and also before the Hon'ble Apex Court when the above C.M.A was Challenged. Therefore, this Court and the Hon'ble Apex Court had no opportunity to deal with the agreement entered by the Food Corporation of India with its Workers Unions. According to the Second respondent, if this Circular was considered by the Madurai Bench of this Court as well as by the Hon'ble Apex Court, they would not have passed a

different order holding that ESI Act will apply to NWNP workers. Therefore, since this Circular had not been brought into the knowledge of the Hon'ble Apex Court as well as before the Madurai Bench of this Court the order passed in the above CMA will not be applicable for the present case and he insist to pass fresh order considering the Circular No.14 of 2011.

15.This Court has gone through the circular and upon perusal, it appears that this circular was issued, wherein it has been stated that the bipartite settlement was signed with FCI Workers Union on 11.05.2011 and the same was also registered under Industrial disputes Central Rules, wherein, it has been agreed that DPS/NWNP system labourers will be extended benefits of the Medical Health care Scheme as per the provisions of ESI Act 1948. This was the settlement deed between Workers Union and FCI. It is a bipartite agreement, where ESI is not a party to this agreement. At this juncture, it would be appropriate to extract the notification dated 20.07.2009 issued by the Ministry of Labour and Employment. The relevant portion of the notification is reproduced hereunder:

<i>Description of the Establishments</i>	<i>Area in which the Establishments are situated</i>	<i>Category of employees to whom the Act applies</i>
The following establishments belonging to or under the control of the Central Government wherein twenty are employed or were employed for wages on any day of the preceding twelve months namely, i) ii) viii) Establishments engaged in Insurance Business, other than Non-Banking Financial companies (NBFC), Port Trusts, Airport Authorities AND WAREHOUSING.	All areas where the provisions of the ESI Act 1948 have already been brought into force under Section 1(3) of the Act.	All casual and Contract Employees.

In the present case, NWNP employees are comes under the category of regular employees. As per above circular, the ESI Act will apply only to all casual and contract employees of the FCI. However, the bipartite agreement was entered between FCI and its Workers Union without including ESI as party to the bipartite agreement. The said bipartite agreement was made to provide coverage under ESI and as per the above notification, the ESI Act will apply

only to the casual and contract employees. When such being a position, the application of ESI Act to NWNP workers who are being regular employees do not arises. Therefore, the bipartite agreement was entered without taking note of this fact.

16.It was also brought into the knowledge of this Court that Paragraph No.6 of the Circular No.14 of 2011, dated 02.09.2011, whereby the Medical Health Care Scheme vide Circular No.10 of 2005 dated 23.08.2005 has been withdrawn immediately at the pilot location after the coverage of DPS workers in Medical Health Scheme of ESIC. A perusal of the said paragraph would show that the scheme has been withdrawn after the coverage of DPS workers in Medical Health Scheme.

17.As this NWNP employees are regular employees, the FCI and its Workers Union ought not to have entered this bipartite agreement when ESI Act does not permit any coverage for the regular employees and in such circumstances, any such circular issued by withdrawing the benefits by virtue of the bipartite agreement, will not be legally sustainable as far as the applicability

of ESI Act to NWNP employees are concern. If any such withdrawal of the benefit in terms of clause 6 of the Circular No.14 of 2011, it is for the Food Corporation of India to restore it and make it available all benefits for the NWNP workers with immediate effect.

18.A perusal of the notification dated 20.07.2009, would show that the benefits available under ESI will be applicable only to the casual labour or contract labour. In the present case, it is crystal clear that the NWNP workers neither a casual nor a contract labours. They have been provided all the benefits which would be provided to the regular employees including Compassionate Appointment, Pensionary Benefit, Gratuity, Leave Salary, Weekly off. When such facilities have been provided, there is no justification to treat the NWNP workers either as casual or the contract labour and to compel them to bring them under the ESI Act.

19.The main issue to be decided in this matter is as to whether the Food Corporation of India can withdraw I.A.No.14 of 2015 without hearing the Workers Union? In a similar circumstances, the Hon'ble Apex Court in **Bhakra**

Beas Management Board case, referred supra, held that wherever any petition is filed by an employer under Section 75 of the Act, the employer has not only to implead ESIC but has also to implead at least some of the workers concerned (in a representative capacity if there are a large number of workers) or the trade union representing the said workers. If that is not done, and a decision is given in favour of the employer, the same will be in violation of the rules of natural justice.

20. In the present case, obviously while permitting the Food Corporation of India to withdraw I.A.No.4 of 2015, the Workers Union have not been heard as per the law laid down by the Hon'ble Apex Court. The Court below should have heard the grievances of the Workers Union while permitting to withdraw the said I.A. A mere perusal of the order would show that no such opportunity was provided to the Workers Union to explain their case before permitting to withdraw the said I.A. The challenge under ESIOP was only against the demand made by the ESI Corporation to pay the contribution for the NWNP workers. Therefore, as stated earlier, in the present case, the withdrawal of the said I.A will affect the interest of the workers. As held by the Madurai Bench of

this Court and Hon'ble Apex Court the NWNP workers are the regular workers and they are not either casual labour or contract labour so as to cover under the provisions of ESI. Thus, obviously it is for the Workers Union to protect the interest and its workers, at the time of hearing the application filed by the Food Corporation of India.

21.Hence, this Court is of the opinion that the order passed by the Court below in I.A.No.4 of 2015 deserves to be set aside. Accordingly, the order passed by the Court below in I.A.No.4 of 2015 in unnumbered ESI OP of 2015 is set aside and I.A.No.4 of 2015 is restored. The Court below is directed to hear the Workers Union before passing any order in I.A.No.4 of 2015 pending before the Employee's Insurance Court, Puducherry.

22.In the result, this Civil Revision Petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

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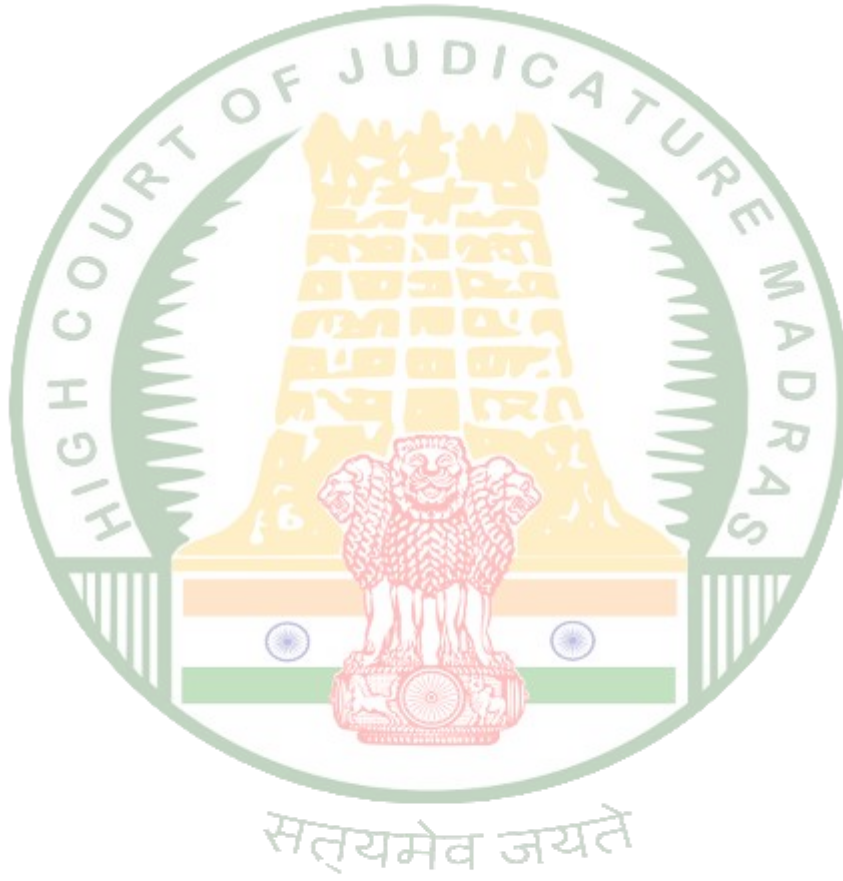
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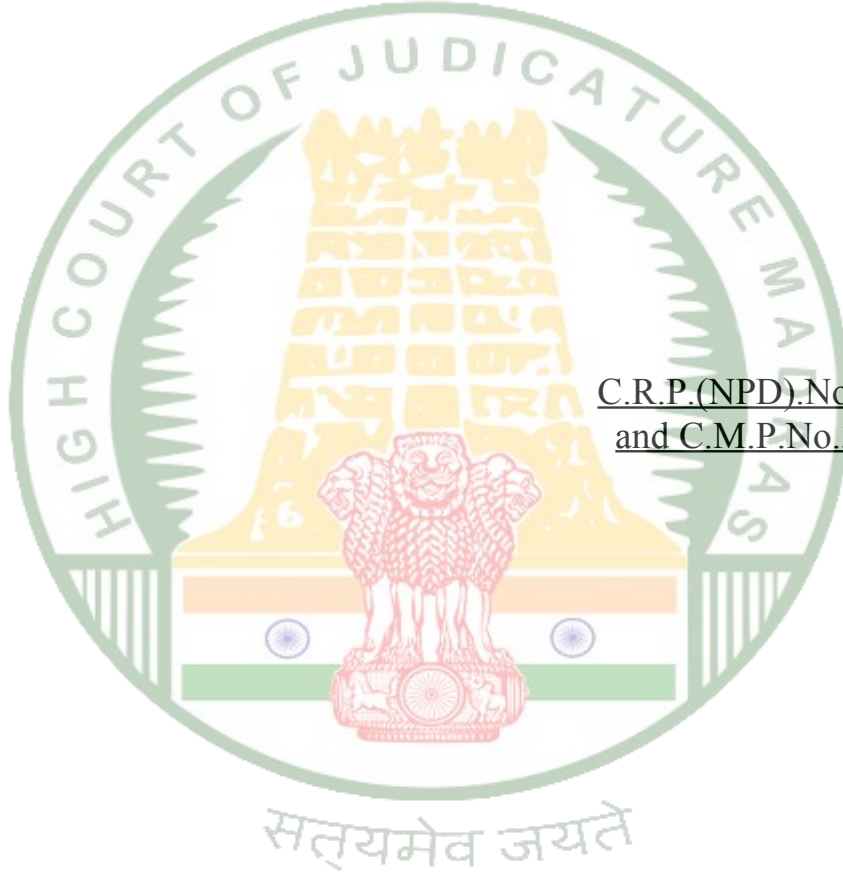
The Employee's Insurance Court, Puducherry.



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