



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 26.07.2021

Delivered On : 20.10.2021

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

C.M.A. (MD)No.158 of 2013

WEB COPY

The Employees State Insurance Corporation (SRO),
Rep. By its Deputy Director,
having its office at,
No.1-B, Old Post Office Street,
Tallakulam, Madurai - 625 002,
Now at, 4th Main Road,
K.K.Nagar, Madurai-625 020. ..Appellant/Respondent

Vs.

A.Azeema,
W/o.A.Asraf,
Business Proprietrix of Kaaba,
Carrying on No.142, A & B, 1st Floor,
South Masi Street,
Madurai Town. .. Respondent/Petitioner

Prayer: This Civil Miscellaneous Appeal is filed under Section 82(2) of the ESI Act, to set aside the judgment and decree passed in E.S.I.O.P.No.11 of 1998 dated 31.01.2012, on the file of the Employees State Insurance Cum Labour Court, Madurai.

For Appellant	: Mr.C.Karthick
For Respondent	: Mr.M.Mahaboob Athif
	For M/s.Ajmal Associates

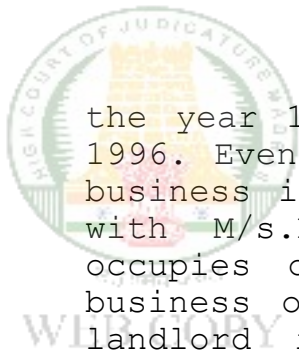
JUDGMENT

This Civil Miscellaneous Appeal has been filed against the award passed in E.S.I.O.P.No.11 of 1998 dated 31.01.2012, on the file of the Employees State Insurance Cum Labour Court, Madurai.

2.The appellant herein is the respondent and the respondent herein is the claimants in the claim petition. The respondent has filed a claim petition in E.S.I.O.P.No.11 of 1998, to set aside the order of the Deputy Director under Section 45(a) of the Act dated 11.11.1997. Against the order, the appellant has preferred this appeal.

3.A brief substance of the claim petition in E.S.I.O.P.No.11 of 1998 is as follows:

The claimant is the propreitrix of M/s.Kaaba, which is dealing with sarees in whole sale and retail situated at 142-A and B, first floor, South Masi Street, Madurai. The claimant started business in



the year 1993. The claimant employed 12 employees during the year 1996. Even now the strength of the employees is 12. The claimant's business is an independent separate business. It has no connection with M/s.Kaaba Agencies and M/s.Kaaba Textiles. The claimant occupies only a portion of first floor. The claimant is doing business only in sarees. The building belongs to two owners. The landlord is collecting rents separately. The petitioner never employed more than 12 employees. The claimant unit is not covered under the ESI Act. The claimant is having separate bank account, ledger and daybook and separate income tax assessment and has no connection with other concern.

M/s.Kaaba is a proprietrix concern. The proprietor is Mrs.Azeema w/o, A.Asraf. It is located in the first floor. M/s.Kaaba Textiles is carrying on business in Door No.142-B. The clubbing of employees in all the units is not proper. The order of the respondent dated 11.11.1997 is not legal. The order was passed without following the procedures. The building is a business complex. The claimant was not given an opportunity. The respondents did not give an opportunity to represent the petitioner's case. The order is liable to be set aside.

4.Brief substance of the counter filed by the respondent is as follows:

The claimant has no locus standi to file this petition. The Inspector of the respondent conducted inspection and found out that business is carried out in the building at Door No.142 A and B (ground floor and first floor) South Masi Street, Madurai. In all the above concern, they are employing more than 20 persons. The claimant's concern is covered under the ESI Act. There is functional integrity between the two concerns. The respondent issued C11 notice dated 19.04.1996, but they failed to comply the provisions of the ESI Act. A reasonable opportunity was given to the claimant after the determination of the contribution under Section 45A of the Act. The claimant failed to disclose the actual wages paid by them and failed to produce any documents. The assessment of contribution under Section 45A is correct.

5.On the side of the petitioner therein, no witness was examined and one document was marked. On the side of the respondent therein, no witness was examined and no document was marked. After trial, the Labour Court has allowed the petition and set aside the order by remanding the matter back to the Labour Commissioner for fresh disposal in accordance with law and directed the respondent to issue notice to the claimants to appear and to produce relevant records and to dispose of the matter on merits, after hearing the claimant within a period of three months from the date of receipt of copy of the order. Against which, the appellant has preferred this Civil Miscellaneous Appeal.



6.The appellant herein has raised the following questions in the appeal:

"(i)Once the learned himself admitted that, the respondent has not produce the relevant records to show that the actual number of persons engaged by them at the time of personnel hearing and the enquiry Officer also given several opportunities to produce the records to establish that they are all separate entity. In the above said circumstances was the learned Judge is correct to remand the above matter to the Appellant's Corporation for the fresh disposal ?

(ii)In the instant case, factual findings show that there was unity in management, supervision and control, geographical Proximity, financial unit, general unit of purpose and functional integrality between the different units. Was the learned Judge was correct to set aside the order under Section 45 A of the ESI Act by the Appellant Corporation ?"

7.On the side of the appellant, it is stated that the Labour Court has admitted that the respondent had not filed any documents before the authorities at the time of personal hearing. The Labour Court failed to consider that the the claimant's unit and other two units are run by the same family members. The entire business is managed by Asruf. All the three units are using the same entrance, same electricity connection and consumption, packaging and delivery section, sign board, telephone, and cash counter.

8.On the side of the appellant, it is stated that at the time of inspection, in January 1996, three units engaged 28 employees for wages. In the month of February 1996, 35 employees were employed by the appellant. All the three units clubbed together come under the purview of the ESI Act. The appellant gave reasonable opportunity to the respondent. At the time of personal hearing, the respondent has raised objections regarding clubbing of the employers engaged in the three units. Without deciding the main issue, remitting the ESI O.P. again to the Corporation is illegal and arbitrary. ESI OP was filed in the year 1998 and the issue was not decided, even after 13 years.

9.On the side of the appellant, it is stated that the establishment is covered under the ESI Act. In support this contention, a judgment passed by the Hon'ble Apex Court in the case of **Sumangali v. Regional Director, ESI**, reported in **2008 (9) SCC 106** is cited, wherein it is stated as follows:

"Corporation treating separate proprietary concerns as single establishments - units owner by separate partners/proprietors having financial ties clubbed for coverage purpose after on site inspection - permissibility - held factual findings as recorded by the ESI Court and the High Court go to show that there was unit in



management supervision and control geographical proximity, financial unit, general unity of purpose and functional integrality between the different units and for the sake of ESI coverage, the different units could be treated as "one establishment" - it is the rule of the Corporation to read between the lines to find out the true intent - the concurrent conclusions are essentially factual and are legitimate inferences - Hence no interference warranted."

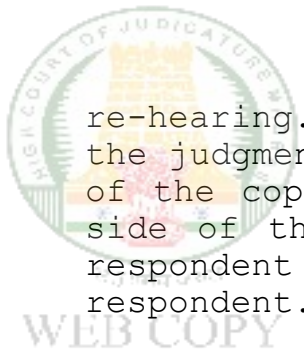
10. On the side of the appellant, it is further stated that the Act is a welfare Act. Three establishments were run by the same family members. All the three units were functioning under the same name. Totally 37 persons were working in the unit. Notice under C11 was issued on 19.04.1996. A show cause notice was issued on 06.01.1997. An opportunity for personal hearing was given. The matter was adjourned to 26.02.1997. Personal hearing was given on 09.07.1997, 16.07.1997, 03.09.1997 and 06.11.1997. The appellant did not produce even a single paper to substantiate the claim. Even the Labour Court has made an observation that no document was filed. No reason was stated in the petition for the non filing of the documents.

11. On the side of the appellant, it is stated that there was functional integrality and that all the units were run by the same family members within the same premises using same entrance, cash counter, electricity connection, common packaging area and single name board and that all the units have to be clubbed together.

12. On the side of the respondent, it is stated that the order was passed on the basis of an inspection report. As per the visit note, accounts were separately maintained and separate income tax was paid. There were three entrance in the premises, separate accounts were maintained, separate income tax was paid and separate E.B. was paid. All the three units were separated by partition. Though the owners belonged to the same family, their businesses were different and different GST was paid. All the three concerns were independently owned by three separate persons. The inspection note was not served on the respondent. No notice was sent to the respondent.

13. The learned counsel for the respondent has relied upon the judgment passed by the Hon'ble Supreme Court in the case of **Royal Talkies, Hyderabad and others v. Employers State Insurance Corporation** reported in **AIR 1978 SCC 1478** is cited.

14. On the side of the respondent, it is stated that no opportunity was given to the respondent. Under Section 82(2) of ESI Act, no appeal shall lie before the Court, unless there is a substantial question of law. The questions raised by the appellant are only questions of fact. The matter was only remanded back for



re-hearing. There is no legal injustice for the appellant. Even in the judgment cited by the appellant, it was held that non furnishing of the copy of the report was fatal. No document was filed on the side of the appellant to prove that copies were furnished to the respondent and that sufficient opportunity was given to the respondent.

15.On the side of the appellant, it is stated that the husband of the respondent refused to receive the copy of the visit note. Six times opportunity was given to the respondent for personal hearing. But the respondent failed to utilise the opportunities and the respondent failed to produce any documents. The purchase is common. They are using common door number and same entrance. There is no necessity to remand the matter back to the Deputy Director for further hearing.

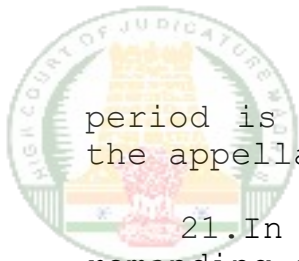
16.The claim of the appellant is that three units were functioning under the name and style of "M/s.Kabaa, M/s.Kaaba Agencies and M/s.Kaaba Textiles". All the three units are in the same premises using common entrance, electricity, cash counter, etc. Based on the visit note, the Deputy Director of the ESI Corporation has sent a notice in C11 and then a show cause notice and passed an order under Section 45A of the Act.

17.The contention of the respondent is that they were using separate entrance and were paying separate current bills and were paying separate IT and separate GST. Both sides produce citations in their favour.

18.The visit note which is the base for the entire proceedings was not marked by the appellant. Production of documents is necessary to verify the name of employees engaged by the respondent and others on the date of visit. The case of the respondent is that no opportunity was given to question the visit note. The case of the appellant is that the respondent failed to produce documents, though they were given sufficient opportunities.

19.In the above circumstances, the production of the documents from the year 1996 - 1997 are necessity to prove functional integrity. The appellant has not chosen to examine any witness or to mark any documents. Without supporting documents, the number of employees engaged by the respondent and the other units cannot be decided. There was no documents on the side of the appellant to substantiate the order under Section 45-A of the ESI Act.

20.It is seen that no opportunity was given to the respondent to putforth his case. No document was filed and no witness was examined on the side of the appellant to prove that sufficient opportunity was given to the respondent. Both the questions raised by the appellant are questions of fact and not questions of law. The



period is 1996 - 1997. There is no use in remanding the matter to the appellant for fresh disposal, after a lapse of 25 years.

21.In the above circumstances, the order of the Labour Court remanding the matter back to the Labour Court for fresh disposal is set aside and E.S.I.O.P.No.11 of 1998 is allowed.

22.In the above circumstances, this Civil Miscellaneous Appeal is dismissed. No Costs.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

MRN

Note : In view of the present lock down owing to COVID - 19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

1.The Judge,
Employees State Insurance Cum Labour Court,
Madurai.

2.The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

C.M.A. (MD) No.158 of 2013

20.10.2021

PS (CO)

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