



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 21.06.2021

Delivered On : 02.07.2021

CORAM

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THE HONOURABLE MRS. JUSTICE R. THARANI

C.M.A.(MD)No.209 of 2013

The Assistant Director,
ESI Corporation,
Tirunelveli - 1.

..Appellant/Respondent

Vs.

P.Subramanian

..Respondent/Petitioner

Prayer: This Civil Miscellaneous Appeal is filed under Section 82(2) of the ESI Act, 1948, to set aside the decree and judgment of the ESI Court (Labour Court, Tirunelveli) passed in E.S.I.O.P.No.7 of 2011 dated 06.01.2012.

For Appellant : Mr.C.Karthik
For Respondent : Mr.G.Dhanapal

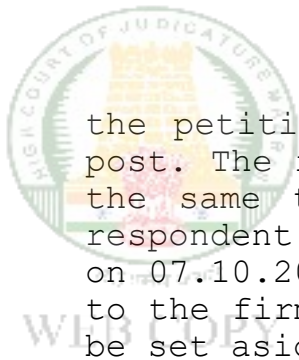
JUDGMENT

This Civil Miscellaneous Appeal has been filed against the judgment and decree passed in E.S.I.O.P.No.7 of 2011 dated 06.01.2012, on the file of the Labour Court, Tirunelveli.

2.The appellant herein is the respondent and the respondent herein is the petitioner in the claim petition. The respondent herein has filed a petition in E.S.I.O.P.No.7 of 2011, to set aside the notice issued by the petitioner herein dated 19.07.2010.

3.A brief substance of the claim petition in E.S.I.O.P.No.7 of 2011 is as follows:

The petitioner is manufacturing Asafoetida with five employees. At the time of inspection by the respondent in the year 2007, only three employees were engaged by the petitioner. During inspection in the year 2009, five workers were engaged by the petitioner. During the inspection on June 2010, only five persons were employed by the petitioner. On 09.07.2010, when the respondent inspected the premises, six persons were employed by the petitioner. But there were four loadmen. Those loadmen were not engaged by the petitioner. There were independent workmen. Those loadmen were not working under the control of the petitioner. The Social Security Officer by coercion got a statement from the petitioner. Immediately the petitioner wrote a letter to his Superiors. Again on 13.07.2010,



the petitioner wrote a letter to the respondent through registered post. The respondent in a hasty manner prepared 'Form C-11' and sent the same to the petitioner. The petitioner sent a notice to the respondent. For that letter, the petitioner received a reply notice on 07.10.2010 with some false particulars. ESI Act is not applicable to the firm run by the petitioner. The notice dated 19.07.2010 is to be set aside.

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

The Firm of the petitioner was inaugurated on 31.01.2007. The Firm was inspected by the respondent on 09.07.2010. As per the attendance register, there were six workers in the Firm. But four loadmen were found unloading goods within the premises. There were ten employees at the time of inspection. It was the petitioner, who engaged the loadmen. The loadmen were paid by the petitioner. The petitioner was using electricity for the grinder and for the sealing machine and the firm comes within the purview of ESI Act and the petition is to be dismissed.

5.Three witnesses were examined and thirteen documents were marked on the side of the petitioner and one witness was examined and four documents were marked on the side of the respondent and one document was marked as witness document. After the trial, the Labour Court has allowed the petition. Against which, the respondent in the main petition has preferred this Civil Miscellaneous Appeal.

6.On the side of the appellant, it is stated that the respondent engaged six regular employees for wages and four other persons were engaged for the purpose of loading and unloading goods from the lorry. The respondent paid them wages. The persons, who are doing loading and unloading falls under Section 2(9) of the ESI Act. The work falls under the category 'incidental work'. ESI Act is a beneficial legislation. The trial Court failed to mention why the loadmen are not considered as employees of the respondent factory.

7.The definition for 'employee' under Section 2(9) of ESI Act reads as follows:

"employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and -

(I) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or"

8.The definition for 'factory' under Section 2(12) of ESI Act reads as follows:

<https://hcservices.ecourts.gov.in/hcservices/>



"factory" means any premises including the precincts thereof whereon ten or more persons are employed or were employed on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on or is ordinarily so carried on, but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952) or a railway running shed."

9.On the side of the appellant, it is stated that in Ex.P3, a statement given by the employer to the Social Security Officer, the employer has admitted that four loadmen were engaged by him on the date of inspection. Already there were six permanent employees. The total number of employees at the time of inspection is 10. Since ten persons were employed by the respondent at the time of inspection all the ten persons were to be treated as Employees and the premises has to be defined as a factory under the ESI Act.

10.On the side of the respondent, it is stated that on the date of inspection i.e. on 09.07.2010, persons, who are unloading the goods, were not the employees of the respondent. They belong to a Society (சுமை தூக்கும் தொழிலாளர் சங்கம்). Ex.R3 was obtained from the respondent by way of coercion. Ex.C1 clearly shows that the said Society would not allow any body else to do loading and unloading. P.W.2, the Manager of the lorry company, was summoned and has deposed that only the members of the Society will do the loading and unloading works and they will not allow any body else to do that work.

11.Only occasionally once or twice in a year goods will be loaded or unloaded in the respondent's factory. An independent tea seller who sells tea, within the premises cannot be treated as an employee. The loadmen from the Society cannot be treated as the employee of the respondent and the ESI Act is not applicable to the respondent.

12.On the side of the appellant, it is stated that admittedly loading and unloading was done during the time of inspection and that even a person working outside the premises but on the direction of employer is also to be considered as an employee. In support of his contention, a judgment passed by the Hon'ble Supreme Court in the case of **Rajakamal Transport and another v. The Employees State Insurance Corporation in C.A.Nos.5376-77 of 1985** is cited, wherein it is stated as follows:

"What is important is that they work in connection with the work of establishment. The loading and unloading work is done at their directions and control."



13. On the side of the respondent, it is stated that a person engaged in loading and unloading are also covered by the Act. In support of his contention, a judgment of the High Court of Rajasthan in the case of **Jain Plaster and Minerals v. Regional Director** reported in **2002-III-LLJ** is cited, wherein it is stated as follows:

"Another was that the employees engaged for loading and unloading of goods were not the appellant's employees.....It was found that the loading and unloading work was done at the appellant's directions and control and as such was covered by the ESI Act. The appeal was therefore dismissed."

14. Both these cases are relating to transport companies, which engage men for loading and unloading on regular basis. The nature of work of the transport company includes loading and unloading and the loadmen are to be treated as employees. The respondent is not a transport company engaging loadmen on regular basis. Hence, this judgment is not applicable to the case before this Court.

15. The learned counsel for the appellant would rely upon another judgment passed by the High Court of Rajasthan in the case of **Jodhpur Woollen Mills Ltd., v. Regional Director**, reported in **2010-III-LLJ-171**, wherein it is stated as follows:

"Work of loading and unloading done outside the factory premises was covered by the definition of Workman under Section 2(9) of ESI Act"

16. On the side of the appellant, it is stated that incidental or temporary employees who were engaged only for a short period are to be treated as employees. The learned counsel for the appellant would rely upon the judgment passed by this Court in the case of **Soft Beverages (P) Ltd., v. E.S.I. Corporation**, reported in **2001-II-LLJ**, wherein it is stated as follows:

"Definition of 'employees' wide enough to include persons whose period of employment may be short or on daily wages - Persons regularly engaged for loading and unloading sugar, new bottles etc. by company doing business in soft drinks held to be 'employees' - question whether person 'employee' or not, being one of fact, appeal not found to fulfil requirement of Section 82."

17. In both these cases, loading and unloading was done on regular basis. But in this case, the appellant has failed to prove that loading and unloading was "regularly" done in the premises. Hence, these citations are not applicable to the present facts of the case.

18. From the evidence of P.W.2, it is clear that they are members of an independent Society, who engaged in loading and



unloading and that Society never allows others to do the loading work. It is seen that from the year 2007 till 2010, only 3 to 6 employees were engaged by the respondent. The inspection during the 2007, 2008, 2009 and 2010 reveals the same. Only on the date of inspection, four persons were engaged in loading and unloading. Those loadmen were not engaged regularly. The loadmen mentioned in the citations were engaged by their employer on "regular basis" either in transport business and in other factories. The judgments cited by the appellant are not applicable to the present facts of the case.

19. In the above circumstances, it is decided that there is nothing sufficient enough to interfere in the order passed in E.S.I.O.P.No.7 of 2011 dated 06.01.2012, on the file of the Labour Court, Tirunelveli. Hence, this Civil Miscellaneous Appeal is dismissed. No Costs.

Sd/-

Assistant Registrar (ADII)

// 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 Presiding Officer,
Labour Court, Tirunelveli.

Copy to

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

C.M.A. (MD) No.209 of 2013
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