**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

Date of Reservation	24.02.2021
Date of Judgment	08.06.2021

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CORAM:**THE HONOURABLE MRS.JUSTICE T.KRISHNAVALLI**C.M.A(MD)No.55 of 2013

The Joint Regional Director,
Employees' State Insurance Corporation,
Tallakulam, Madurai. : Appellant/Respondent
Vs.

M/s.Tenzing Transports (P) Ltd.,
Boopathy Buildings,
17-A, Thiruthangal Road,
Sivakasi
through its Managing Director : Respondent/Petitioner

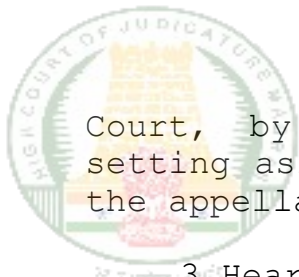
PRAYER: Civil Miscellaneous Appeal has been filed under section 82 of the ESI Act, 1948 against the order, dated 11.10.2012 passed by the Labour Court (Employees State Insurance Court) Madurai, in ESI OP No.15 of 2001.

For Appellant : Mr.P.Ganapathisamy
For Respondent : Mr.P.Chandra Bose
(No appearance)

J U D G M E N T

Challenge made in this appeal is to the order, dated 11.10.2012 passed by the Labour Court (Employees State Insurance Court) Madurai, in ESI OP No.15 of 2001.

2.The short facts of the case is that the respondent herein is a Lorry Transport Company and its covered under the ESI Act and they have been regularly paying the contribution as per the Act. The respondent Company carries goods through their lorry to the various parts of India. The Head Office is situated at Sivakasi. The ESI Inspector sent Form C-18 notice, dated 24.05.1993 to the respondent demanding arrears of contribution of Rs.53,186/- towards omitted wages for the period from April 1990 to March 1992. On receipt of the said notice, the respondent remitted the arrears of contribution for the said period and also sent a detailed reply, dated 08.06.1993 to the appellant stating that they have already paid the arrears and no contribution is payable towards the loading and unloading charges. Thereafter, after a lapse of 3-1/2 years, the appellant sent another notice, dated 05.08.1996. Thereafter, the appellant passed the order under section 45A of the ESI Act, dated 08.12.1998. Challenging the said order, the respondent filed ESI OP No.15 of 2001 before the ESI Court (Labour Court), Madurai. The learned



Court, by judgment, dated 11.10.2012 allowed the petition, by setting aside the order, dated 08.12.1998. Aggrieved over the same, the appellant is before this court.

3. Heard both sides and perused the materials available on record.

4. The main contention of the appellant/respondent is that the loading and unloading work in a Goods Carrier is part of the work. Like drivers, conductors, etc., these coolies do the work outside the premises of the establishment and therefore, the condition of the trial court that they should within the premises is not sustainable and the respondent/petitioner concern is liable to pay the ESI contribution for the loading and unloading work in a Goods Carrier and prays that the Civil Miscellaneous Appeal has to be allowed. For that the learned counsel appearing for the appellant/respondent submitted the following rulings:-

(1) 1996-II-LLJ 435 (Rajkamal Transport Vs. ESI Corporation);

(2) 2000(3)L.L.N.299 (ESIC Vs. North Arcot District Consumers Wholesale Society Limited and another);

(3) 2001-II-LLJ-701 (Soft beverages (P) Limited Vs. ESIC);

(4) 2000(1) LLN 70 (Transport Corporation of India Vs. ESIC and another); and

(5) 1978-I-LLJ-181 (Hyderabad Asbestos Cement Products Limited Vs. ESIC)

5. The contention of the respondent/petitioner is that loading and unloading coolies are not the employees of the respondent/petitioner and they are not under the direct control and supervision of the respondent/petitioner and hence, the respondent/petitioner is not liable to pay any contribution for loading and unloading coolies and they are not employees of the respondent/petitioner and the coolie paid by the employer is not wages and hence, the respondent/petitioner is not liable to pay the contribution. In support of the contention, the learned counsel appearing for the respondent/petitioner submitted the following rulings before the trial court:-

(1) 1994 Supp. (3) Supreme Court cases 567 (Employees' State Insurance Corporation Vs. Premier Clay Products);

(2) 2012(134) FLR 10041 (Siduarasan Home Appliance Vs. Deputy Director, ESI Corporation):



(3) 2000(1) LLN 873 (Regional Director, Employees' State Insurance Corporation, Madras Vs. S.S.R.S brothers, Madurai);

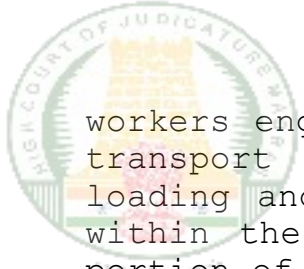
(4) 2006-I-LLN-670 (Sitamahalakshmi Enterprises Vs. Regional Director, Employees' State Insurance Corporation, Hyderabad and another);

(5) 2002-II-CLR 349 (E.I.D Parry (India) Limited, Vijayawada Vs. Employees State Transport Corporation and another).

6. It is the case of the appellant/respondent that their official inspected the establishment on 08.03.1993 and verified the records for the period from April'1990 to March' 1993 and he found that the respondent/petitioner has not paid contribution on many items like building construction coolie and difference in wages as per the General Ledger and Form-7 and Loading and Unloading coolie and a notice (in Form C-18), dated 24.05.1993 was issued in the matter proposing to charge a contribution of Rs.53,186/- on the wages booked under the said items and in response, the employer had stated that out of the said amount of Rs.53,186/-, he was liable to pay Rs.13,045/- only and he had paid that amount of Rs.13,045/- on 20.03.1993 and according to the employer, remaining amount of Rs.40,141/- related to the "Loading and Unloading Charges" and the expenditure on this head of account cannot be treated as wages as the amounts booked under this head were paid to outside unidentifiable coolies, who had no continuity of service and there was no employee-employer relationship in the case and thus, the employer had contended that he was not liable to pay Rs.40,142/- as contribution on "Loading and Unloading Charges" and the Assessing Officer decided that the contribution of Rs.40,141/- was payable on loading and unloading charges and passed order on 08.12.1998 under section 45A of the ESI Act, denying the contribution payable as Rs.40,141/- for the period from 01.04.1991 to 31.03.1992.

7. In this case, the appellant/respondent mainly relied on the ruling reported in 1996-II-LLJ 435 (Rajakamal Transport and another Vs. The Employees' State Insurance Corporation, Hyderabad) and in that case, it has been held the Hamalis/ casual workers engaged for loading and unloading of goods undertaken by the transporter for carriage as carriers come within the meaning of employee under section 2(9) of the ESI Act and the charges paid in connection with the loading and unloading work are wages within the meaning of section 2(22) of the said Act.

8. The main contention of the respondent/petitioner is that the workers engaging the direct loading and unloading are not in the premises and the above coolies are not the employees of the respondent/petitioner and hence, the employer is not liable to pay the contribution. On perusal of the ruling reported in **1996-II-LLJ 435 (Rajakamal Transport Vs. ESI Corporation)**, the Hamalis/casual



workers engaged in loading and unloading of goods undertaken by the transport for carriage as carriers came within the meaning of loading and unloading work and the wages paid for them are wages within the meaning of section 2(22) of the ESI Act. The relevant portion of the above ruling is extracted hereunder:-

“The appellants' regular business is transportation of the goods entrusted to it as carrier. When the goods are brought to the warehouse of the appellants, necessarily the appellants have to get the goods loaded or unloaded through the Hamalis and they control the activities of loading and unloading. It is true as found by the Insurance Company that instead of appellants directly paying the charges from their pocket, they collect as a part of the consideration for transportation of the goods from the customers and pay the amount to the Hamalis. The test of payment of salary or wages in the facts of this case is not relevant consideration. What is important is that they work in connection with the work of the establishment. The loading and unloading of the work is done at their directions and control.

9. Further, in the above judgment, it has been held in para 6 and 7 as follows:-

“6. The same question was considered in another recent judgment of this court in Kirloskar Brothers Vs. Employees' State Insurance Corpn. (1996-I-LLJ-1156), wherein this court held in paragraph 11 as follows:-

The test of predominant business activity or too remote connection are not relevant. The employee need not necessarily be the one integrally or predominantly connected with the entire business or trading activities. The true test is control by the principal employer over the employee. That test will alone be the relevant test.”

7. It is seen that the Insurance Court after elaborate consideration, found as a fact, that the appellants have the control over loading and unloading of the goods entrusted to the appellants. The appellants regular business is transportation of the goods entrusted to it as carrier/ When the goods are brought to the warehouse of the appellants, necessarily the appellants have to get the goods loaded or, unloaded through the Hamalis and they control the activities of loading and unloading. It is true as found by the Insurance Court that instead of appellants directly paying the charges from their pocket, they collect as as



part of the consideration for transportation of the goods from the customers and pay the amount to the Hamalis. The test of payment of salary or wages in the facts of this case is not relevant consideration. What is important is that they work in connection with the work of the establishment. The loading and unloading of the work is done at their directions and control."

10. It is admitted on the side of the respondent/petitioner that they are doing transport of goods entrusted to it as carriers. When the goods are brought to the warehouse of the respondent/petitioner, necessarily the respondent/petitioner have to get the goods loaded or unloaded through the workers and they control the activities of loading and unloading and when the workers in connection with the work of the establishment and the loading and unloading work is done at the direction and control of the respondent/petitioner.

11. Further, in the decision reported in **1996-II-LLJ 435 (Rajkamal Transport Vs. ESI Corporation)**, it was held that test of payment of salary or wages is not relevant consideration. What is important is that they work in connection with the work of the establishment and the loading and unloading of the work is done at their directions and control. In this case, also, the loading and unloading work is done at the direction and control of the respondent/petitioner. Hence, it is held that the employer is liable to pay the contribution. But the trial court wrongly came to the conclusion that the loading and unloading were done out side the premises. But the respondent/petitioner is doing transportation of goods. Hence, it is held that the loading and unloading can be done only at the direction and control of the employer. Hence, it is held that the employer is liable to pay the contribution.

12. For all the reasons stated above, this court is of the considered view that without properly appreciation the above facts, the trial court has wrongly passed the impugned order, which is liable to be set aside.

13. In the result, the Civil Miscellaneous Appeal is allowed. The impugned order, dated 11.10.2012, passed by the ESI Court (Labour Court), Madurai, is set aside. No costs. Consequently connected Miscellaneous Petition is closed.

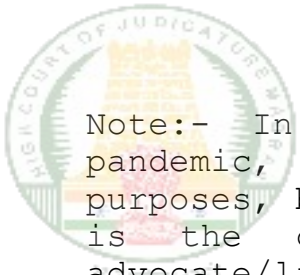
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Assistant Registrar (P&A)

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Sub Assistant Registrar (CS)



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.

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To,

- 1.The ESI Court (Labour Court),
Madurai.
- 2.The Record Keeper, (2C)
V.R Section,
Madurai Bench of Madras High Court,
Madurai.

C.M.A (MD) No.55 of 2013
08.06.2021

KB(06.07.2021) 6P 4C