BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 21.06.2021 (CMA(MD)No.59 of 2013)
12.07.2021 (CMA(MD)No.1112 of 2013)
Delivered On : 12.11.2021

CORAM

THE HONOURABLE MRS.JUSTICE R. THARANI

C.M.A.(MD)Nos.59 and 1112 of 2013
and
M.P.(MD)No.1 of 2013

M/s.Jaihind Saree Palace,
No.93, East Main Street,
Thanajvur,
Represented by its Proprietrix,
Bhavari Chaganlal Jain
... Appellant/Petitioner NO.1 in C.M.A.(MD)No.59 of 2013

M/s.Jaihind Enterprises,
(Since closed on 10.02.2001),
No.92, East Main Street,
Thanjavur,
Represented by its owner,
Ghenmal Cheganlal Jain .
... Appellant/Petitioner No.2 in C.M.A.(MD)No.1112 of 2013

Vs.

1.Employees State Insurance Corporation,
represented by its Regional Director,
Pradeep Bhavanam,
143, Sterling Road,
Nungambakkam,
Chennai - 600 034. ... 1st Respondent in both C.M.As.

2.Jaihind Enterprises,
(Since closed on 10.02.2001),
No.92, East Street,
Thanjavur,
Represented by its owner,
Ghenmal Cheganlal Jain
... 2nd Respondent/Petitioner No.2 in C.M.A.(MD)No.59 of 2013

2.Jaihind Saree Palace,
No.93, East Main Street,
Thanajvur,
Represented by its Proprietrix,
Bhavari Chaganlal Jain
... 2nd Respondent/Petitioner No.1 in C.M.A.(MD)No.1112 of 2013

Common Prayer: This Civil Miscellaneous Appeals are filed under Section 82 of the ESI Act, 1948, to set aside the decree and judgment passed in E.S.I.O.P.No.22 of 2003 dated 06.08.2012 by the ESI Court cum Principal District Judge, Tanjore.

For Appellant (in both C.M.As.)	: Mr.P.Chandra Bose
For 1st Respondent(in both C.M.As.)	: Mr.R.Ravi Kumar
For 2nd Respondent(in both C.M.As.)	: No Appearance

COMMON JUDGMENT

These Civil Miscellaneous Appeals have been filed against the order passed in E.S.I.O.P.No.22 of 2003 dated 06.08.2012 on the file of the ESI Court cum Principal District Judge, Tanjore.

2.Since both the appeals are against the same order, both the appeals are taken up together and C.M.A.(MD)No.59 of 2013 is taken as the lead case. The word 'appellant' herein will denote the appellant in C.M.A.(MD)No.59 of 2013. The word 'first respondent' will denote the first respondent in C.M.A.(MD)No.59 of 2013 and the word 'second respondent' will denote the second respondent in C.M.A.(MD)NO.59 of 2013.

3.Both the appellant in C.M.A.(MD)Nos.59 and 1112 of 2013 are the petitioners and the first respondent herein is the respondent in the claim petition. Both the appellant have filed a claim petition in E.S.I.O.P.No.22 of 2003, to declare that the petitioners' concerns are not covered under the definition of Section 2(12) of the ESI Act and that the order passed in TN/RECY/CP-1-51-11666-101CCRNo.995 by the respondent is null and void.

4.Brief substance of the claim petition in E.S.I.O.P.No.22 of 2003 is as follows:

The first petitioner is represented by its Proprietor Bhavari Cheganlal Jain and the second petitioner is represented by its Proprietor Genmal Cheganlal Jain. Both the petitioners are dealing in textiles and they have separate income, separate tax assessment and separate account number. The unit of the second petitioner remained closed from 10.02.2001 onwards. But the respondent Corporation issued a notice under Section 1(5) of the Act. The respondent Corporation clubbed both the units and issued a single notice. After inspection on 19.07.2001, notice under Section 45(c) to 45(i) of the Act was served on the petitioners, demanding Rs.2,88,518/- (Rupees Two Lakhs Eight Eight Thousand Five Hundred and Eighteen only) for the period from 01.01.1993 till 31.05.1998 towards contribution under the ESI Act. The order was passed on 19.09.2002. The petitioners filed this petition to declare the notice as null and void.

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

The claim of the respondent is not disputed before any Court of law and it become final. The recovery proceedings dated 19.02.2002 cannot be challenged in any civil Court. The first petitioner in the letter dated 01.07.1998, has declared the number of employees in her establishment. On 01.07.1998, the Inspector from the respondent Corporation visited the premises and found that the second petitioner concern is running along with the first petitioner's concern without any partition in between and they have engaged 21 persons together and there was a common name board, common entrance and common telephone.

The proprietrix of the first petitioner concern is the wife of the proprietrix of the second petitioner concern. They used to interchange the workers in between their units. Hence, the respondent Corporation sent a notice in Form C11 dated 02.05.2000, to the petitioners concern to register their employees and to pay contribution and to maintain records under the Act. The petitioners' concern were covered under Section 1(5) of the Act as an establishment. On verification of the records, the respondent came to know that on 01.01.1983, they employed 27 employees and the petitioners failed to pay contribution to the extent of Rs.55,520/- (Rupees Fifty Five Thousand Five Hundred and Twenty only) as left out wages and over time wages for the period from November 1999 till May 2001. The officer issued spot observation letter dated 19.07.2001 and also issued a claim notice to the petitioners in form C18 dated 04.02.2002 for Rs.1,45,035/-. The petitioners concern were given opportunity of personal appearance. The petitioners did not come forward with the relevant documents. A recovery certificate in form C19 dated 12.09.2002 demanding a sum of Rs.2,88,493/- towards contribution along with interest from 01.09.1999 to 31.09.1999 was issued.

6.On the side of the petitioners therein, two witnesses were examined and ten documents were marked. On the side of the respondents therein, one witness was examined and seven documents were marked. After hearing both sides, the ESI Court cum Principal District Judge dismissed the petition. Against the same, the appellants have preferred these appeals.

7.On the side of the appellant in C.M.A.(MD)No.59 of 2013, it is stated that the appellant's concern is a retail show room trading textiles and mainly dealing with the retail selling of sarees. The appellant is having her own income tax, sales tax assessment numbers and is maintaining separate registers as well as day books, ledgers. The appellant concern was not having 20 or more employees to attract the ESI Act. The appellant's in C.M.A.(MD) No.1112 of 2013 was running a separate unit in the next building. The ESI Inspector visited the appellant's establishment in the month of June 1998 and verified the records and found out that 12 employees were employed in the unit of the appellant. The appellant started a branch in Kumbakonam, in the year 1999 and thereafter clubbing the employees in that unit, the appellant's unit was covered under the ESI Act with effect from 01.06.1999.

8.On the side of the appellant, it is further stated that after the inspection dated 19.07.2001 by the ESI Inspector, a notice under Section 44(c) to 45(i) of the Act was served demanding a contribution of Rs.2,88,518/- (Rupees Two Lakhs Eighty Eight Thousand Five Hundred and Eighteen only) towards interest, for the period from 01.01.1993 till 31.05.1998 by clubbing both the appellant and second respondent units.

9.Challenging the notice, the appellant approached the ESI Court. There was no control or supervision and there was no transfers of employees and that there was no common ownership. Both the units have separate buildings, separate name board and separate electricity, separate phone, separate book of accounts and registers, etc. Both the appellant's units are not covered under the provision of Section 45(A) of the Act. Without a decision on the applicability of the Act, the ESI Court has dismissed the petition. The report of the Inspector was not correct. The second respondent (appellant in C.M.A.(MD)No.1112 of 2013) was not a part of the appellant's establishment. It is an error to club both the units together. The second respondent herein was having only nine employees and the second respondent unit remains closed from 11.02.2000.

10.The trial Court failed to note that the concern is not a factory coming under Section 2(12) of ESI Act. Jaihind Saree Palace was a show room and not a manufacturing unit. On the date of inspection by the Inspector on 19.07.2001, the second respondent concern was closed and there was no transfer of employee.

11.In support of his contention, a judgment passed by the Bombay High Court in the case of ***Sundar Transport v. Regional Provident Fund Commissioner*** reported in ***1993 ILLN 480*** is cited wherein it is stated that "even if four units are using a common telephone, post box number and engaging a same accountant to write the accounts, on which reliance of that have been placed on by the Regional Provident Fund Commissioner for the purpose of clubbing together all the four units and treating them as one was not accepted. The respondent Corporation has not established these facts".

12.On the side of the appellant, it is stated that there was no functional integrity. The employees of the second respondent already settled their accounts and they left the premises and all the trading activities were completely stopped from 10.02.2001. No employee related to the second respondent concern was going to be benefited. Both the appellant concern is now having only seven employees. The second respondent cannot register this concern under Regulations 10(b) and the employees engaged by the closed unit of the second respondent cannot file any declaration form and cannot get any allotment of Insurance number and cannot get any benefits. The impugned coverage of notice and recovery proceedings dated 19.03.2002 cannot be enforced. Hence, clubbing a closed concern and covering the appellant concern under the ESI Act is not maintainable.

13.On the side of the appellant, it is stated that without conducting an enquiry under Section 45A, as to the applicability of the Act, the lower Court has passed the order, which is erroneous. In support of his contention, a judgment of the Allahabad High Court reported in ***1986(53) FLR P.471*** is cited.

14.The points for consideration are as follows:

> *"(i)Whether conclusion of the ESI Court that the petitioner establishment and the second respondent establishment treated as a single unit and there was functional integrity, ignoring the facts and evidence and on that passing of the impugned order of the ESI Court is perverse or not ?*
>
> *(ii)Without conducting any inquiry under Section 45A of the ESI Act, the recovery proceedings and demand of the corporation to claim a sum of Rs.2,88,518/- as contribution for the period from 01.01.1993 to 31.05.1998 is correct or not ?"*

15.On the side of the appellant, it is stated that both the establishments have different names. One of unit had a phone and the other unit was not having a phone. Both the concerns are not manufacturing units covered under Section 2(M) of the Act. Section 2(M) of the Act is applicable only to manufacturing units. ESI rules is not applicable to the appellant's unit. The Inspector has assessed 22 employees, by clubbing both the units together. But the appellant has engaged only 12 members and the second unit was already closed. Hence, the Act is not applicable to the appellant unit.

16.On the side of the first respondent, it is stated that the second respondent unit was closed only in the year 2001. The demand is from the year 1993 to 1998. On 01.07.1998, 21 employees were engaged. Both the units were using a common name board, common electricity and common entrance. The order of the Department was not challenged. Only the execution proceedings was challenged.

17.On the side of the appellant, it is stated that the functional integrity is the criteria to decide the issue and that there was no documents to show both the units were integrated and the questioning the execution proceedings amounts to questioning the order and prayed the appeal to be allowed.

18.The claim of the appellant is that both the units are separate units. Two separate sales taxes were maintained. Both the units are separately registered. A copy of the certificate of registration was marked as Ex.P8. The report regarding the closure of the unit sent by the second respondent to the Commercial Tax Officer was marked as Ex.P9. The certificate of closure of the second respondent unit issued by the Commissioner Tax Officer dated 30.11.2001 was marked as Ex.P10. Separate notification was made on 19.07.2001.

19.The list of employees dated 01.07.1998 was marked as Ex.R1 and the preliminary inspection report of the Inspector of the respondent dated 01.07.1998 was marked as Ex.R2. It is stated that 21 employees were engaged by the appellant and the second respondent and that on 01.07.1998, there was no partition between both the units. On the basis of the report, Form C18, notice was issued on 04.02.2002. Only in the notice, it was stated that the appellant is liable to pay Rs.2,88,518/- towards contribution for the period from 01.01.1993 till 31.05.1998. The documents from the period 1993 till 1998 were not filed before the ESI Court.

20.On the side of the Corporation, it is stated that on verification of the records, it was found that the appellant establishment engaged 27 employees (15+12) as on 01.01.1993. Ex.R1 and Ex.R2 were produced on the side of the Corporation to prove the engagement of 27 employees. Ex.R1 list of employees was signed by the appellant in C.M.A.(MD)No.59 of 2021. A perusal of Ex.R1 reveals that two separate lists were given in the same letter pad. Furnishing two lists in the same letter pad itself in not sufficient to prove that all the employees mentioned in the two separate lists were employed together. Attendance Register and salary registers were not produced to substantiate Ex.R1.

21.On the side of the first respondent, it is stated that in Ex.R2 column No.9 and 10, it was clearly stated that 12 persons were seen working under the unit Jaihind Saree Palace and nine persons were seen working at Jaihind Enterprises and that the position was same from 01.06.1998.

22.Mere suggestion in Ex.R2 made by the Inspector regarding the possibility of interchange of employees is not sufficient enough to decide that both the units were actually interchanging the employees and were functioning as a single unit.

23.A worksheet was annexed with Ex.R4 calculating the number of employees from January 1993 onwards. As per Ex.R1 and Ex.R2, the number of employees in Jaihind Saree Palace on 01.07.1998 is 12. But in the list annexed with Ex.R4, the number of employees in Jaihind Saree Palace from January 1993 is mentioned as 15, 16, 13, etc. As per Ex.R1 and Ex.R2, the number of employees in Jaihind Enterprises as on 01.07.1998 was 9. But the number of employees in Jaihind Enterprises from January 1993 is mentioned as 12, 13, 11 and 10, etc. On what basis the number of employees from 1993 till 1998 were mentioned in the worksheet was not stated in Ex.R4. Except Ex.R1 and Ex.R2, there was no other proof regarding the number of employees engaged by the appellant and the second respondent. No documents from the year 1993 to 1998 was produced by the respondents. The period covered in the proceedings was from 1993 till 1998. The preliminary inspection report dated 01.07.1998 cannot be taken into consideration without the production of documents from the year 1993 till 1998. Why the first respondent has not taken any steps from the year 1993 till 1998 was not explained in the counter.

24.The contention of the first respondent is that the appellant and the second respondent failed to avail the opportunity given for personal appearance. No document was filed before the ESI Court to prove that an enquiry was ever conducted and that an opportunity was given to the appellant.

25.It is seen that without giving an opportunity to the appellant, the order was passed. Even the ESI Court has not gone into the applicability of Section 45(A) of the ESI Act for the period from 01.01.1993 to 31.05.1998. Except the preliminary inspection report dated 01.07.1998 and the inspection report dated 19.07.2001, there was no other documents to prove that the second respondent and the appellant acted as a single unit during the period 1993 till 1998 and there is no documents to show that the appellant unit and the second respondent units interchange the employees and they employed 20 or more persons during the period 01.01.1993 till 31.05.1998. Hence, it is decided that basis of the order dated 19.09.2002 was not proved by the first respondent. Hence, no enquiry is conducted under Section 45A of the Act, the order passed by the first respondent dated 19.09.2002 is perverse and is liable to be set aside.

26.These Civil Miscellaneous Appeals are allowed. The order passed in E.S.I.O.P.No.22 of 2003 dated 06.08.2012 on the file of the ESI Court cum Principal District Judge, Tanjore is set aside. No Costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS I)

// 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 ESI Court cum Principal District Judge,
Tanjore.

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

C.M.A.(MD)Nos.59 and 1112 of 2013
12.11.2021

NA(CO)
RS/PM (23.11.2021) 8P 4C