BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Reserved on : 29.06.2021
Delivered on : 19.07.2021
CORAM:
THE HONOURABLE MRS.JUSTICE R.THARANI
C.M.A(MD) No.773 of 2013
and
M.P.(MD)No.1 of 2013

B.Mohanachandran Nair ... Appellant / Petitioner

Vs.

1.The Assistant Regional Director,
Employees State Insurance Corporation,
Sub-Regional Office,
Municipal Shopping Complex,
Sindupoonthurai, Tirunelveli.

2.The Recovery Officer,
Employees State Insurance Corporation,
Sub- Regional Office,
4th Main Road, K.K.Nagar,
Madurai – 20. ... Respondents / Respondents

Prayer: Civil Miscellaneous Appeal filed under Section 82 of the Employees State Insurance Act, to set aside the order of the Employees State Insurance Court, dated 02.01.2013, passed in E.S.I.O.P.No.07/2012, in confirming the demand notice of the second respondent in No.57/RRC/30214/SRO/MDU/07, dated 07.06.2007.

For Appellant : Mr.M.Azeem
For Respondents : Mr.R.Ravikumar

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JUDGMENT

This Civil Miscellaneous Appeal is filed against the order of the Employees State Insurance Court, dated 02.01.2013, passed in E.S.I.O.P.No.07/2012, confirming the demand notice of the second respondent in No.57/RRC/30214/SRO/MDU/07, dated 07.06.2007.

2.The appellant herein is the petitioner. The petitioner filed a petition before the Employees' State Insurance Court, Tirunelveli, in E.S.I.O.P.No.07 of 2012. The petitioner approached the Employees State Insurance Court, questioning the notice, dated 07.06.2017.

3.Brief substance of the petition in E.S.I.O.P.No.07 of 2012., is as follows:-

The petitioner is running a Cashew Factory in the name and style of “Prasanthi Cashew Company”, having its head office at Kannumamoodu in Kanyakumari District. The petitioner is running a processing unit at Marudhankodu Anjal Kottavilai, in Survey No.199/11 with an extend of 72 cents. Originally the property belonging to one Parvathi Prasath @ Riya and one Viswanatha Prasath. A person by name, G.Sundaresan was running the unit in the name of "Parvathy Cashew" as a leasee. He died on 29.12.2003 and then that unit was completely closed. The petitioner purchased the property on 28.01.2005 and he engaged his own employees and he run a Factory in the name of Prasanthi Cashew Company. On 16.08.2005, a notice under Form C-18 was sent to M/s.Parvathi Cashew and G.Sundaresan with a demand for a period from 01.10.2001 to 31.08.2002. The notice was served on the petitioner and the petitioner sent his Clerk / S.Krishnankutty, in person with a letter stating that the petitioner is having no connection with Parvathi Cashew Company. The Enquiry Officer adjourned the enquiry to 20.10.2005. Again, the matter was adjourned to 11.11.2015, the clerk of the petitioner filed a letter on that date along with a challan for Rs.4,443/- (Rupees Four Thosuand Four Hundred and Forty Three only), dated 08.12.2005.

4.Another notice was issued on 20.02.2006, claiming a sum of Rs.3,19,516/- (Rupees Three Lakhs Nineteen Thousand Five Hundred and Sixteen only) for the period from 01.10.2001 to 31.08.2002 . Even after the reply from the petitioner, on 16.03.2006, another notice dated 16.03.2006 Forum C-18(i), claimaing a sum of Rs.2,32,608/- (Rupees Two Lakhs Thirty Two Thousand Six Hundred and Eight only) was sent. Though representations were made to set aside the notice, the first respondent has passed an order under Section 45-A.

5.The petitioner was not in a position to produce the particulars regarding the persons employed by the previous owner, only in the order, dated 12.05.2006, mentioning was made regarding the Report of the Inspector, dated 16.05.2001. Even that order was addressed only to M/s.Parvathi Cashew Company and to one G.Sundaresan. All the communications were addressed to M/s. Parvathi Cashew Company, but, it was served on the petitioner. The petitioner is no way connected with Parvathi Cashew Company.

6. The leasee / G.Sundaresan, who was in occupation of the premises, died on 29.12.2003. Subsequently, there was no functioning in the premises. Only vacant possession of the building was purchased by the petitioner, on 28.02.2005. The order passed against a dead person is not valid. There was no reply for the letters sent by the petitioner, on 25.05.2006 and on 06.07.2006. In the meanwhile, another notice under Form CB-2 addressed to M/s. Parvathi Cahew Company and to G.Sundaresan, was served on the petitioner.

7. Only a notice, dated 07.06.2007, was addressed to the petitioner, claiming a sum of Rs.1,93,231/- for the period 31.01.2003 till 25.02.2003, under Section 93-A. . The petitioner sent a letter on 26.07.2007, there was no reply from the respondent. The petitioner filed a Writ Petition in W.P.No.9267 of 2007 and that petition was dismissed on 22.01.2011, with a direction to approach

the E.S.I Court. The petitioner is no way connected with the previous Company and the employees of the previous Company. All the notices were addressed only to the previous owner of the premises and the lessee of the premises. Only on 07.06.2007, notice was addressed to the petitioner. No enquiry was conducted as to whether Section 93-A of the E.S.I. Act is applicable to the petitioner and prayed the notice dated 07.06.2007 to be set aside.

8.Brief substance of the counter in E.S.I.O.P.No.07 of 2012, is as follows:-

The petitioner had purchased M/s.Parvathi Cashew Company along with the building. Under Section 93-A of the E.S.I. Act, the subsequent purchaser is liable to pay the amount due from the previous owner. The petitioner has accepted his liability and has paid Rs.4,443/- for 39 employees engaged by the leasee/ G.Sundaresan for the period from October - 2001 to August - 2002. Enquiry was conducted and the petitioner was heard. But the petitioner was not able to produce any document at that time and order, dated 12.05.2006, under Section 45-A was passed demanding Rs.2,32,608/-. The purchaser of the Company, though he changed the name of the Company, is also liable to pay contribution that was due from the previous owner. The petitioner failed to pay the Contribution amount and he failed to file any documents. Hence, the calculation was made approximately, under Section 93-A of the E.S.I Act. Both the previous owner, lessee, and the petitioner are jointly and severely liable to pay the contribution amount. There is no necessity to conduct fresh enquiry and the order, dated 07.06.2007, is valid.

9.On the side of the petitioner, one witness was examined as P.W.1 and ninetten documents were marked as Ex.P1 to Ex.P19. On the side of the respondents, one witness was examined as R.W.1 and seven documents were marked as Ex.R1 to Ex.R7.

10.After hearing both sides, the E.S.I. Court, has dismissed the petition. Against which, the appellant / petitioner preferred this Civil Miscellaneous Appeal.

11.On the side of the appellant, it is stated that the lower Court failed to consider Ex.R1 to R3 were addressed only to the Principal employer, Parvathi Cashew Company and the lessee / G.Sundaresan and were not addressed to the appellant. All the previous notices, viz., Ex.P1, Ex.P10, Ex.P11, Ex.P12, Ex.P15 and Ex.P16, were addressed to the previous owner and the previous leasee. The lessee / Sundaresan died on 29.12.2003, after his death, M/s.Parvathi Cashew Company was not at all functioning. No document was filed by the respondents, to prove that the Company was continuously functioning. Only asset, viz., the land and the building were transferred to the appellant. The arrears from a lessee is not attached with the factory and the liability cannot be transferred from the lessee to the appellant and the appellant is not liable under Section 93-A of the Act.

12.The respondents suppressed the employees Registration Form under Regulation 10-B of the EPF General Regulation and passed the order under Section 45A of the Act, dated 03.12.2002 The participation of the appellant in the enquiry, under Section 45-A for the period from October – 2001 to August 2002 was only to explain the situation to the first respondent. Payment of contribution on the basis of the provident fund records received from the owner will not create any liability on the appellant. The payment was made only under protest and the same was disclosed under Ex.P5 and P7.

13.The details of the death of the previous lessee-Sundaresan was not known to the appellant at the time of submitting Ex.P14, but, the appellant has explained in his letter – Ex.P5 and Ex.P7 that the premises was closed at the time of purchase, no demand was ever made by the respondent to the previous owner or the lessee.

14.The trial Court failed to note the impugned demand notice, Ex.P17, dated 07.06.2006 ws not disclosing any details. There was no transfer of any liability from the owner of the propertly to the appellant in terms of Section 93-A,. The determination of the Contribution was only made against the lessee and under Ex.P12. The order passed against a dead persson was void abinitio. The appellant is not a transfree from Sundaresan.

15.On the side of the respondents, it is stated that the previous owner has clearly narrated that they were running a Cashew Company and the appellant has purchased the building along with the company. Though notice was sent to one Sundaresan, the respondent is not accepting him as a lessee, there was no lease agreement.

16.The learned counsel for the appellant relied on the Judgment of the High Court of Kerala, in the case of ***Thomas K.C. Vs. Regional Director, E.S.I. Corporation,*** reported in ***1998-II-LLJ-984*** is cited, wherein it is stated as follows:-

> "...The above provision would clearly show that the term "principal employer" has got a different connotation than lessor of a factory.
>
> ...This would also show that whenever persons, who are employed through immediate employer the principal employer continues to be occupier of the factory. But in the case of lease the position is entirely different. The right to run the factory is transferred to the lessee who therefore gets a proprietary right in the property viz., factory. The licence to run the factory has to be taken in his name and he will be occupier for the factory. Therefore, the position is when the owner himself is running the factory he will be the principal employer. But if a lessee is running the factory

the lessee will be the occupier and therefore the principal employer. We are of the view that there cannot be two principal employers in respect of a factory at the same time, namely, the owner and the occupier, even though wording of the definition of principal employer would shoe that the principal employer can be either the owner or occupier of the factory. In the light of the above, we reject the contention taken by the learned counsel for the I respondent that in the present case the appellant has to be taken as the principal employer even when the factory was leased out and it was being run by a lessee.”

17. The learned counsel for the appellant relied on the Judgment of the High Court of Patna in a case of ***Patna Offset Press Vs. Employees' State Insurance Corporation and others*** reported in ***2005 (1) LLJ 1015*** and another judgment of this Court in Regional Director E.S.I and another Vs. Rahimaniya Saga Factory, Attur, passed in C.M.A.No.1936 of 2000, dated 17.04.2008.

18.The contention of the appellant is that the previous owners were running a Company by name M/s. Parvathi Cashew Company and one Sundaresan was running the factory for lessee and he died on 29.12.2003. Subsequently, the Company was kept closed and the appellant purchased the Company on 28.01.2005. The claim of the appellant is that he is not liable for the obligations of a lessee. On the side of the appellant, it is stated that Ex.R2 and Ex.R4 and in the evidence of R.W.1, it was accepted that Sundaresan was a lessee occupying the premises. It is further stated that the appellant may be liable for the Contribution to be paid by the previous owner but not by the lessees. It is further stated that before purchasing the property, the building was kept vacant, no Company was functioning in the premises, after the death of the lessee, till the purchase by the appellant, and that the factory was kept closed and was not functioning.

19.Under Section 93-A of the E.S.I Act, the purchaser is liable for the contribution to be paid by the previous owner. Ex.P1 reveals that the lessee / Sundaresan died on 29.12.2003. There was no evidence to show that even after the death of the said Sundaresan, the factory was functioning. Hence, it is decided that the factory was not functioning, after the death of Sundaresan.

20.The purchaser of the factory is liable 93-A of E.S.I. Act for the contributions to be paid by the previous owner. Here, the contributions due was only from the lessee and not from the previous owner. The appellant has purchased the property along with the building, but, he has not continued the business that was run by the previous owner or the lessee. The appellant purchased vacant possession of the building and the property and he started his own business in that premises. The appellant has not engaged any of the employees engaged by the previous owner or by the lessee. There was no evidence on the side of the respondent to show that the Company was kept running till the purchase by the appellant.

21.In Ex.R4, only the name of Sundaresan was recognised as the Employer and not the M/s.Parvathi Cashew Company. R.W.1 has admitted that during the inspection, Sundaresan was the previous employer. The appellant is not a transferee from Sundaresan and the appellant is not liable for any payment on behalf of Sundaresan.

22.It is seen that Ex.P4, Ex.P10, Ex.P11, Ex.P12 were addressed only to the previous owner and the lessee and were not addressed to the appellant. The submission of the appellant that the appellant is not aware of the persons employed by the lessee or the previous owner, was not taken into consideration by the Labour Commissioner. Since the premises was kept vacant and since the lessee died much before the purchase made by the appellant, the appellant was not able to produce any document regarding the number of persons employed by the previous owner or by the lessees. Ex.P5 to Ex.P9, Ex.P13, Ex.P14 were sent by the appellant to the respondents.

23.It is seen that the notice to the appellant was issued only on 06.07.2006, even in the counter, the respondent has admitted that no enquiry was conducted, after the explanation given by the appellant. When the applicability of 93-A of the E.S.I. Act was questioned by the appellant, it is the duty of the Labour Commissioner to take up the matter for enquiry. The required relevant documents were pertaining to the lessee period and the lessee was already dead and that there was no possibility for the appellant to produce those documents. Even in the counter of the respondents, it was stated that the amount was approximately fixed by the respondents. Without giving an opportunity to the appellant, without any records, an approximate amount was fixed by the respondents and without any enquiry, the impugned order was passed.

24.For the above reasons, this Civil Miscellaneous Appeal is allowed and the order of the Employees State Insurance Court, dated 02.01.2013, passed in E.S.I.O.P.No.07/2012, in confirming the demand notice of the second respondent in No.57/RRC/30214/SRO/MDU/07, dated 07.06.2007 is hereby set aside. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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To

1.The Labour Court (E.S.I Court), Tirunelveli.

Copy to:-

1.The Assistant Regional Director,
Employees State Insurance Corporation,
Sub-Regional Office,
Municipal Shopping Complex,
Sindupoonthurai, Tirunelveli.

2.The Recovery Officer,
Employees State Insurance Corporation,
Sub- Regional Office,
4th Main Road, K.K.Nagar,
Madurai – 20.

3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.M.P.SENTHIL(Azeem), Advocate (SR-23032[F] dated 19/07/2021)

+1 CC to M/s.R.RAVIKUMAR, Advocate (SR-23272[F] dated 20/07/2021)

C.M.A(MD)No.773 of 2013
19.07.2021

RD(3.08.2021) 7P 8C