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

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| **Date of Reservation** | **01.03.2021** |
| **Date of Judgment** | **14.06.2021** |

**CORAM:**

**THE HONOURABLE MRS.JUSTICE T.KRISHNAVALLI**

**C.M.A(MD)No.8 of 2013**

ESI Corporation,
Sub Regional Office,
1-B, Old Post Office Street,
Tallakulam,
Madurai-625 002. : Appellant / Respondent

Vs.

1.M/s.Chellam Oil Agencies (Firm) through
one its Partners R.Venugopal

2.P.C.Ramalingam : Respondents/Petitioners

**PRAYER:** Civil Miscellaneous Appeal has been filed under Section 82 of the ESI Act, 1948 against the order dated 15.09.,2012 o the file of the ESI Court (Labour Court), Madurai, in ESI OP No.2 of 2001.

For Appellant : Mr.P.Ganapathisamy
For Respondents : Mr.P.C.Saravanan

**JUDGMENT**

This Civil Miscellaneous Appeal is directed against the order, dated 15.09.2012 passed by the ESI Court (Labour Court), Madurai, in ESI OP No.2 of 2001.

2.The respondents herein running a small petrol bunk in a very small space for several years and complies with all labour enactments and maintains all registers required to be maintained for complying with the Labour Acts and Rules and is periodically visited by the concerned Labour Department officials and inspected by them and all the registers are checked by them. The number of employees is only 5 and only on occasions, when they are absent, temporary employee is employed for the occasion and no other temporary employee is permanently employed. While so, on 01.04.1998, two officials of the appellant Corporation visited the respondents petrol bunk and got signature of the Manager of the firm in a visit note stating that 5 persons were employed as per attendance register and 7 additional employees were found employed on physical verification. The appellant, issued a provisional coverage order, dated 27.04.1998 proposing to cover with effect from 01.04.1998. It was opposed by the respondents by sending objection, dated 27.09.1998. The appellant issued C18 notice dated 20.10.1999 assessing contribution of Rs.33,462/- from 01.04.1998 on the basis of the assumed wages of Rs.3,575/- per month, per employee for 12 employees and fixed the date on 07.12.1999 for personal hearing. The 1st respondent/petitioner appeared on 07.12.1999 for personal hearing and produced salary, attendance register and general ledger for 1998-1999 and signed and the personal hearing was adjourned to 07.01.2000. On 07.01.2000, at the request of the 1st respondent, the personal hearing was adjourned to 15.02.2000. On 15.02.2000, the 2nd respondent appeared and produced Profit and Loss Account and the personal hearing was adjourned to 28.02.2000 after getting signature. On 28.02.2000, the respondents appeared and gave a letter seeking time. However, the appellant issued the impugned order, dated 03.05.2000 covering the 1st respondent firm under ESI Act and directed the respondents to pay Rs.7,461/- from 01.04.1998 to 31.03.1999 with interest at the rate of 12% p.a and for subsequent periods. Challenging the said order, the respondents filed ESI OP No.2 of 2021 on the file of the ESI Court, Madurai. The learned ESI Court allowed the petition, by order, dated 15.09.2012, by setting the impugned order of the DD, dated 03.05.2000. Aggrieved over the same, this Civil Miscellaneous Appeal is filed by the ESI Corporation.

3.At the time admitting the Civil Miscellaneous Appeal, the following substantial questions of law were framed for consideration:-

> (1)Whether the trial court is justified in annulling the coverage under the said Act even though the coverage limitation, which is a separate cause of' action, was not challenged before the trial court and when there was no prayer, for annulling the coverage?

> (2)Whether the trial court can examine the coverage aspect while the claim under section 45A of the said Act is challenged?

> (3)Whether the trial court is justified in interfering with the coverage under the said Act even though the workers (employees), who are the material parties to be benefited under the said Act, were not listed as parties before the trial court?

(4)Whether the trial court is justified in casually interfering with the coverage and claim of the said Corporation despite the protection available in under section 114, illustration (e) of the Evidence Act?

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

**Substantial questions of law 1 to 4:-**

5.The learned counsel appearing for the appellant/respondent submitted that the coverage of the unit in the instant case was done as the employer had shown only 5 employees in the attendance register, the remaining 7 employees, whose names were not entered in the attendance register, were found on physical verification and except attendance register, no other records were produced by the unit for inspection on 01.04.1998 on the plea that they were no readily available and hence, the trial court held that the unit was coverable, as they were only five employees shown in the register is not correct and it is the bounden duty of the ESI Court to accept the view of the said Corporation to the concerned workers, thereby complying with the directive principles of State enshrined in Articles 39(e), 42 and 47 of the Constitution of India and the coverage of the unit was for the public purpose of providing social security benefits to the works of the unit and the inspection report was proved by the appellant/respondent and hence, the trial court has to reject the case of the employer and prays that the Civil Miscellaneous Appeal has to be allowed.

6.The learned counsel appearing for the respondents/petitioners argued that the Inspector of ESI Corporation has noted the names of several persons in the visit note, who are not the employees and these persons have come for filling diesel and petrol and the respondents/petitioners, approached the Inspector and stated about the correct number of employees actually working and denied the employment of temporary employees and on the side of the respondents/petitioners, explanation was given for the proposal to cover the workers under the ESI Act and the respondents/petitioners seek time for submitting their explanation, for a latter, dated 28.02.2000 sent by the appellant/respondent Corporation, but without affording an opportunity to the respondents/petitioners, the appellant/respondent passed the order under section 45A of the Act and the appellant/respondent falsely came to the conclusion that more than 20 employees were working for wages on 01.04.1998 and hence, the report of the above Inspector is not correct ad hence, the ESI Court has corrected passed the order and prays for dismissal of the Civil Miscellaneous Appeal.

7.The contention of the appellant/respondent is that on 01.04.1998, their Inspector inspected the respondents/petitioners establishment and they found that 12 employees were working for wages and he noted the names of the alleged persons in the unit note and the notice was signed by the Manger of the respondents/petitioners concern and due to it, inspection of coverage was issued to the respondents/petitioners and hence, the respondents/petitioners are liable to pay the contribution.

8.In this case, the ESI Inspector, inspected the respondents/petitioners concern on 01.04.1998 and they found 12 employees were working for wages and their names were noted in the visit note and the visit note was signed by the Manger as an acknowledgement of the facts and an intimation of coverage of their unit under ESI Act was issued to the employer and a personal hearing was given to the respondents/petitioners and the employer did not comply with the provisions of the ESI Act and notice in C.18 notice, dated 20.10.1999 was issued to the respondents/petitioners and the respondents/petitioners did not attend the hearing on 07.01.2000 and the order was passed under section 45A of the Act, dated 03.05.2000 and the order of the appellant/respondent, dated 03.05.2000 claiming contribution for the period from 1.4.1998 to 31.03.1999 and the official has been noted that nearly 20 employees were working for wages and in 45A order, number of persons has been noted wrongly as 20 persons instead of 12 and for that, directed the respondents/petitioners to pay the contributions.

9.The respondents/petitioners challenged the order of the appellant/respondent, dated 03.05.2000 passed under section 45A of the Act as illegal and the respondents/petitioners concern is a Partnership Firm registered under the Indian Partnership Act and the respondents/petitioners is a firm represented by one of its partner and the respondents/petitioners are also the partners of the respondents firm and it is not covered under the ESI Act and the 2nd respondent/2nd petitioner is a dealer for petrol and diesel of Indian Oil and the 1st respondent/1st petitioner is having office at West Veli Street, Madurai and it is stated by the respondents/petitioners that the respondents/petitioners firm has two machines with four pumps for sale of petroleum products and the respondents/petitioners has employed one manager and 4 persons, totally 5 persons and they never employed more than 5 persons for wages and ESI Act is not applicable to their firm and it is seen that on 01.04.1999, the ESI official visited the respondents/petitioners Oil Agency and prepared the visit note and got the signature from the Manager of the respondents/petitioners. It is seen that the Manager has signed in the visit note. The respondents/petitioners sent a letter, dated 27.07.1998 to the appellant/respondent, requesting them to drop the appellant/respondent's proposal for coverage under the ESI Act. The appellant/respondent issue C.18 notice, dated 30.10.1999 to the respondents/petitioners proposing to determine and recover a sum of Rs.33,462/- as contribution for the period from 1.4.98 to 31.03.99 on the assumed wages of Rs.3575/- p.m. A personal hearing was offered by the appellant/respondent on 7.12.1999. The respondents/petitioners have stated that the calculation arrived by the appellant/respondent is nor correct. The respondents/petitioners admitted that they appeared before the appellant/respondent on 7.12.1999 and explained the details. The ESI Corporation has adjourned the hearing to 7.1.2000 for production of documents. But the respondents/petitioners have not attended the hearing and so the appellant/respondent passed the order under section 45-A of the Act.

10.It is seen that the intimation was sent to the respondents/petitioners to appear on 15.02.2000. The respondents/petitioners did not attend the hearing on 15.02.2000 and they sought for adjournment. It appears that the respondents/petitioners did not appear on 28.02.2000 and the respondents/petitioners also did not produce the documents. But it is seen that the appellant/respondent passed order under section 45A of the Act determining the contribution and directed the respondents/petitioners to pay contribution. The respondents/petitioners disputing the coverage of the Act to their concern. In this case, it is to be decided that whether the respondents/petitioners engaged more than 10 persons to cover the ESI Act or not. In the counter filed by the appellant/respondent, it is stated that in the respondents/petitioners concern, they employed more than 12 persons. But in the 45A order, it was stated that in the respondents/petitioners concern, more than 20 persons were working at the time of inspection. In this case it is to be seen that whether the appellant/respondent saw during their inspection, 12 or 20 persons were working in the concern. The appellant/respondent is not certain to say that during their inspection, how many persons were working at the time of their inspection.

11.In this case, the respondents/petitioners filed attendance register before the trial court for the period from 1998-1999. Further, the respondents/petitioners filed register of wages, salary chit, Form VI register for casual leave holiday. On perusal of the above registers, only 5 employees names were marked and only 5 employed, signed. In Ex.P9 visit note, it is stated that at the time of inspection, he saw five persons employed and 7 temporary employees. But the details of the above 7 temporary workers were not stated in Ex.P9 visit note and the signatures of the above 7 temporary employees were not obtained by the Inspector in the visit note. It was also admitted by RW1, who was the Inspector of ESI Corporation. It is argued on the side of the respondents/petitioners that it is stated that number of persons employed and the particulars of the same are necessary to be mentioned in the report of the

Inspector of ESI and the Inspection report should contain the details of the employees and when the report does not contain the details of the employees, the report of the Inspector of ESI Corporation cannot be relied upon. For that, the learned counsel appearing for the respondents/petitioners submitted a ruling reported in **Vol.79 FJR 188 (Employees' State Insurance Corporation Vs. Karnataka Asbestos Cement Products).** In this case also, in Ex.P9 visit note, the details of the employees were not given. It is the duty of the Inspector of ESI Corporation to give the details of the employees in his report. But in the visit note, the Inspector of ESI Corporation, have not mentioned the details of the employees.

12.In the decision reported in ***2010 LAB.I.C.303 (Employees' State Insurance Corporation, New Delhi Vs. Om Prakash),*** it has been stated that when the ESI Corporation stated that more than required number of employees were working and the employees stated that upto five persons were working, it is the duty of the ESI Corporation to establish that more than 10 persons were working at the time of inspection by the Inspector of ESI Corporation. But in this case, the report of the Inspector was not established that at the time of inspection, there are more than 5 persons in the respondents/petitioners concern. Further, in the visit note also, the details of the employees were not given. It is the duty of the Inspector of ESI Corporation to verify the relevant records in the establishment to ascertain whether more than 10 employees for wages were employed. But the records filed on the side of the respondents/petitioners reveals that only they employed five persons in their concern. Hence, it is held that the report of the Inspector, ESI Corporation, cannot be relied upon.

13.This court finds that the trial court correctly came to the conclusion that only at the time of inspection by the Inspector of ESI Corporation, the respondents/petitioners concern is not coverage under ESI Act. Accordingly, all the substantials questions of law are answered in favour of the respondents/petitioners.

14.In fine, the Civil Miscellaneous Appeal is dismissed. No costs.

Sd/-

Assistant Registrar (T & P)

// True Copy //

/ /2021

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.

To,

1.The Judge,
The ESI Court (Labour Court),
Madurai.

2.The Record Keeper,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.P.C.SARAVANAN, Advocate ( SR-19413[F] dated 16/06/2021 )

**CMA(MD)No.8 of 2013**
**14.06.2021**

**RS (18.08.2021) 7P 4C**