



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 06.12.2021

CORAM :

THE HONOURABLE MRS.JUSTICE S.ANANTHI

C.M.A. (MD)No.982 of 2021

and

C.M.P (MD)No.9266 of 2021

K.Arumugasamy

...Appellant/Petitioner

Vs.

The Assistant Regional Director,
Employees State Insurance Corporation,
Sub Regional Office, 4th Main Road,
K.K.Nagar,
Madurai - 625 020.

...Respondent/Respondent

PRAYER: Civil Miscellaneous Appeal filed under Section 82(2) of the Employees State Insurance Act, 1948, to set aside the order, dated 02.08.2021 of the Employees State Insurance Court (Labour Court) Madurai passed in E.S.I.O.P.No.44 of 2007, allow the appeal.

For Appellant :Mr.T.Ravichandran

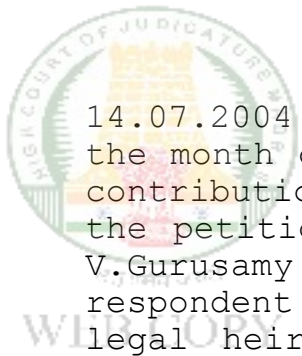
For Respondent :Mr.C.Karthick

JUDGMENT

This Civil Miscellaneous Appeal has been filed to set aside the order, dated 02.08.2021 of the Employees State Insurance Court (Labour Court) Madurai.

2.The appellant herein, as petitioner, has filed a petition under Section 75(1) of the ESI Act, 1948 to set aside the impugned order under Section 68 of ESI Act in No.57-R/13/12(A)/Sec.68/2006-DB, dated 09.04.2007 directing the petitioner to pay Rs.2,07,245/- with future interest and to grant stay order against the said order.

3. (i) It is mentioned in the petition that the petitioner was running a fire works manufacturing unit manufacturing the crackers manually without the aid of power. The Inspector of respondent ESI Corporation of Sivakasi Taluk has visited the petitioner's unit on



14.07.2004 and found that there are 20 employees being employed from the month of April 2004. The petitioner is prompt in remitting the contribution from the date of coverage i.e., from 4/2004. While so, the petitioner's unit met with an accident and one employee namely V.Gurusamy died. In view of the coverage of the ESI Act, the respondent commenced the payment of the dependent benefits to the legal heirs of the deceased by its proceedings dated 10.01.2006 which was also issued to the petitioner. The respondent continued to pay the dependent benefits to the legal heirs of the deceased.

(ii) Meanwhile, the respondent has issued an order u/s.45(A) of the ESI Act, dated 10.10.2005 claiming contribution of Rs.74,360/- for the period from 12/2002 to 3/2004. The respondent has arrived the contribution on adhoc basis taking average wage of Rs.3,575/- per month per employee for the period from 12/2002 to 3/2004. As per the inspection report, the respondent has taken a new stand as if the area is covered with effect from 1.12.2002 itself, there is collusion between some of the ESI Corporation Officials. The petitioner's factory was functioning since 1988 and more than 23 employees are being employed as early as in the year 1993 and the petitioner failed to produce muster roll and the wages register from 12/2002 to 3/2004, the documents relating to cancellation of the registration of the petitioner unit with effect from 10.03.2003 and opened only in the year 2004. More so, the respondent has determined the contribution for the closure period. Aggrieved by that, the petitioner has filed earlier ESIOP.No.79/2005 and obtained interim stay and the coverage of the ESI Act to the relevant period is in dispute.

(iii) In such situation, the respondent has issued an order under Section 68 of the ESI Act 1948 wherein he took the stand that since the factory was not registered under the ESI Act and the deceased worker is not covered under the ESI Act, the petitioner in collusion with some ESIC officials registered the factory thereafter under the Act after the occurrence of the accident and obtained the code number for the coverage of the Act with effect from 01.04.2004 and the records are created and produced and that the factory should have been covered under the ESI Act with effect from 01.12.2002. As it was a Factory, as per the Factories Act and for the intention to get the dependent benefits provided under the ESI Act in whatsoever manner and hence directed to remit the entire amount of compensation of Rs.2,07,245/- payable to the dependent of the deceased employee from the petitioner. The respondent failed to consider the fact that it is the practise of the respondent to inspect the units under the areas covered under the Act and based on the inspection report of the Inspector of the ESIC and direct for the coverage of the Act by allotting the code number and it is the routine procedure adopted by the respondent and on the other hand only when liability for payment of dependent benefit arose, in order to collect the entire dependent benefits from the petitioner, the respondent come



Act. The said order is without any basis and illegal and hence the petitioner with no other option has approached this Court for setting aside the impugned order, dated 09.04.2007 passed by the respondent under Section 68 of the ESI Act.

4. On the basis of the available rival evidence on record, the court below has allowed the petition and thereby set aside the impugned order demand made by the respondents. Against the order passed by the court below, the present civil miscellaneous appeal has been preferred at the instance of the respondents as appellants.

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

6. The learned counsel for the appellant contended that on 14.07.2004 the inspection was conducted by the ESI Corporation. Only after inspection the factory came to know that the Factory covered under ESI Act. Even as per the area notification in the year 2002, the factory has to pay contribution. Since the factory was closed from 1/2/2002 to 3/2004, it need not pay contribution.

7. The learned counsel appearing for the respondent/petitioner has contended that court below after considering all the available evidence on record and allowed the petition and therefore the order passed by the court below is perfectly correct and the same does not require any interference.

8. According to the appellant, since the factory was closed from 1/2/2002 to 3/2004, it need not pay contribution. But from 01.04.2004 the factory has to pay contribution voluntarily and regularly. The contribution was paid only after the accident occurred on 28.06.2004. When contribution was made after the accident, the corporation already paid contribution can proceed under section 68 of ESI Act and recover the benefits given to the deceased from the employer. As per judgment of this Court made in **C.M.A(MD)No.1156 of 2016** in the case of **The Deputy Director, Employees' State Insurance Company Vs. Hotel Gowri Ganga** it has been held as follows:-

'3. The appellant Corporation had filed a counter affidavit agreeing to disburse the benefit to the dependants of the deceased under the said Act. However, in paragraph 12 of the counter, it was submitted that since only a posthumous registration was done by the employer, the appellant sought liberty to proceed under Section 68 of the ESI Act, to recover the capitalized value of the benefit from the employer. But the ESI Court merely allowed the petition by impugned order dated 09.06.2015, without adverting to the implication of Section 68 of the ESI Act. Aggrieved by the same, this appeal has been filed by the Corporation.



4.This Court admitted this appeal on 09.11.2016. The substantial questions of law that had arisen for determination in this appeal is as to whether the ESI Court ought to have permitted the ESI Corporation to proceed under Section 68 of the ESI Act, against the employer for recovery of the capitalized value.

5.It is not in dispute that the employer did not register the name of the deceased employee originally. It is beyond dispute that only posthumous registration was made. When the employer had not remitted any contribution under the ESI Act, Section 68 of the Act will automatically come into play. In this case, the Corporation was satisfied that contribution ought to have been paid by the employer for the deceased Duraipandi. The dependants of the deceased Duraipandi cannot be made to suffer for the omission on the part of the employer. In order to deal with such situation, Section 68 of the Act has been incorporated. The ESI Court had remarked that it is for the ESI Corporation to decide and if law permits would be entitled to proceed against the employer.

6.I am of the view that the ESI Court ought to have given a specific finding in this regard, by enabling the Corporation to proceed under Section 68 of the ESI Act. Even while confirming the other findings rendered by the ESI Court, this Court answers the substantial questions of law framed in this appeal in favour of the appellant. Therefore, the order dated 09.06.2015, in E.S.I.P.No.61 of 2005 on the file of the ESI Court, Madurai, is modified. The ESI Corporation is permitted to proceed under Section 68 of the ESI Act, to recover the capitalized value from the employer/respondent herein.''

9. It is seen from the records that the employer had not remitted any contribution under the ESI Act. When the employer had not remitted any contribution under the ESI Act, Section 68 of the Act will automatically come into play. In this case, the Corporation was satisfied that contribution ought to have been paid by the employer for the deceased. The dependants of the deceased cannot be made to suffer for the omission on the part of the employer. In order to deal with such situation, Section 68 of the Act has been incorporated. Therefore, the well considered order of the Court below needs no interference by this Court.

10.In fine, this civil miscellaneous appeal is dismissed. The <https://hcservicescourts.gov.in/hcservices/> entered order passed in E.S.I.O.P.No.44 of 2007 by the Employees



State Insurance Court (Labour Court), Madurai, is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

WEB COPY

/ /2022

Sub Assistant Registrar(CS)

vsd

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

The Judge,
Employees State Insurance Court (Labour Court),
Madurai.

C.M.A. (MD)No.982 of 2021
and
C.M.P (MD)No.9266 of 2021
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