BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reservation	01.03.2021
Date of Judgment	09.06.2021

CORAM

THE HONOURABLE MRS.JUSTICE T.KRISHNAVALLI

C.M.A(MD)No.1315 of 2015
and
MP(MD)Nos.1 and 2 of 2015

Ravi Fish Nets,
Gurukulam Road,
Thammathu Konam,
Erumbukadu Post,
Kanyakumari,
Rep. by its Proprietor : Appellant/Petitioner

Vs.

1.E.S.I Corporation,
Assistant Regional Office,
Tirunelveli-3.
Rep. by its Joint Regional Director

2.Recovery Officer,
Assistant Regional Office,
E.S.I Corporation,
Tirunelveli-3.

3.L.A.S.Pandian : Respondent/Respondents

PRAYER:- Civil Miscellaneous Appeal has been filed under Section 82 of the Employees' State Insurance Act, 1948 against the order, dated 21.09.2015 made in E.S.I.O.P No.26 of 2014 on the file of the Employees State Insurance Court (Labour Court), Tirunelveli.

For Appellant : Mr.M.E.Ilango
For R1 and R2 : Mr.I.Pinaygash

For 3rd Respondent : Mr.G.Venugopal

J U D G M E N T

This Civil Miscellaneous Appeal is directed against the order, dated 21.09.2015 made in E.S.I.O.P No.26 of 2014 on the file of the Employees State Insurance Court (Labour Court), Tirunelveli.

2.The petitioner is a proprietary concern and is engaged in the manufacture of fishnet. The petitioner purchased 20 cents of land and building constructed thereon from the 3rd respondent, by virtue of a registered sale deed, dated 15.11.2011. While so, on 30.01.2012, the 1st respondent ESI Corporation sent a letter to the petitioner stating that the said establishment was covered by ESI Act from 01.07.2012 onwards and allotted Code No.666305100010106 and directed the petitioner to comply with the provisions of the Employees State Insurance Act 1948 (hereafter referred to as ESI Act). Thereafter, the 1st respondent ESI Corporation directed the petitioner to pay a sum of Rs.2,62,584/- for the period from January 2008 to November 2011 and Rs.41,828/- from December 2011 to May 2012. Subsequently, the 2nd respondent, who is the Recover Officer of the 1st respondent also sent notice to the Indian Overseas Bank, in which the petitioner had an account, requesting the Bank to transfer Rs.4,25,687/- to the 1st respondent account. The petitioner filed a petition in ESIOP No.26 of 2014 on the file of the Labour Court, Tirunelveli, alleging that he never engaged 13 persons at any point of time and no separate code under the ESI Act was allotted to his establishment and 1st respondent ESI Corporation had fixed wages only on adhoc basis and not an actual basis. It was further alleged in the petition that he had purchased only the land and building from the 3rd respondent on 15.11.2011 and as such, he was not responsible to pay any amount that was due from the Pandiyan Fish Net before 15.11.2011. The Labour Court, by order, dated 21.09.2015 directed the petitioner to pay Rs.42,828/- and further directed the petitioner and the 3rd respondent to pay Rs.2,62,584/- jointly. Aggrieved by the said order, the petitioner is before this court with this Civil Miscellaneous Appeal.

3.Heard the learned counsel appearing on either side and perused the materials available on record.

4.The learned counsel appearing for the appellant/petitioner submitted that section 93A of the ESI Act could be invoked only when an establishment is transferred either by way of lease, sale or in any other manner and in the instant case, neither the factory nor the establishment has been transferred to the appellant/petitioner and hence, the appellant/petitioner could not be made jointly and severally liable for the default committed by the 3rd respondent from whom the appellant/petitioner has purchased the land and building only and no machinery has been purchased and even though, a direction has been issued to the 1st respondent by the Labour Court, that firstly proceedings for recovery should be initiated only against the default committed by the 3rd respondent and thereafter, if it could not be recovered in full, then only the 1st respondent could proceed against the employer, still the appellant would be made to suffer for non fault on his part and the impugned order has not served on the appellant/petitioner, but it was served on the 3rd respondent and the orders have been passed in violation to the principles of natural justice, without affording any reasonable opportunity to the appellant/petitioner and prays that the Civil Miscellaneous Appeal has to be allowed.

5.On the other hand, the learned counsel appearing for respondents 1 and 2 argued that the 1st respondent ESI Corporation already issued a show cause notice to the 3rd respondent regarding payment of ESI Contribution for the period ended upto 3/11, but the 3rd respondent, after receipt of the notice did not appear for personal hearing and thereafter, only the 1st respondent ESI Corporation issued notice under section 45A of the ESI Act and then, the 1st respondent again sent a show cause notice to the 3rd respondent and it was received by the 3rd respondent and final chance of personal hearing was also given to the 3rd respondent, but he did not appear for final personal hearing of the final chance and notice was issued under section 45A of the ESI Act for payment of contribution for the period from 12/11 to 5/12 and hence, reasonable opportunity was given to the 3rd respondent as well as to the appellant/petitioner and therefore, no question arose that the impugned order passed without providing opportunity and the transferee establishment is also squarely cover and liable for paying ESI contribution in the light of Section 93 of the ESI Act and hence, finally to meet the principles of natural justice, the ESI Corporation had passed the order under section 45A of the ESI Act and prays that the Civil Miscellaneous Appeal has to be dismissed. 6.In respect of applicability of Section 93A of the ESI Act, the learned counsel appearing for the respondents 1 and 2 submitted the following rulings:-

(1)2009(4)LLN 880 (Ker.) (ESIC Vs. Mohanachandran Nair):

(2)2010-IV-LLJ-480 (Mad.) (Protchem Industries India Ltd., Vs. RPF Commissioner);

(3)2018(3) LLN 450 (Ker.) (Komalapuram Spinning and Weaving Mills Vs. APFC, Office of EPFO; and

(4)Unreported judgment of this court, dated 29.11.2017 made in CMA(MD)No.793 of 2017 (ICD's represented by its partner I.C.M. Jahira Begum Vs. The Deputy Director, Sub Regional Office, Employees' State Insurance Corporation, Madurai.

7.The main contention raised on the side of the appellant/petitioner is that he only purchased the building and not the machinery and hence, he is not liable to pay the ESI contribution. Per contra, it is contention of the 1st respondent/ESI Corporation that as per Section 93(A) of the ESI Act, the transferee establishment also squarely cover and liable for paying ESI contribution.

8.At this juncture, it is necessary to refer Section 93(A) of the ESI Act, which would run thus:-

"***93-A.Liability in case of transfer of establishment.****-Where an employer, in relation to a factory or establishment, transfers that factory or establishment in whole or in part, by sale, gift, lease or licence or ln any other manner whatsoever, the employer and the person to whom the factor or establishment is so transferred shall jointly and severally be liable to pay the amount due in respect of any contribution or any other amount payable under this Act in respect of the periods up to the date of such transfer."*

9.In this case, the appellant/petitioner purchased the property of the 3rd respondent establishment. Further, the 3rd respondent has not taken steps to contest to the effect that ESI contribution deducted by the respondents 1 and 2 is not correct.

10.On careful perusal of the impugned order, it reveals that already sufficient opportunity was given to the 3rd Respondent. But the 3rd respondent has not taken any steps to oppose it. But as per section 93(A) of the ESI Act, the purchaser of the property of the 3rd respondent establishment namely the appellant/petitioner is jointly and severally liable to pay the ESI contribution along with the previous owner.

11.It is admitted fact that the appellant/petitioner purchased the property of the 3rd respondent establishment. Hence, the argument put forth on the side of the appellant/petitioner stating that no reasonable opportunity was given is not at all acceptable. The 3rd respondent has not informed to the respondents 1 and 2 that he sold the establishment to the appellant/petitioner. No document was filed on the side of the appellant/petitioner to show that he has not purchased the machineries.

12.It is to be seen that already the respondents 1 and 2/ESI Corporation sent coverage notice to the appellant/petitioner. But the appellant/petitioner has not taken any steps to give explanation. From Ex.P1, it reveals that the respondents 1 and 2 only gave reasonable opportunity to the petitioner regarding the payment of ESI contribution in respect of the 3rd respondent establishment. Hence, as per Section 93(A) of the ESI Act, the appellant/petitioner is also jointly and severally liable to pay the ESI contribution. The trial court correctly came to the conclusion that as per Section 93(A) of the ESI Act, the appellant/petitioner is also jointly and severally liable to pay the contribution. Hence, it is not necessary to interfere with the findings given by the trial court.

13.In fine, this Civil Miscellaneous Appeal fails and the same is dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS I)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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<u>Note :</u>

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 Employees State Insurance Court,
(Labour Court), Tirunelveli.

2.The Record Keeper,
VR Section,
Madurai Bench of Madras High Court,Madurai.(2c)

<u>C.M.A(MD)No.1315 of 2015</u>
09.06.2021

KK(23.06.2021) 5P 4C