BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 13.12.2021

CORAM:

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

W.P(MD)No.21218 of 2021 and
WMP(MD) No.17800 of 2021

M.Saravanakumar ...Petitioner

vs.

The Recovery Officer,
Office of the Recovery Officer,
Employees State Insurance Corporation,
Sub Regional Office (Madurai),
Second West Street,
K.K.Nagar,
Madurai 625 020. ...Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari, calling for the records relating tot he impugned recovery order of the respondent in Ref.No.57/RRC/00/047411/000/0101/SRO/MDU, dated 07.10.2021 for a sum of Rs.5,03,862/- for the period from October 2010 to March 2012; and impugned recovery order Ref.No.57/ RRC/ 00/ 047411/ 000/ 0101/ SRO/ MDU, dated 07.10.2021, for a sum of Rs.40,53,218/-, for the period from June 2005 to September 2009 and quash the same insofar as the petitioner is concerned.

For Petitioner : Mr.K.Muthu Ganesa Pandian
For Respondent : Mr.C.Karthick

O R D E R

This writ petition is filed as against the orders of recovery issued by the respondents in reference Ref.No.57/RRC/00/047411/000/0101/SRO/MDU, dated 07.10.2021, for a sum of Rs.5,03,862/- for the period from October 2010 to March 2012; and impugned recovery order Ref.No.57/ RRC/ 00/ 047411/ 000/ 0101/ SRO/ MDU, dated 07.10.2021, for a sum of Rs.40,53,218/-, for the period from June 2005 to September 2009.

2.According to the petitioner, the orders impugned in this writ petition are the liability of the petitioner's vendor and the petitioner purchased M/s.Thomas Spinning Mills India Pvt Ltd only in the year 2014. The order impugned is also by way of attachment, even without providing any opportunity to this petitioner.

3.The learned counsel for the petitioner relied on Section 45 (A) of ESI Act,which reads as follows:-

> "45A.Determination of contributions in certain cases. (1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 or any (Social Security officer) or other official of the Corporation referred to in sub-section (2) of section 45 is [prevented in any manner] by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under section 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment.
>
> [Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard:]
>
> [Provided further that no such order shall be passed by the Corporation in respect of the period beyond five years from the date on which the contribution shall become payable.]

4.The learned counsel also relied upon the judgment of this Court in batch of writ petitions in W.P.Nos.3590 of 2021 etc., dated 16.02.2021, wherein, this Court in similar circumstances, by referring to the orders of the Honourable Apex Court, in ***Hafeez Motor Transport Vs.Deputy Regional Director, reported in 2000 SCC Online Mad 1123,*** has set aside the order, on the ground of violation of principles of natural justice and remitted the matter back to the authority, with a direction to provide an opportunity of personal hearing to the petitioner and decide the matter afresh, within a period of six weeks from the date of receipt of a copy of that order.

5.The learned counsel also relied upon the judgment of this Court in W.P. No.18776 of 2004, wherein, in similar such circumstances, the matter was remitted back to the authority for fresh consideration.

6.Mr.C.Karthick, learned counsel appearing for the respondents takes notice and submits that vendor of this petitioner was already issued with notice under Section 45(A) of ESI Act and he has also challenged the same before the ESI Court, in ESI Case No.58 of 2010 and the same was dismissed for default on 02.08.2018 and order under Section 45(A) of ESI Act was passed on 29.06.2010 itself. More over, notice under Section 45(A) of ESI Act, has already been issued to the subsequent purchaser for the subsequent period and therefore, there is no error in the impugned orders of recovery.

7.The learned counsel also relied on the judgment of this Court in W.P.(MD) No.11208 of 2005, wherein, this Court has held as follows:-

> *13.Subsequently, the respondents ESI Corporation had filed a counter affidavit dated 29.01.2010. It was stated that under Section 93 of the ESI Act, any transfer made, the transferee is jointly and severally liable to pay the amount due to the corporation. The contentions raised in these writ petition are no longer res integra.*
>
> *14.The Supreme Court very recently while analysing the scope of the EPF vide its decision in Maharashtra State Co-operative Bank Ltd. v. Assistant Provident Fund Commissioner and others reported in (2009) 10 SCC 123 has held in paragraphs 66 to 69 which is as follows:-*
>
>> *"66. Section 11 gives statutory priority to the amount due from the employer vis-`-vis all other debts. Clause (a) of sub-section (1) of Section 11 is applicable to cases where an employer is adjudicated insolvent or, being a company, an order of its winding up is made. In that situation, the amount due from the employer in relation to an establishment to which any scheme or the Insurance Scheme applies in respect of any contribution payable to the Fund or, as the case may be, the Insurance Fund, damages recoverable under Section 14-B, accumulations required to be transferred under Section 15(2) or any other charges payable by him under any other provision of this Act or of any provision of the Scheme or the Insurance Scheme. Clause (b) is applicable to cases where the amount is due from the employer in relation to exempted establishment in respect of any contribution to the provident fund or any insurance fund insofar it relates to exempted employees under the rules of provident fund or any insurance fund, any contribution payable by him towards*

the Pension Fund under Section 17(6), damages recoverable under Section 14-B or any charges payable by him to the appropriate Government under the Act or under any of the conditions specified in Section 17. This sub-section then lays down that such amount shall be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of the company being wound up. Sub-section (2) lays down that any amount due from the employer whether in respect of the employees# contribution deducted from the wages of the employee or the employer#s contribution shall be deemed to be the first charge on the assets of the establishment, and shall be paid in priority to all other debts.

67. The expression #any amount due from an employer# appearing in sub-section (2) of Section 11 has to be interpreted keeping in view the object of the Act and other provisions contained therein including sub-section (1) of Section 11 and Sections 7-A, 7-Q, 14-B and 15(2) which provide for determination of the dues payable by the employer, liability of the employer to pay interest in case the payment of the amount due is delayed and also pay damages, if there is default in making contribution to the Fund. If any amount payable by the employer becomes due and the same is not paid within the stipulated time, then the employer is required to pay interest in terms of the mandate of Section 7-Q. Likewise, default on the employer#s part to pay any contribution to the Fund can visit him with the consequence of levy of damages.

68. As mentioned earlier, sub-section (2) was inserted in Section 11 by Amendment Act 40 of 1973 with a view to ensure that payment of provident fund dues of the workers are not defeated by the prior claims of the secured and/or of the unsecured creditors. While enacting sub-section (2), the legislature was conscious of the fact that in terms of existing Section 11 priority has been given to the amount due from an employer in relation to an establishment to which any scheme or fund is applicable including damages recoverable under Section 14-B and accumulations required to be transferred under Section 15(2). The *legislature was also aware that in case of delay the employer is statutorily responsible to pay interest in terms of Section 17. Therefore, there is no plausible reason to give a restricted meaning to the expression #any amount due from the employer# and confine it to the amount determined under Section 7-A or the contribution payable under Section 8.*

69. If interest payable by the employer under Section 7-Q and damages leviable under Section 14 (sic Section 14-B) are excluded from the ambit of expression #any amount due from an employer#, every employer will conveniently refrain from paying contribution to the Fund and other dues and resist the efforts of the authorities concerned to recover the dues as arrears of land revenue by contending that the movable or immovable property of the establishment is subject to other debts. Any such interpretation would frustrate the object of introducing the deeming provision and non obstante clause in Section 11(2). Therefore, it is not possible to agree with the learned Senior Counsel for the appellant Bank that the amount of interest payable under Section 7-Q and damages leviable under Section 14-B do not form part of the amount due from an employer for the purpose of Section 11(2) of the Act."

15.Therefore, this Court is not inclined to entertain the writ petitions solely on the ground that one petitioner is a purchaser under the SARFAESI Act and therefore, they are not liable to pay any amount either to the PF or ESI Corporation. Further, the contention that SARFAESI Act is a special law and therefore, it overrides the other prior enactment cannot be countenanced in the light of the judgment of the Supreme Court referred to above.

16.The writ petition in W.P.No.11208 of 2005 will stand dismissed as it is only a notice under Section 7A of the EPF Act. If at all the writ petitioner company was aggrieved by that order, they should have moved the Appellate Tribunal constituted under Section 7I of the EPF Act.

17.Similarly in W.P.No.19413 of 2009, the petitioner if at all aggrieved, he has to raise a dispute before the ESI Court under Section 75 and not rush to this Court on an intimation of taking possession of the property which was *already under attachment. Hence, W.P.No.19413 of 2009 stands dismissed."*

8.This Court paid its anxious consideration to the rival submissions made and also perused the materials placed on record.

9.The orders impugned in this writ petition are the notices issued under Section 45(A) of ESI Act and consequent orders of recovery. As against the two notices, this writ petition is filed. Admittedly, this petitioner is the subsequent purchaser of M/s. Thomas Spinning Mills India Pvt Ltd, Dindigul. The erstwhile owner has already contested the notice before the concerned ESI Court, in ESI Case No.58 of 2010 and the same was dismissed for default on 02.08.2018. Admittedly, it was not decided on merits. Under such circumstances, in order to provide one more opportunity to this petitioner, this Court set aside the impugned orders and remits the matter back to the respondent to provide an opportunity to the petitioner and to take further course of action, in accordance with law, within a period of eight weeks from the date of receipt of a copy of this order. The petitioner shall also work out the possibility, if any, to restore the ESI Case No.58 of 2010, which was already dismissed for default.

10.With the above said directions, the Writ Petition is disposed of. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (T&P)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

vrn

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 Recovery Officer,
Office of the Recovery Officer,
Employees State Insurance Corporation,
Sub Regional Office (Madurai),
Second West Street,
K.K.Nagar,
Madurai 625 020.

+1 CC to M/s.K.MUTHU GANESA PANDIAN, Advocate (SR-38548[F] dated 14/12/2021)

ORDER MADE IN
W.P(MD)No.21218 of 2021 and
WMP(MD) No.17800 of 2021
13.12.2021

NSN(CO)
GC(24.02.2022) 7P 3C