



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.04.2022

PRONOUNCED ON: 12.05.2022

CORAM

THE HONOURABLE MS. JUSTICE P.T.ASHA

C.MA.NOS.833 & 843 OF 2022

AND

C.M.P.NOS.5956 & 6108 OF 2022

M/s.Sales Service Company
186, Thambu Chetty Street
Chennai-600001.
Rep. by Rajesh Malhotra
Managing Partner

...Appellant/Petitioner
[Common in both the CMAs]

Vs.

The Deputy Director
The Employees' State Insurance Corporation,
Regional Office (Tamil Nadu)
143, Sterling Road
Chennai-600034.

...Respondent/Respondent
[Common in both the CMAs]

PRAYER in CMA.No.833 of 2022:

Appeal is filed under Section 82 of the Employees' State Insurance Act, to set aside order and decree of Employees State Insurance Court (Principal Labour, Court, Chennai) in EIOP.No.59 of 2015 dated 10.12.2021.

PRAYER in CMA.No.843 of 2022:

Appeal is filed under Section 82(2) of the Employees' State Insurance Act, to allow the appeal and set aside order and decree of Employees State Insurance Court (Principal Labour Court, Chennai) in EIOP No.26 of 2005 dated 23.11.2021.



WEB COPY

For Appellant : Mr.Anand Gopalan
for M/s T.S.Gopalan & Co.

For Respondent : Mr.S.P.Srinivasan
[Standing Counsel]

COMMON JUDGMENT

Aggrieved by the dismissal of their petitions in EIOP Nos.59 of 2015 and 26 of 2015 by the Employees Insurance Court (Principal Labour Court) Chennai, the appellant is before this Court by filing CMA Nos.833 of 2022 and 843 of 2022. The brief facts are as follows:

2. Facts of the case:

i). The facts are common for both the appeals excepts that there are two orders which are challenged in the above two appeals. The appellant is an establishment which according to them did not engage more than 20 workmen at a given point of time who would qualify to be covered under the provisions of the Employees State Insurance Act, hereinafter, for the sake of brevity referred to as the ESI Act.. While so, on 17.03.2004 drawing strength from a Government order extending the provisions of the ESI Act to Establishments, the respondent/Corporation had issued a coverage notice treating the petitioner as provisionally covered under the ESI Act. The appellant has responded by contending that the establishment has never employed more than 20 coverable employees on their premises. The appellant, to prove the above had provided the attendance register, salary register etc., for the scrutiny of the respondent.

ii). The appellant had engaged the services of M/s. Skilled Security Services for providing security to their premises. The said security service was an independent establishment under the cover of the ESI Act. The said Skilled Security Services has deployed four of their workmen as a security guards in the appellant premises. The Insurance Inspector had inspected the premises of the appellant and he had treated these four security guards as employees of the Appellant/ Establishment and held that the provisions of the ESI Act would apply to the Appellant/Establishment.

iii). Thereafter, a C-18 notice dated 16.08.2004 was issued on the basis of assumed wages for 22 employees at the rate of



Rs.3,557/- per month. The appellant had submitted their objections vide letter dated 17.01.2005. They had contended that their employees were always less than 20 in number and these security guards cannot be treated as their employees for the purpose of coverage under the Act. However, the respondent proceeded to pass orders under Section 45(A) of the ESI Act, rejecting the contentions of the appellant. The appellant was therefore, constrained to file EIOP No.26 of 2005 before the Employees State Insurance Court (Principal Labour Court) Chennai. By an order dated 23.11.2021 the ESI Court had dismissed the said petition. Aggrieved by which the appellant establishment is before this Court in C.M.A.No.843 of 2022. While the proceedings in EIOP No.26 of 2005 was pending a C-18 notice was issued once again on the basis that the appellant/establishment had on its rolls 22 coverable employees and contribution was calculated at the rate of Rs.8,250/- per month. The representatives of the employer namely, the appellant herein attended the hearing and brought to the notice of the Authority that the total number of coverable employees was less than 20.

iv). Despite receiving the said explanation the authority proceeded to pass an order under Section 45(A) of the ESI Act, rejecting the contentions of the appellant that the four security officers cannot be treated as the employees of the Appellant. Challenging the said order the appellant had filed the petition before the Employees State Insurance Court (Principal Labour Court, Chennai) in EIOP No.59 of 2015. However, by order dated 10.12.2021 the ESI, Court rejected the contention put forward by the appellant and dismissed the petition. Aggrieved over which the appellant is before this Court by filing CMA.No.833 of 2022.

v). The primary ground of challenge in the above appeals to the impugned demand is that the authority has committed an error in counting the four Security Guards as employees of the appellant. These four employees are assessed under the ESI Act in their establishment namely, M/s. Skilled Security Services. The contention of the appellant is that they have only 18 coverable employees and therefore the provisions of the ESI Act would not be attracted. The appellant would also state that the judgment reported in (2010) 11 SCC page 553 - Saraswath Films Vs. Regional Director, Employees State Insurance Corporation, Trichur which was relied upon by the Respondent/Corporation would not apply to the facts of the present case, since the question as to whether the contract workmen who are already covered under the scheme under their immediate employer would still be reckoned for the purpose of coverage of principal



employer was not the matter in issue in the said case.

3. From a perusal of the two appeals the following substantial questions of law which arise for the consideration of the Court were framed:

i) Whether the four security guards could be treated as employees as defined under Section 2(9)(iii) of the ESI Act, in order to appreciate the establishment within the coverage of the ESI Act.

ii) Whether the four security guards whose contributions to the ESI is already been done through their immediate employer namely, skill security services. They could be treated as employees of the appellant for the sake of contribution.

4. Submissions:

i). Mr. Anand Gopalan appearing on behalf of the appellant in both the appeals would submit that Section 38 of the ESI Act proposes that all the employees who are coverable in a factory/establishment should be insured in the manner provided by the ESI Act. Section 39 talks about all the contributions payable under the ESI Act.

ii). He would draw the Court's attention to the judgments of this Court reported in 2011 SCC Online Mad 1350 - The Madurai District Central Cooperative bank Ltd, Vs. Employees' Provident Fund Organisation and Another, where the Court has observed that the employees of a contractor by no stretch of imagination can be treated as employees of the principal employer. However, the Court held that the liabilities of an unregistered contractor falls on a petitioner therein who was the principal employer. The issue in the said writ petition related to the payments of contributions.

iii). He would also rely upon the judgment reported in 2015 SCC Online Mad 2944 - M/s.Brakes India Ltd. Vs. The Employees Provident Fund Organisation. The arguments advanced therein, on the side of the principal employer was that the contractor has been allotted a separate PF code and therefore, the principal employer would not be liable to pay the contribution. The



learned Judge relying upon the judgment in The Madurai District Central Cooperative bank Ltd cited supra held that applying the ratio of this Judgment the contractor had to be treated as an independent employer and therefore, the recovery proceedings initiated against the petitioner company therein was not maintainable. The learned counsel would submit that the very same analogy has to be applied to the case on hand and the four security guards should therefore, be held to be the employees of the Security Service and cannot be considered for coverage of the ESI Act to the appellant/establishment.

iv). Per contra, Mr.S.P.Srinivasan appearing on behalf of the corporation would contend that the security guards were taken into consideration for the sake of bringing the appellant/establishment within the ambit of the ESI Act and not for collecting contributions. He would argue that the very object of the Act is to ensure coverage for all the workmen who are coverable and therefore, this intent is sought to be achieved by considering the definition of the word employee as provided under Section 2(9) of the ESI Act. He would rely upon the judgment of the Hon'ble Supreme Court reported in (1998) 8 SCC page 111 - Employees' State Insurance Corporation Vs. M M.Suri & Associates (P) Ltd., wherein the Hon'ble Supreme Court relying upon an earlier judgment reported in ESI Corporation Vs. Apex Engineering Pvt. Ltd. reported in 1997 (77) F.L.R. 878 = (1998) 1 SCC 86 had extracted the characteristics laid down to consider a person to be an employee qua the service condition. The Hon'ble Supreme Court had set out six conditions/characteristics. Mr.S.P.Srinivasan would rely upon characteristic no.4 therein to contend that the four security guards have to definitely be treated only as employees of the appellant/establishment. He would also rely upon the judgment reported in (2010) 11 SCC page 553 - Saraswath Films Vs. Regional Director, Employees' State Insurance Corporation, Trichur. In the above case before the Hon'ble Supreme Court, the issue was whether the two security guards working in the premises could be considered as the employee of the Principal employer therein. The Hon'ble Supreme court after referring to the Act and the earlier judgments in this regard had held that the work of the security guards was directly and intrinsically a part of the work of the establishment and therefore, they had to be considered as the employees of the Principal employer therein. He would submit that the ratio laid down in the above judgment would squarely apply to the facts on hand and therefore, the order passed by the learned Principal Labour Court, Chennai does not require to be set aside.

v). Heard the learned counsel on either side.



WEB COPY

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere ; or

(ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment ; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service ;

[and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment ; [or any person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), [and includes such person engaged as apprentice whose training period is extended to any length of time] but does not include] -]

(a) any member of 3 [the Indian] naval, military or air forces ; or

[(b) any person so employed whose wages (excluding remuneration for overtime work) exceed 5 [such wages as may be prescribed by the Central Government] :

Provided that an employee whose wages (excluding remuneration for overtime work) exceed [such wages as may be prescribed by the Central Government] at any time after (and not before) the beginning of



iii). If the Section is analysed the following categories of employees are sought to be covered by the Act:-

- iv). Therefore, from the facts that have been culled out the four security guards will come within the 3rd category. The issue for consideration is whether the four security guards can be counted as employees of the appellant/establishment for the purpose of extending the coverage of the Act and whether the appellant/establishment can be asked to pay contribution for the four security guards along with the employees of the appellant/establishment by extending the coverage of the Act although they are already covered by the ESI Act as employees of M/s. Skilled Security Services.

v). The Hon'ble Supreme Court in the Judgment reported in Saraswath Films Vs. Regional Director, Employees' State Insurance Corporation, Trichur - (2010) 11 SCC 553, which arose with reference to the dispute as to whether the two security guards could be considered as employees of the appellant had answered in favour of the respondent/corporation. The Hon'ble Supreme Court had extracted the core question for consideration in para nos.4 and 5 of the judgment as follows:

"4. The core question that arises for consideration is whether the establishment of the appellant comes within the purview of the Act. The answer to the question in the context of the case of the parties, depends on determination of the question whether the security guards are employees within the meaning of Section 2(9) of the Act. Section 2(9) of the Act reads as follows:

"2.(9). " employee " means any person employed



for wages in or in connection with the work of a factory or establishment to which this Act applies and –

WEB COPY

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere ; or

(ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment ; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service ;

"5. In this connection the definitions of the expressions "immediate employer" under Section 2 (13) and "principal employer" under Section 2 (17) are also relevant. They are quoted below:

"2.(13). " immediate employer " in relation to employees employed by or through him, means a person who has undertaken the execution on the premises of a factory or an establishment to which this Act applies or under the supervision of the principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily



lent or let on hire to the principal employer and includes a contractor.

(15) 'occupier' of the factory shall have the meaning assigned to it in the Factories Act, 1948 (63 of 1948)

(17) " principal employer " means –

(i) in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under the Factories Act, 1948 (63 of 1948), the person so named ;

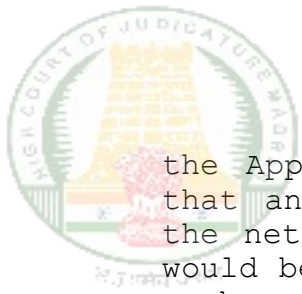
(ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the head of the department ;

(iii) in any other establishment, any person responsible for the supervision and control of the establishment ;

vi). The learned Judges thereafter went on to hold that the provisions in Section 2(9) is wide and of a comprehensive nature where persons who are lent temporarily are also considered to be an employee of the establishment particularly when the work carried out is incidental to the process of the establishment. The learned Judges ultimately held that the security guards would come within the purview of the expression employee of the establishment as defined under Section 2(9) of the ESI Act.

6. Conclusion

i) Bearing in mind the object of the Act and the ratio laid down in the judgments supra it naturally follows that the four security guards have to be treated as the employees of the Appellant/Establishment. Once they are so treated, the number of coverable employees of the appellant/establishment would stand increased from 18 to 22 thereby making the ESI Act applicable to



the Appellant/Establishment. We cannot loose sight of the fact that an unscrupulous employer who wants to avoid coming within the net of the ESI Act would take on their rolls employees who would be coverable under the ESI Act just short of the mandatory number. They would then engage the services of an contractor to do the other works that are intrinsically related to the main/core work of the establishment. By doing so the employees who fall within the cover of the ESI Act of such establishments are deprived of the benefit. It is to overcome such devious methods that Section 2(a) (iii) defines an employee to include contract workmen. Therefore, considering the fact that the four security guards fall within the definition of the word 'employee' they have to be treated as the employees of the Appellant/Establishment. Consequently, the 1st question of law has to be answered in favour of the respondent.

ii) The next question that falls for consideration is whether the Appellant/establishment is duty bound to pay the contribution of these contract workmen particularly when their immediate employer is already covered under the Act and is paying the contribution. The counsel for the appellant had produced a circular of the Employees State Insurance bearing No.P-12-(11)-11/83/05-Rev.II dated October, 2007. This circular has been issued pursuant to the representations received from different Associations of Employees, Expert Bodies of Employees and Individual Employees from various regions expressing the difficulties faced by them in covering the employees engaged by them through immediate employers/contractors on jobs outsourced. The respondent/corporation taking into consideration the judgments of the High Court of Madras, Madhya Pradesh and Karnataka had deputed personnel to undertake a field study and after perusing the data collected by them had issued guidelines to handle different categories of cases. The 1st of such category is the one that is relevant to the case on hand which reads as follows:

"2(A). The Jobwork done inside the factory/establishment premises through Contractors/immediate Employers having independent Code Nos:

Under this category, the contribution is not to be claimed from the Principal Employer in respect of the employees of the Job Contractors/Immediate Employers who are independently covered. In this category the supervision is implied. However, at the time of inspection, the Insurance Inspector



WEB COPY

should verify the records of the Principal Employer in respect of Contractors/Immediate Employers required to be maintained by the Principal Employers, according to the provisions of Section 41(1A) and Regulation 32 (1) (a). The Revenue Branch Officers should keep this aspect in view while passing 45-A order."

This clearly provides that where an employee of an Immediate Employer is independently covered, contribution cannot be claimed from the Principal Employer.

iii) Therefore, taking into consideration the above circular it is clear that the appellant cannot be called upon to pay the contribution for the four security guards who are already covered under their immediate employer M/s. Skilled Security Services. The finding of the Principal Labour Court, Chennai is therefore erroneous in this regard.

iv) Therefore, on a conspectus of the above discussion it is held that:-

a) The four security guards shall be treated as employees of the appellant/corporation for the purpose of bringing the appellant/establishment under the cover of the ESI Act.

b) The appellant/establishment cannot be made to pay the contribution for the four security guards who are already assessed under their immediate employer M/s. Skilled Security Services. Therefore, the Substantial Question of Law No.1 is answered against the appellant and the Substantial Question of Law No.2 is answered in favour of the appellant.

v) The above Civil Miscellaneous Appeals therefore stands partly allowed. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar(CS III)

//True Copy//

shr

Sub Assistant Registrar



To

1. Employees State Insurance Court
(Principal Labour, Court) Chennai.

2. The Deputy Director
The Employees's State Insurance Corporation,
Regional Office (Tamil Nadu)
143, Sterling Road
Chennai-600034.

+2ccs to M/s T.S.Gopalan & Co., Advocate, S.R.No.31384, 31383
+2ccs to Mr.S.P.Srinivasan, Advocate, S.R.No.31372, 31373

C.MA.Nos.833 & 843 of 2022
and
C.M.P.Nos.5956 & 6108 of 2022

RR(CO)
PM/14/06/2022