IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :	**26.04.2023**
PRONOUNCED ON :	**01.06.2023**

CORAM :

THE HONOURABLE MRS. JUSTICE J.NISHA BANU

W.P.No.18820 of 2013 and M.P.No.2 of 2013

Food Corporation of India,
Zonal Office,
2, Haddows Road, Chennai 6
Rep. By its Executive Director (South) ... Petitioner

Vs.

1. The Regional Director,
   ESI Corporation,
   Regional Office, 143 Sterling Road,
   Chennai 34

2. The Recovery Officer,
   ESI Corporation,
   143, Sterling Road,
   Chennai 34

3. The Branch Manager,
   State Bank of India,
   Meenambakkam Branch, Chennai

4. The North Coimbatore Food Corporation
   of India Workers, Labour Contract Co-operative
   Society Ltd, rep. By its Special Officer,
   Tatabad, Coimbatore 12 … Respondents

PRAYER: Writ Petition filed under Article 226 of Constitution of India, praying for issuance of Writ of Certiorarified Mandamus, to call for the records relating to the second respondent vide proceedings No.56/63523/RRC/13 dated 12.02.2013 and quash the same and also for forbearing the respondents from recovering the dues pursuant to the proceedings No.TN/RECY/CP-3/51-6323/CCR-17547 dated 03.07.2013.

For Petitioner	:	Mr.S.Vijayakumar, Senior Counsel for Mr.Syed Jaffer Ahmed
For RR 1 & 2	:	Mr.C.V.Ramachandramurthy
For RR 3 & 4	:	No Appearance

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ORDER

This writ petition is filed by the petitioner-Food Corporation of India, (a) challenging the proceedings of the 2nd respondent-Recovery Officer, ESI Corporation, dated 12.2.2013, whereby, the FCI was requested to settle the dues of Rs.55,98,309.00/-, which amount is the total amount to be recovered including contribution of Rs.20,86,142.00; interest amounting to Rs.5,00,674.00; further interest from 01.03.2002 to 31.03.2013 of Rs.29,98,558.00. It was stated that the said total amount was directed to be settled within 7 days, otherwise, coercive action will be taken; *and*

(b) The petitioner further prays for forbearing the respondents-ESI and SBI from recovering the dues pursuant to the proceedings dated 03.07.2013. The Prohibitory Order dated 03.07.2013 was issued by the Recovery Officer, ESI, 2nd respondent, under Rule 26(1) of the II Schedule to the Income Tax Act, 1961 read with Section 45 C to 45-I of the ESI Act, 1948 (as amended).

2. The Petitioner-Food Corporation of India, entered into an agreement with the 4th respondent Labour Contract Cooperative Society for the purpose of loading, unloading and other related work in FCI. The petitioner-FCI refers to the clause VII(a) of the agreement, which reads as follows:-.

> *"All persons employed by the contractors shall be engaged by them as their own employees/workers in all respects and the responsibility under the Indian Factories Act, or the workmen compensation Act, or employees Provident Fund Act or any other similar enactments in respect of all such persons shall be that of the contractors. The contractors shall be bound to indemnify the corporation against all claims whatsoever in respect of the said personnel under the workmen compensation act, 1923*

or any statutory modification thereof or otherwise for in respect of any damage or compensation payable in consequence of any accident or injury sustained to any workmen or other person whether in employment of the contractor or not."

The petitioner's contention is that they are not paying the wages to the workers of the fourth respondent. But the petitioner-Corporation will pay remuneration in respect of the service bills for the work done. There is no obligation on the part of the FCI to pay any contribution under the ESI Act, in respect of the the workers engaged by the 4th respondent.

3. Mr.S.Vijayakumar, learned counsel for the petitioner-FCI would contend that the 4th respondent filed W.P.No.18871/2005 before this Court, challenging recovery order passed by the ESI dated 03.03.2005. This Court, by order dated, 15.12.2010, dismissed the said writ petition, holding that the Authorities can deem it as a final order and proceed to recover the amount. This Court also held that in the absence of challenge to Section 45-A Notice before the ESI Court under Section 75 of the Act, it can become final and the Corporation is entitled to execute the said order by invoking coercive machinery.

4. The learned counsel for the petitioner-FCI would argue that FCI is not liable to pay any contribution for engaging the employees by the 4th respondent under the agreement of contract and also the subsequent supplementary agreement dated 05.09.1995. The agreement stipulates that all the statutory dues are payable by the contractor and that the corporation is not liable to make any payment.

5. The learned counsel would also submit that after abolition of contract labour by Notification dated 23rd April, 2010, issued by the Government of India, in exercise of the powers conferred under sub-sec (1) of Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970, the workers engaged directly come under the control of the FCI with effect from November 2010. FCI is liable to pay contribution from the date of absorbing the labour on their roll, but they are not liable for the contribution from 1995 to 2000.

6. The learned counsel would urge before this Court that when the petitioner-FCI was threatened with further coercive action to recover the dues,

the petitioner-FCI issued a post dated cheque No.299695 for Rs.21,00,000/- dated 09.07.2013. On receipt of the same, the Recovery Officer-ESI, revoked the prohibitory order dated 03.07.2013 and stated further balance amount will have to be paid without delay.

7. The learned counsel, in support of his submissions, relied on judgment in CMA(MD).No.534/2017 [FCI Workers Union Vs. FCI] dated 06.11.2017 and submitted that ESI Act would not apply to the labourers/workers engaged by the FCI and only contractural/casual labourers engaged in warehousing corporation would come under the purview of the ESI Act and it would not apply to the DPS workers/NWNP workers engaged by FCI. The learned counsel would submit that the said order has been confirmed by the Hon'ble Apex Court in Civil Appeal No.8841-8843/2019 [ESI Corporation Vs. FCI Workers Union]. The learned counsel would also rely on the order passed in CRP(NPD).No.741/2018 [FCI Workers Vs. FCI Workers Union], wherein, this court directed the court below to hear the workers union before passing any order in I.A.No.4 of 2015 pending before the Employee's Insurance Court, Puducherry.

8. Per contra, Mr.C.V.Ramachandramurthy, learned Standing counsel for ESI (for R1 and R2) filed counter affidavit before this court and reiterated the submissions made therein. It is submitted that FCI is Principal Employer and has to pay the contributions due to the ESI Corporation. It is the responsibility of the principal employer-FCI to look after the compliance position with ESIC while settling the bills of the society. As per Section 40 of ESI Act, it is the duty of the principal employer to make payment of contribution to the ESI.

9. It is submitted in the counter affidavit that it is the primary duty of FCI to watch that the statutory liability of the society are fulfilled. The order in W.P.No.18871/2005 has been dismissed by this court, observing that the society can move to ESI court u/s.75 (1) of the ESI Act or has to obey the order of ESI u/s.45 A which is recoverable as an arrear of land revenue as specified u/s.45 B. So there is no saying about FCI in the order.

10. The learned Standing counsel for ESI Corporation would point out that the dismissal of the W.P.18871/2005 will not prevent FCI to make payment of contribution towards ESI dues. It is the duty of the FCI to

discharge the liabilities of statutory obligation of agent with respect to ESI dues and hence, the Bank account has been freezed. After the notification dated 23rd April 2010, the FCI is liable to pay contribution of immediate employer to ESI. Based on the freezing order, the FCI released Rs.21,00,000/- vide challan No.299695 dated 09.07.2013 to ESI and hence, the order of freezing has been revoked.

11. Heard both sides and perused the records carefully.

12. The writ petition was admitted on 09.07.2013. Pending the writ petition, this court granted an interim stay. The dismissal of the earlier Writ Petition in W.P.No.18871 of 2005 was filed by the 4th respondent-Society as against the recovery initiatiated by the Corporation invoking s.45-G of the ESI Act. The 4th respondent made a claim that the liability is with principal employer under the ESI Act and not the society. This court, observed that the society, did not challenge the demand order dated 31.12.2001, but challenged the recovery order. It has been held by this court that if the petitioner society is aggrieved by the order passed under Section 45A of the Act, that cannot be

challenged before this court on any ground and in the absence of challenge to Section 45-A notice before the ESI court under section 75 of the Act, it can become final and the ESI Corporation is entitled to execute the said order by invoking coercive machinery.

13. This Court on a perusal of the impugned order, finds that the ESI while issuing the proceedings dated 12.02.2013 asking the FCI to settle the dues to the tune of Rs.55,98,309.00, it was pointed out by the Recovery Officer that "the socieity was covered under ESI Act, code No.56-63523-101. The employer failed to pay the contribution in respect of the employees engaged for work in the premises of Food Corporation of India. This office has issued recovery notice vide CR.No.17547 dated 01.04.2003 to recover amount. Now it is reported that the said society is defunct and non existence and all employees of the society engaged for FCI have absorbed by FCI to continue the work regularly done by them. It is observed from the records available in this Office that employees of the said society were worked for FCI only in order to avoid middlemen. The society was formed and wages were distributed through society instead of direct as a temporary measure. It is also

reported that the formation and continuation of the Society was only a stop gap arrangement pending absorption of the workers directly by the FCI. Since the works were carried out on behalf of FCI and later absorbed the employees engaged for the work done by them. Hence, FCI is fully responsible to settle the dues to ESI Corporation under the existing provisions of ESI Act and the same has already been intimated by the authorized Officer vide this Office letter dated 09.11.2012."

14. Subsequent to notice dated 09.11.2012 by the Authorised Officer, ESI, and intimating the FCI to settle the dues of Rs.55,98,309.00/- within 7 days, otherwise coercive action will be taken, the FCI has not approached the statutory authority prescribed under the ESI Act. Thereafter, by Prohibitory Order dated 03.07.2013 the Recovery Officer, ordered to freeze the bank stating that no withdrawal is permissible from the amount of Rs.5676026/- the arrears of ESI dues.

15. This Court carefully gone through the decisions relied on by the learned counsel for the petitioner-FCI. The judgment in CMA(MD).No.534 of 2017 dated 06.11.2017, would deal with Central Government Notification dated 20.07.2009 which extended the provisions of the Employees State

Insurance Act, 1948. The court answered the substantial question of law that as to whether the FCI is covered by the Notification dated 20.07.2009 of the Government of India, Ministry of Labour? stating the notification dated 20.07.2009 unambiguously states that only the casual and contract employees of the warehousing establishment are brought within the fold of the Act. Therefore, the said decision cannot be of any assistance to decide the issue on hand. The order dated 16.02.2021 passed in CRP.No.741 of 2018, also gives a direction to the court below to hear the workers union before passing any order in I.A., pending before the Employees' Insurance Court, Puducherry. So this direction is also not going to advance the case of the petitioner-FCI.

16. The petitioner has a remedy of appeal under Section 45-AA and thereafter remedy lies under Section 75 of the ESI Act before the Employees Insurance Court against an order passed under Section 45-A of the ESI Act. The statutory provisions prescribed under Sections45A and 75 of the ESI Act is reproduced hereunder for ready reference:-

> *"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 main- tained 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. (2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation under section 75 or for recovery of the amount determined by such order as an arrear of land revenue under section 45-B or the recovery under section 45-C to section 45-I. "

17. In the present case, after hearing the parties and on examination of

the record, I am of the opinion that it is not a case in which it can be said that principle of natural justice has been violated or procedure required has not been adopted before passing of the Recovery order.It is settled proposition of law that Section 75(2) empowers not only the recovery of the amounts due to the Corporation from the employer by recourse to the ESI Court, but also the settlement of the dispute of a claim by the corporation against the employer. While this is so, there is no impediment for the Corporation also to apply to the ESI Court to determine a dispute against an employer where it is satisfied that such a dispute exists. If there is no dispute in the determination either under Section 45-A(1) or under Section 68, the Corporation can straightaway go for recovery of the arrears.

18. Under the circumstances noted above, in view of availability of an equally efficacious statutory remedy to the petitioner for the redressal of their grievances, I am not inclined to entertain the present writ petition under extraordinary writ jurisdiction.

19. Accordingly, the writ petition is disposed of with liberty to the

petitioner to approach the appellate authority prescribed under the ESI Act, 1948. In case such an appeal is filed before the appellate authority within four weeks from the date of receipt of a copy of this order, the appellate authority shall condone the delay in filing the appeal and decide the same on merits in accordance with law. No costs. Interim stay stands vacated.

01.06.2023

Index : Yes/No
Speaking Order : Yes/No
Neutral Citation : Yes/No
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J.NISHA BANU, J.,

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Order made in
W.P.No.18820 of 2013

Dated:
01.06.2023