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C.M.A.No.356 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON: 24.03.2023

JUDGMENT PRONOUNCED ON: 23.06.2023

Coram:

THE HONOURABLE MRS.JUSTICE N.MALA

C.M.A.No.356 of 2020

and

CMP.Nos.2286, 11835 and 11837 of 2020

1.The Employees State Insurance Corporation
Rep. by its Regional Director,
No.143, Sterling Road, Nungambakkam,
Chennai-600 034.

2.The Recovery Officer,
Employees State Insurance Corporation,
143, Sterling Road, Nungambakkam,
Chennai-600 034.

...Appellants

Vs.

1.R.Shanthi

2.The Manager,
Indian Bank,
Washermanpet Branch,
Chennai-600 021

...Respondents

Prayer: Civil Miscellaneous Appeal is filed under under Section 82(2) of ESI Act, praying to set aside the order dated 25.10.2018 passed in E.I.O.P.No.117/2007 on the file of the Employees Insurance Court (Principal Labour Court, Chennai).



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For Appellants : Mr.S.Subbiah, Senior Counsel
for M/s.G.Bharadwaj

For R-1 : Mr.R.Parthasarathy
For R-2 : No appearance

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JUDGMENT

The Employees State Insurance Corporation has filed the above Civil Miscellaneous Appeal raising the following substantial questions of law:

- a. Whether the petition under Section 75 of the ESI Act challenging the consequential recovery proceedings dated 09.08.2007 and 20.08.2007 are maintainable without challenging the order Dated 27.04.2004 passed under Section 45-A of the Act?
- b. Whether the finding of the ESI Court that the Factory was closed on 31.03.1996 is correct merely on the letter dated 01.04.1996 sent by the first respondent?
- c. Whether any notice under Section 45-C and 45-H of the Act is required to be issued before issuing an order under Section 45-G of the Act?

2. The brief facts leading to the above appeal are as follows.

The first respondent was the Proprietrix of the factory run by her in the name and style of M/s.Raj Medias. The said factory was covered under the provisions of the Employees State Insurance Act, 1948. Though the first respondent had



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paid the contributions upto the month of March 1996, she did not make any contributions from 01.04.1996. Based upon the Inspection reports and other materials on record, and after due notice to the first respondent and after affording personal hearing, the petitioner/appellant Corporation passed an order dated 27.04.2004 under Section 45-A of the ESI Act determining the contribution payable by the first respondent at Rs.4,59,798/- for the period from 04/1996 to 03/1997 and 1994-1995 to 1995-1996. Since the first respondent did not make the payment as per the order dated 27.07.2004, recovery proceedings came to be initiated as against the first respondent under Section 45-G of the said Act, and a sum of Rs.70,000/- was recovered by attachment of the amounts lying to her credit with the garnishee, the second respondent herein. The first respondent therefore filed E.I.O.P.No.117 of 2007 on the file of the Principal Labour Court, being the Employees Insurance Court, Chennai, praying to pass orders, holding that she would not be liable to pay any contributions to the corporation, in respect of the relevant period, and also for setting aside the consequential recovery orders passed therein, and for the refund of sum of Rs.70,000/- recovered, through the second respondent herein.

3. The appellants contested the above said petition, on several grounds including the preliminary objection that the first respondent was not entitled to



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challenge the recovery proceedings without challenging the order dated 27.04.2004 passed under Section 45-A of the Act, by the Deputy Director, the competent authority notified under the said Act.

4. Before the ESI Court, the respondent examined one K.Rajan as P.W.1 and produced Ex.P.1 to Ex.P.8. The appellants examined two witnesses as R.W.1 and R.W.2 and produced Ex.R.1 to Ex.R.9.

5. The ESI Court, on an assessment of entire evidence on record allowed the petition under Section 75 of the ESI Act by setting aside the notice bearing No.TN/RECY/45(G)-51-52134, dated 09.08.2007 and 20.08.2007 issued by the 2nd respondent to the 3rd respondent and to Anna Thirumana Maligai, demanding payment an amount of Rs.10,76,487/- u/s.45-G of the ESI Act, 1948.

6. Aggrieved by the order of ESI Court, the appellant corporation has preferred the above appeal.

7. The learned counsel for the appellant vehemently contended that the order passed under 45-A of the ESI Act determining the liability of the first respondent was not challenged and hence challenge to the consequential



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recovery proceedings cannot be sustained.

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8. The learned counsel for the first respondent on the other hand submitted that the recovery proceedings were issued without notice to the first respondent and therefore the 45-A proceedings were non-est in law. According to the learned counsel for first respondent, the 45-A order for the period 1994-96 was passed after a lapse of 11 to 13 years and that too without conducting an enquiry under Section 45 of the ESI Act, which adversely affected and prejudiced the first respondent. According to the counsel, in the absence of notice of 45-A proceedings, the petitioner could not challenge the 45-A proceedings.

9. Both the learned counsels relied on several Judgments in support of their respective cases. The learned counsel for the appellant relied on the Judgments reported in *AIR 2015 SC 2261*, *Kerala High Court Judgment dated 01.10.2021 in WP(c) No.20729 of 2021*, *MANU/SC/0926/2011*, *2007 (1) SCC 584*, *Madras High Court Judgment dated 27.01.2020 in C.M.A.No.285 of 2020*.

The learned counsel for the first respondent relied on the following Judgments.



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2013 SCC online Mad 3989: 2013 LL 1188, 1996(3) SCC 364: 1996 SCC (L&S) 717, 1995 SCC online Mad 78: 1995 (1) CTC 401:1995(1) LW 351: (1995) (2) Mad LJ 158 (FB): 1995 (6) SLR 264 (FB): 1995 Writ LR 203, 2019 (11) SCC 633: 2018(5) SCC (Civ) 528: 2018 SCC online SC 1921.

10. I have perused the entire materials placed on record and the Judgments relied on by the respective counsels.

11. The short point that has to be decided in this appeal is whether the petition under Section 75 of the ESI Act challenging the consequential recovery proceedings dated 09.08.2007 and 20.08.2007 are maintainable without challenging the order dated 27.04.2004 passed under Section 45-A of the Act.

12. The first respondent was the Proprietrix of the factory in the name of Raj Medias, which was engaged in manufacture of ready-made garments. The said factory was covered under ESI Act and was assigned No.51-52137-19. According to the first respondent, she was regularly complying various provisions of the Act, including registration of its employees and payment of contribution to the ESI Corporation. According to the first respondent, due to



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fierce competition and lack of orders, the factory was closed on 31.03.1996 and

the same was intimated to the appellant Corporation vide letter dated 01.04.1996. The first respondent's further case was that, a copy of the letter dated 01.04.1996 was given to the area inspector of the appellant Corporation within whose jurisdiction the factory was situated. According to the first respondent, she had paid the contributions till date of closure and as such there were no dues to the Corporation. Whiles, the Inspector of the appellant Corporation inspected the first respondent's factory on 08.08.1995 and during November 1996, verified the records for the period 01.07.1994 to 31.03.1996 and the General Ledgers for the period 1994-1995 and 1995-1996, recorded his finding in the inspection book and advised the payment of an amount of Rs.1,460/- and Rs.31,572/- towards contributions for the period from 01.04.1994 to 31.03.1996. According to the first respondent, she was not issued with any spot letter nor any communication was received by her from the appellant herein subsequent to the inspections. It was only on 10.07.2007 that the first respondent received a communication from the second appellant herein summoning her to appear before him on 16.07.2007, stating that an amount of Rs.10,66,414/- as per Form CP-1, said to have been served on 05.06.2007 was due and payable. The letter sought production of the Profit and Loss Account, General Ledgers, details of immovable property, etc. According to the first



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respondent, her authorised representative appeared before the second appellant and briefed him of the closure of the factory on 31.03.1996 onwards and also that the contribution till the date of closure were regularly paid to the Corporation. It was further stated that first respondent had not received any demand from the appellants during the past 10 years demanding contributions. The first respondent thereafter received certain communications dated 09.08.2007 directing her to pay Rs.10,76,487/- towards contributions, interest, cost and charges. Along with the said communication, a 45-G notice was also sent demanding the amount of Rs.10,76,487/- to Anna Thirumana Maligai.

13. The first respondent therefore filed a petition under Section 75 of the ESI Act challenging the notice dated 09.08.2007 and 20.08.2007 issued by the first appellant to second appellant and to Anna Thirumana Maligai under Section 45-G of the ESI Act demanding payment of Rs.10,76,487/-.

14. The appellants case was that the 45-A order was passed on 27.04.2004 and the same was not challenged. In the absence of challenge to the 45-A order, the challenge to the consequential proceedings under Section 45-G was not maintainable. The appellant further disputed the petitioners contention



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that the factory was closed and the same was intimated to the appellant. On 04.11.1996, the Corporation's Inspector furnished full particulars to the respondent on the basis of payment, nature and place of work, the parties to whom the wages were paid etc. The Inspector had further informed the respondent that if the parties were covered by different code numbers, the same had to be furnished within 15 days, failing which the entire amount would be taken for the purpose of contribution. As the respondent did not reply to the Inspector's communication, the Inspector forwarded his report to the appellant officer, who issued Adhoc notice dated 20.03.1998 along with enclosure with details to the respondent to show cause as to why the proposed contribution of Rs.4,59,748/- may not be determined. An opportunity of hearing on 14.05.1998 to appear along with the records was also afforded. According to the appellant, the respondent failed to appear and further opportunity was given on 19.01.1999 and 14.07.1999 and inspite of the opportunities, the respondent neither replied nor appeared before the Competent Authority, opposing the proposed determination of contribution. As the respondent failed to object, inspite of repeated opportunities, the appellant passed the 45-A order on 27.04.2004 and determined the contribution at Rs.4,59,748/- for the wages paid. As the respondent failed to pay the amount of Rs.4,59,748/-, determined under Section 45-A, the appellant office issued the recovery certificate under



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form C-19 after due intimation to the petitioner and the petitioners' factory. The

appellant denied the submission of the respondent that he had not received any communication from the respondent in the past 10 years. According to the appellants, as the procedure contemplated under the Act was strictly followed, the respondent could not have any grievance. The appellant contented that in spite of several opportunities, the respondent failed to utilise the same and only to avoid the payment towards statutory dues, the respondent had set up the plea of non-availability of records due to long lapse of time. The appellant therefore prayed that the petition under Section 75 of the Act deserved to be dismissed.

15. The learned counsel for the appellant requested the Court to decide the preliminary objection first. The objection is that the respondent had failed to challenge the order passed under Section 45-A of the Act and therefore the demand notice under Section 45-G, in the absence of challenge to the 45-A proceedings was not maintainable.

16. Though, several submission were made by the learned counsel on either side and several Judgments as aforesaid were relied on, in view of the submission of the appellants counsel, the preliminary issue is decided first. In



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the Judgment of the Hon'ble Supreme Court in the case of *ESI Corpn. Vs.*

CC.Santhakumar reported in 2007 (1) SCC 584, the answer to the said preliminary objection is seen. In para 30 of the Judgment, the Hon'ble Supreme Court held as follows:

" The legislature has provided for a special remedy to deal with special cases. The determination of the claim is left to the Corporation, which is based on the information available to it. It shows whether information is sufficient or not or the Corporation is able to get information from the employer or not, on the available records, the Corporation could determine the arrears. So, the non-availability of the records after five years, as per the Regulations, would not debar the Corporation to determine the amount of arrears. Therefore, if the provisions of Section 45-A are read with Section 45-B of the Act, then, the determination made by the Corporation is concerned. It may not be final so far as the employer is concerned, if he chooses to challenge it by filing an application under Section 75 of the Act. If the employer fails to challenge the said determination under Section 75 of the Act before the Court, then the determination under Section 45-A becomes final against the employer as well. As such, there is no hurdle for recovery of the amount determined under Section 45-B of the Act, by invoking the mode of recovery, as contemplated in Section 45-C to 45-I."



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So also this Court in the case of *M/s.Cosmo Computer Printers Vs. The Employees' State Insurance Corporation* vide Judgment dated 27.01.2020, held that when the 45-A proceedings were not challenged and were allowed to become final, there was no impediment under the ESI Act to the Authority to issue the recovery certificate.

17. The learned counsel for the respondent relied on the Judgement of this court in the case of *Hotel Guru Pvt. Ltd. vs. Deputy Director, Regional Office, Employees' State Insurance Corporation and another* reported in 2013 SCC Online Mad 3989. In my view the said Judgment will not aid the respondent as the facts of that case are completely different from the facts of the present case. In the said case, the 45-A order was challenged and the Court held that as the 45-A order was passed after a long delay of 8 years, the said order was vitiated by delay and laches. That was not a case where the consequential order was challenged, but a case where the 45-A order was itself challenged. Following the Judgment of the Hon'ble Supreme Court reported in 2007 (1) SCC 584 and the Judgment of this Court in the case of *M/s.Cosmo Computer Printers Vs. The Employees' State Insurance Corporation* vide Judgment dated 27.01.2020. I hold that when the order passed under Section 45-A is not



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challenged and is allowed to become final, the consequential recovery proceedings under Section 45-G cannot be questioned. The learned counsel for the respondent vehemently disputed the receipt of notices in the 45-A proceedings. According to the counsel in the absence of notice of enquiry in the 45-A proceedings, the order is non-est and hence no challenge was necessary. In my view the said submission is untenable. Only when the 45-A order is challenged, then only the appellant's will have to prove the compliance of the statutory mandate. The respondent cannot be allowed to ignore the 45-A order as non-est without even challenging the same.

18. The learned counsel for the respondent then submitted that in the event, the Court holds against the respondent on the preliminary issue, an opportunity may be given to the respondent to challenge the 45-A order before the Tribunal. In my view, as there is a serious dispute, on the receipt of the various notices sent by the appellant under 45-A proceedings to the respondent, the factual position will have to be established by leading evidence. I am therefore of the opinion that an opportunity should be given to the respondent to challenge the 45-A proceedings. All the issues now raised, including the plea of delay and laches can be raised before the ESI Court.



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19. It is seen that the ESI Court has held that the 45-A proceedings were hit by delay and laches even without a challenge to the same. In my view in the absence of a challenge to the 45-A order, the ESI Court had no jurisdiction to hold that the 45-A order was vitiated by delay and laches. Hence, the impugned order of the ESI Court dated 25.10.2018 in E.S.I.O.P.No.117 of 2007 is set aside.

20. The appeal is allowed with the following directions

The respondent shall move the ESI Court within a period of four (4) weeks from the date of receipt of a copy of the order. The respondent shall deposit 30% of the amount claimed with the ESI Court along with the application under Sections 75 and 76. The ESI Court shall thereafter determine the quantum of contribution, if any, payable and also determine the question whether the demands were raised within a reasonable time or not, after considering the prejudice, if any, caused to the respondent for the delayed action taken by the Corporation. The ESI Court shall determine the issue without reference to the observations, if any, made in this Judgment.

Consequentially connected Miscellaneous Petitions are closed. There shall be no order as to costs.



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Index: Yes/No

Speaking Order: Yes/No

Neutral Citation: Yes/No

To

The Employees Insurance Court,
Principal Labour Court, Chennai.

N.MALA.J.,

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Judgment in C.M.A.No.356 of 2020

Judgment Delivered on
23.06.2023