IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM :

THE HONOURABLE **MR.JUSTICE SUNDER MOHAN**

C.M.A.Nos.1350 and 1355 of 2023
and C.M.P. Nos.13545 and 13579 of 2023

Judgment reserved on 02.08.2023	Judgment pronounced on 16.08.2023

M/s.Poshak Industries
Represented by K.K.Agarwal,
Kartha of M.S.Agarwal, HUF
No.15, Racecourse Road,
Guindy, Chennai – 600 032. ...Appellant/Petitioner in both the appeals

Vs.

Employees' State Insurance Corporation
Rep.by the Regional Director,
143, Sterling Road
Nugambakkam
Chennai – 600 034. ...Respondents/Respondents in both the appeals

Common Prayer : These Civil Miscellaneous Appeals have been filed under Section 82 (2) of Employees State Insurance Act, 1948, seeking to set aside order and decree of Employees Insurance Court (Principal Labour Court, Chennai) in EIOP Nos.100 and 101 of 2004 dated 07.01.2023.

For Appellant : M/s.S.Haroon. AL.Rasheed for
M/s.T.S.Gopalan and Co., in both the appeals

For Respondent : Ms.G.Narmadha for
Mr.G.Bhardwaj in both the appeals

COMMON JUDGMENT

The above two appeals challenge the orders passed by the Presiding Officer, Principal Labour Court, Chennai under Section 75 of the Employees' State Insurance Act, 1948 (hereinafter referred to as "***ESI Act***" for the sake of convenience).

2. C.MA.No.1350 of 2023 is against the order passed in EIOP.No.100 of 2004 dated 07.01.2023. The said petition before the Principal Labour Court, Chennai, challenged the order passed by the respondent/Employees' State Insurance Corporation under Section 45-A of the ESI Act directing the appellant/petitioner to pay Rs.3,10,918/- as ESI contribution for the period from 01.10.2002 to 31.03.2003. Likewise, C.M.A.No.1355 of 2023 challenges the order passed in EIOP.No.101 of 2004 dated 07.01.2023, which was filed against an order under Section 45-A of the ESI Act passed by the respondent directing the appellant to pay Rs. 6,21,836/- as ESI contribution

for the period from October 2001 to September 2002. Since the issue involved in both appeals is the same, the appeals are decided by a Common Judgment.

3. The brief facts leading to the above appeals are as follows :

(a) The appellant was carrying a business of manufacturing garments. They had 123 employees. They were paying ESI Contribution of Rs. 12,00,000/- till 31.07.1999.

(b) They had not paid contributions after that. They also did not file returns as required under the ESI Act.

(c) While so, the appellant had received two notices (C-18) dated 27.08.2003 calling upon them to pay the above said amounts as contribution for the two periods mentioned above, in respect of 223 employees.

(d) The appellant sent a reply dated 15.09.2003 stating that the employees working with them were transferred to their sister concern by the name M/s.Paridhan Exports from 31.07.1999 till 01.08.2001; that the appellant retained only their administrative staffs and they had paid contributions for them; that there is no basis for the claim made by the respondent and hence, requested the respondent to drop further action.

(e) The respondent, not satisfied with the reply given by the appellant, passed two orders, both dated 02.12.2023 directing the appellant to pay contributions of Rs.3,10,980/- and Rs.6,21,836/- respectively.

(f) Challenging the two orders, the appellant filed EIOP.Nos.100 and 101 of 2004 before the Employees' Insurance Court. The learned Judge/Presiding Officer of Principal Labour Court, Chennai, dismissed both the petitions and confirmed the orders passed by the respondent.

(g) The instant appeals have been filed challenging the said orders.

4. Mr.S.Haroon AL.Rasheed, the learned counsel appearing for the appellant, submitted that the order of the ESI Court is erroneous inasmuch as the order is passed on surmises and conjectures. The respondent/Corporation

had failed to make an inspection prior to the demand under Section 45-A of the ESI Act, 1948. Section 45 of the ESI Act, 1948 provides that an inspection must be conducted for the purposes of enquiring into the correctness of any of the particulars stated in any return referred to in Section 44 or for the purpose of ascertaining whether any of the provisions of this Act has been complied with. The respondent/Corporation did not make any inspection. However, based on the assumption that the appellant had 223 employees, the corporation had made a demand of contribution for the said number of employees. The appellant ceased its activities as early as in July 1999 and transferred the employees to the rolls of its sister concern, viz. Paridhan Exports. The list of employees for whom contribution was paid by the said Paridhan Exports is the same as the employees that were with the appellant. However, the ESI Court did not take into consideration those facts and had erroneously confirmed the order of the respondent.

5. The learned counsel relied upon the following Judgments in support of his contention: -

(i) 1977 (2) SCC 581 [The Employees' State Insurance Corporation, Bhopal Vs. The Central Press and another]

(ii) 1981 II LLN 602 [Indodan Milk Products Ltd and Regional Director, Employees' State Insurance Corporation, Uttar Pradesh, Kanpur and another]

(iii)1988 SCC Online Kar 20 [Employees' State Insurance Corporation vs. Subbaraya Adiga]

(iv) 1994 II LLJ 754 Mad [Fenner Garments v. Dy. Regional Director, ESIC]

(v) 1991 (63) FLR 638 [ESI Corporation v. Karnataka Asbestos Cement Products]

(vi) 2007 (1) SCC 705 [Srinivasa Rice Mills and others v. ESI Corporation]

The learned Counsel reiterated that an inspection ought to have been conducted by the respondent/corporation before making a demand. The learned counsel also relied upon the Judgment of the Hon'ble Apex Court in ***1999 (1) GLR 328 [ESI Corporation and another v. Hotel Samrat*** wherein it was held that the burden is on the corporation to show that the establishment had employees and failed to pay the contribution.

6. The learned counsel further submitted that the Labour Court also did not consider the documents produced on the side of the appellant to show that the employees of the appellant have resigned from their company and joined the sister concern in the proper perspective. The appellant had produced IT returns to show that during the relevant period, they had paid salary only to the administrative staff ruling out the employment of other employees.

7. Per contra, Ms.G.Narmada, learned counsel appearing for the respondent/Corporation contended that admittedly the appellant did not inform the Corporation about the closure of the business. The appellant also did not maintain any registers as required under the Act. The respondent had issued a show cause notice calling upon the appellant to produce the records. In spite of the same, the appellant did not produce any records. The inspection is one of the methods to ascertain whether the information given by the company is true or not. In all cases, inspection is not mandatory. Enquiries can be conducted even by calling upon the employer to furnish the details. Further, the appellant did not produce Form VI containing the details of the employees employed while they were functioning in order to compare it

with Form VI of the said Paridhan Exports, in which the employees are said to have been transferred. The learned counsel further submitted that in all cases cited by the learned counsel for the appellant, the Court held that inspection was required in cases where coverage was disputed and not where the details of subsequent returns were questioned. Therefore, those Judgments may not be applicable to the facts of the present case. The learned counsel further submitted that the Judgment of the Hon'ble Apex Court in ***1977 (2) SCC 581 [The Employees' State Insurance Corporation, Bhopal Vs. The Central Press and another]*** is also not applicable to the facts of the present case. The learned counsel further submitted that the Labour Court had dealt with all the contentions raised by the appellant and had rendered a finding on facts. The appellant has not raised any question of law, much less substantial question of law, in the instant appeal and, therefore, prayed for dismissal of the appeal.

8. The admitted facts are that:

(a) The appellant was paying ESI contributions till 1999,

(b) They had neither paid contributions nor filed returns thereafter,

(c) They had 123 employees till 1999.

9. An appeal before this Court is maintainable only if a substantial question of law is involved. Though the learned counsel for the appellant raised several questions of law, this Court is of the view that the following substantial question of law is involved in the instant appeal:

> "*What is the nature of information that the ESI Corporation should gather and the manner in which it should be gathered before passing an order under Section 45-A of the ESI Act?*"

10. The facts reveal that since the appellant did not file returns for the relevant periods, the Corporation issued a C-18 notice. The said notice demanded contributions for 223 employees. The notice does not indicate as to how this number and the contribution amounts mentioned were arrived at. The reply sent by the appellant offering their explanation was rejected. The respondent thereafter passed an order which is impugned. The appellant's stand throughout was that they had 123 employees till 1999, and thereafter, the employees were transferred to their sister concern. They had also produced Income Tax returns to substantiate their claim that

salary was paid only to administrative staff and not to other employees during the relevant periods. Both the respondent's Corporation and the ESI Court had proceeded on the basis that the defence of the appellant was not acceptable.

11. However, the question is whether the respondent Corporation had the requisite information to pass an order under Section 45-A of the ESI Act, 1948. Sections 44, 45 and 45-A of the ESI Act, 1948, provides for the procedure and power of the ESI Corporation to deal with cases of non payment of contributions or non filing of returns. Section 44 (2) of the ESI Act, 1948 reads as follows:

> *"44.... (2) Where in respect of any factory or establishment the Corporation has reason to believe that a return should have been submitted under Sub-Section (1) but has not been so submitted, the Corporation may require any person in charge of the factory or establishment to furnish such particulars as it may consider necessary for the purpose of enabling the*

Corporation to decide whether the factory or establishment is a factory or establishment to which this Act applies."

Thus, as per the above Provision, the Corporation has to first require the establishment concerned to furnish such particulars to enable it to decide whether the factory or establishment concerned is liable to pay any contribution. Section 45 of the ESI Act, 1948 provides for the procedure for collecting the information by the Inspector. After the amendment "Inspector" was replaced by "Social Security Officers". The amended Section 45 (2) of the ESI Act, 1948 reads as follows:

"45... (2) Any [Social Security Officer] appointed by the Corporation under sub-section (1) (hereinafter referred to as [Social Security Officer]), or other official of the Corporation authorised in this behalf by it, may, for the purposes of enquiring into the correctness of any of the particulars stated in any return referred to in section 44 or for the purpose of ascertaining whether any of the provisions of this Act has been complied with

(a) require any principal or immediate employer to furnish to him such information as he may consider necessary for the purposes of this Act; or

(b) at any reasonable time enter any office, establishment, factory or other premises occupied by such principal or immediate employer and require any person found in charge thereof to produce to such [Social Security Officer] or other official and allow him to examine such accounts, books and other tamps documents relating to the employment of persons and payment of wages or to furnish to him such information as he may consider necessary; or

(c) examine with respect to any matter relevant to the purposes aforesaid, the principal or immediate employer, his agent or servant, or any person found in such factory, establishment, office or other premises, or any person whom the said "[Social Security Officer] or other official has reasonable cause to believe to be or to have been an employee;

(d) make copies of, or take extracts from,

any register, account book or other document maintained in such factory, establishment, office or other premises;

(e) exercise such other powers as may be prescribed.

The above provision provides for various methods for the collection of information for the purpose of determining the contributions payable by the employer. For gathering information, the officers can require the employers to furnish the same, they can inspect the establishment, examine the employer, his agent or servant, make copies of the extracts from registers and exercise such powers as may be prescribed. Section 45-A of the ESI Act, 1948, which is the provision that empowers the respondent to pass an order determining the amount of contributions payable by the employer is extracted hereunder:

"45-A. 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]

The above Provision empowers the respondent to determine the amount of contributions payable "*On the basis of information available to it.*" if:

(a) No returns, particulars, registers or records are submitted, maintained or furnished as per Section 44 of the ESI Act, 1948.

or

(b) If any (Inspector Social Security Officer now) or other officer of the Corporation is prevented from exercising his functions or discharging his duties;

13. In the instant case, the respondent was justified in invoking the provisions of Section 45 - A of the ESI Act, 1948, as the appellant had any neither filed returns nor submitted any records or registers. However, the question is whether the respondent Corporation had passed the impugned orders on the basis of "information" available to it.

14. In the instant case, the perusal of the impugned Orders passed by

the respondent and the order of the ESI Court reveals that the information on which the impugned Orders were passed has not been disclosed. There is also no basis for demanding contributions for 223 employees, especially when, even for the previous years, it is not denied that the appellant had only 123 employees. "Information" as defined in Oxford English Dictionary means "facts or details about." Therefore, Information for the purpose of demanding contribution is the number of employees. In order to fix the number, the names of the employees in employment have to be ascertained, in this regard, the Judgment of the Division Bench of Karnataka High Court in ***Employees' State Insurance Corporation vs. Karnataka Asbestos Cement Products*** reported in ***1991 (63) FLR 638*** would be relevant:

> *"3... The report was rejected, relying on a decision of this Court in the case of Employees' State Insurance Company v. Subbaraya Adiga [1988 – II L.L.N. 452]. In the said decision, it was held as follows in paragraph at page 454:*
>
> *"... A list of employees prepared by the Employees' State Insurance Inspector in the course of his visit to an establishment, in order to find out whether the provisions of the Employees' State Insurance Act are attracted to it, must contain the name, father's name, place*

from which the employee hails, the designation, the length of service, emoluments and the signature or thumb impression of the employee, as the case may be. If at that time other persons other than the employees are present, the names and addresses of at least two of them with their signatures and also the signature of the proprietor or manager or the person in charge of the establishment should be obtained at the end of the list and a copy of which be furnished to the establishment..."

4. The report furnished by the Inspector RWI. did not contain the details which is was required to contain and, therefore, the learned Judge was correct in rejecting the report. Only other evidence available was to be found in exhibits A1 to A5, the attendance registers produced by the employer which has not been impeached and which disclose that the applicant not employed more than six persons.

15. This Court is of the view that the words "Information" available to it" would mean facts and details (i.e) names and addresses of the employees and the total number of the employees. This information has to be gathered, and any demand for contribution based on guess work or presumptions would

not amount to demand based on information. The Act, as stated earlier, provides for obtaining information in various ways. Section 44 (2) of the ESI Act, 1948 provides for the power to issue show cause notice to the corporation calling upon the factory or establishment to furnish details. Section 45 of the ESI Act, 1948, provides for the gathering of information by the Inspectors appointed by the Corporation. As stated earlier, after the Amendment of the Act in the year 2010, the said provision provided for the gathering of information by a Social Security Officer appointed by the Corporation. Admittedly, in this case, the Inspectors had not resorted to any of the methods provided under Section 45 (2) of the ESI Act, 1948, to gather information. To reiterate, the methods available are:

(a) Calling upon the employer to furnish information. or
(b) To conduct an inspection. or
(c) To examine the employer. or
(d) To take copies of the extracts of the registers etc., or
all of the above.

Without resorting to any of the procedures to gather information, the Corporation cannot determine the amount of contribution. Non-furnishing of returns may amount to a violation, but that does not empower the Corporation to arbitrarily fix the number of employees and claim compensation. The ESI Court also, unfortunately, delved into the correctness or genuineness of the defence of the appellant. Before calling upon the appellant to offer his explanation, the corporation must have information which is based on facts gathered. In the instant case, no such exercise has been done. The substantial question of law is answered accordingly.

16. Therefore, this Court is of the view that the impugned orders passed by the respondent/Employees' State Insurance Corporation, confirmed by the ESI Court, are liable to be set aside. Hence, Civil Miscellaneous Appeals are allowed. No Costs. Consequently, the connected Miscellaneous Petitions are closed.

16.08.2023

dk/rgr
Index: Yes/No
Speaking Order / Non-Speaking Order
Neutral Citation: Yes / No
Copy to:

1. The Employees Insurance Court
   (Principal Labour Court, Chennai)
2. The Section Officer,
   VR Section,
   High Court,
   Madras.

SUNDER MOHAN, J.

dk/rgr

Pre-delivery Common Judgment in
C.M.A.Nos.1350 and 1355 of 2023
and C.M.P. Nos.13545 and 13579 of 2023

16.08.2023