IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDER RESERVED ON : 29.03.2023

ORDER PRONOUNCED ON : 28.06.2023

CORAM:

THE HON'BLE MRS. JUSTICE N.MALA

C.M.A.No.369 of 2020
and C.M.P.No.2393 of 2020

Employees State Insurance Corporation,
Represented by its Joint Regional Director,
1897, Trichy Road, Panchdeep Complex,
Ramanathapuram,
Coimbatore – 641 045. ... Appellant

vs.

M/s.Eastern Spinwel Limited,
Represented by its Managing Director,
Mr.Suresh Kumar, Pothiyampalayam Road,
Arasur Village,
Coimbatore – 641 407. ... Respondent

Prayer: Civil Miscellaneous Appeal is filed under Section 82(2) of ESI Act, praying to set aside the order passed in E.S.I.O.P.No.3 of 2017 dated 27.04.2019, on the file of the Employees Insurance Court (Principal Labour Court Coimbatore), Coimbatore.

For Appellant : Mr.S.P.Srinivasan

For Respondent : Mr.R.V.Gayathri for
M/s.P.B.Ramanjam

* * * * *

JUDGMENT

This Civil Miscellaneous Appeal is filed to set aside the order passed in E.S.I.O.P.No.3 of 2017 dated 27.04.2019, on the file of the Employees Insurance Court (Principal Labour Court Coimbatore), Coimbatore.

2.Notice of motion was ordered on 13.02.2020 in the appeal. At the request of both learned counsels the appeal is heard finally.

3.The appellant Corporation raised the following Substantial Questions of Law:

> 1)Whether the Hon'ble EI Court, Coimbatore is correct and justified in setting aside the impugned order passed under Section 45 A of the ESI Act dated 25.03.2014 and the consequential recovery proceedings?
>
> 2)Whether the Hon'ble EI Court is justified in placing the burden of proof of coverage determination of contribution on the appellant, when the respondent had approached the Court alleging a fact and has already

been allotted ESI Code number?

3)Whether the Hon'ble EI Court is justified in holding that the respondent companyis not liable under ESI Act, when the admitted fact remains that, it had admitted the liability and paid Rs.34,628/- as found in Section 45A Order based on EPF Contribution?

4.For the sake of convenience, parties will be referred to as per the ranking in the appeal.

5.The brief facts leading to the appeal are as follows:

The respondent is a limited company registered under the provisions of the Companies Act. The respondent was having a spinning unit at Pothiyampalayam Road, Arasur Village, Arasur, Coimbatore – 641 407. The respondent company was incorporated in the year 1994 and commenced the operation. As the company was running into heavy losses the respondent entered into a lease agreement with M/s. Castle Textile Mills Private Limited for lease of a portion of it's textile spinning unit for a lease period of three years effective from 14.01.2009 to 13.01.2012.

6.According to the respondent, after letting the unit on lease, the respondent was not involved in the day to day operation of the unit and it was managed by the leasee M/s.Castle Textiles Mills Private Limited. The wages to the workmen were paid by the leasee and the payment registers and vouchers were maintained by the leasee. While the unit was under lease the enforcement Officer of the appellant on 08.06.2010 inspected the unit and submitted an inspection report dated 08.06.2010 demanding the leasee, M/s.Castle Textiles Mills Private Limited to pay Rs.1,43,527/- as contribution from March 2009 to May 2010. It was the further case of the respondent that the said amount was paid by the leasee on 17.06.2010. Thereafter the respondent received a show cause notice from the appellants calling upon him to show cause as to why contribution should not be assessed as provided under Section 45-A of the Employees State Insurance Act and recovered from them.

7.According to the respondent, the respondent appeared for the personal hearing and submitted the documents and further explained about the leasing of the unit. According to the respondent, at the time of hearing it had given the particulars of the employees employed by the leasee and the payment made by the leasee as wages to the employees. The appellant thereafter on 26.03.2014 passed an order under Section 45-A of the ESI Act, 1948, directing the respondent to pay Rs.1,89,041/- as contribution for the period from 14.01.2009 to 31.05.2010. In pursuance of the 45-A order the appellant passed the impugned order on 12.08.2014 and proceeded to recover the said amount. The respondent therefore filed the petition under Section 75 of the ESI Act, challenging the recovery proceedings dated 12.08.2014.

8.The appellants on the other hand contended that the petition was not maintainable in law and on facts. According to the appellants, the respondent had failed to avail the opportunities afforded to it on 23.09.2013 by not producing any relevant records for verification. Even during the personal hearing on 26.03.2014, the respondent had not produced any document for payment of wages made by the leasee like the Wage Registers and other relevant records such as ledgers, cash book, balance sheets, vouchers etc., to assess the contribution on actual wages. Because of the failure of the respondent, the appellant assessed the contribution by invoking Section 45 A of the ESI Act and determined the contribution at Rs.1,89,041/-.

The respondent further failed to avail the opportunity of filing appeal to the appellate authority under Section 45 AA of the ESI Act within 60 days of passing the 45 A order. The appellants therefore submitted that the order under Section 45 A of the ESI Act was fair, reasonable and proper and was made after affording reasonable opportunity of hearing to the respondent. As the respondent failed to comply with the 45 A order the impugned order was passed on 12.08.2014 and the same was challenged before the E.S.I.O.P. Court.

9.The E.S.I.O.P. Court framed the following points for consideration which are as follows:

1) Whether the order of the respondent vide in 56-00-062561-000-0101/Ins I dated 12.08.2014 directing the petitioner to pay Rs.1,89,041/- as contribution is liable to be set aside?

2) To what relief the petitioner is entitled?

10.On the basis of the materials on record the E.S.I.O.P. Court set aside the impugned order dated 12.08.2014. Aggrieved by the order passed by the

E.S.I.O.P. Court in E.S.I.O.P.No.3 of 2017 the appellant corporation has filed the above appeal.

11.The point for determination in the appeal as borne out by the substantial question of law (1) referred to above is whether the ESI Court was justified in setting aside the impugned order passed under Section 45-A of the ESI Act dated 25.03.2014 and consequential recovery proceedings.

12.The respondent is a limited company registered under the provisions of companies act and running a spinning unit at Arasur Village, Arasur Coimbatore. The respondent was incorporated in the year 1994, due to the heavy loses the respondent decided to lease out a portion of the unit to one M/s. Castle Textile Mills Private Limited under a lease agreement for a period of three years from 14.01.2009 to 13.01.2012. According to the respondent the above said lease unit was ran by the leasee and the wages of the workmen were also paid by the leasee by maintaining registers and vouchers. Therefore, it was the case of the respondent that it was not liable for the contribution as it had leased out the portion of the unit to the leasee M/s. Castle Textile Mills Private Limited. According to the respondent, as the immediate employer it was the leasee which was liable to pay the contribution, as the period of demand fell within the lease period.

13.On the other hand it is the case of the appellant herein that the respondent as a principle employer was liable to pay the contribution because even after the lease deed dated 20.12.2018, the employees remained the same and the assets of the respondent also remained the same. Further despite the change of hands under the lease deed there was no change of the ESI code number nor a separate code number was allotted in pursuance of the lease. The appellant further submitted that as the respondent had failed to file the returns, the 45-A proceedings were initiated for the period from 14.01.2009 to 31.05.2010. An amount of Rs.1,89,041/- was determined as contribution, after affording opportunity to the respondent to produce the records. As the respondent failed to utilise the opportunity, the 45-A order was passed on 25.03.2014.

14.The respondent's further case was that 45 A order which was passed on 25.03.2014, was not challenged by the respondent within the statutory period and therefore, the same attained finality. It is seen from the impugned order that the respondent had requested the appellants to reopen the 45 A order under Section 45 AA of the Act. In the impugned order the authority declined the request on the ground of limitation and further requested to comply with the form C-19 notice dated 12.08.2014 demanding Rs.1,89,041/- towards contribution.

15.In my view the contention of the appellant that ESI Court was not correct in setting aside the order passed under Section 45 A of the Act dated 25.03.2014 and consequential recovery proceedings is justified. From the impugned order itself it is seen that the request of the respondent to permit to reopen the 45 A order under Section 45 AA of the Act was rejected on the ground of limitation which means, that the 45 A order had attained finality because of the inaction of the respondent in filing the appeal within the statutory period of 60 days under Section 45 A A of the Act. The ESI Court failed to note that in the absence of a challenge to the 45 A proceedings there could not be any challenge to the consequential recovery proceedings. The ESI Court therefore erred in setting aside the impugned order even without a challenge to the 45 A order dated 25.03.2014. The Hon'ble Supreme Court in the case of ***ESI Corpn. Vs. CC.Santhakumar*** reported in ***2007 (1) SCC 584***, wherein paragraph No.30 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"

16.Further this Hon'be 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.In the light of the above said Judgments and in the light of the fact that the respondent had admittedly not challenged the 45 A order, in my view, the ESI Court erred in setting aside the impugned order dated 12.08.2014 which was only a consequential order. Though several other grounds were raised in the grounds of appeal, as I have held substantial question of law (1) in favour of the appellant, the need to discuss the other grounds does not arise.

18.Accordingly, this appeal is allowed and the order dated 27.04.2019 made in E.S.I.O.P.No.3 of 2017 passed by the Employees Insurance Court (Principal Labour Court Coimbatore), Coimbatore is set aside. Consequently, the connected miscellaneous petition is closed.

28.06.2023

Index : Yes / No
Internet : Yes / No
Speaking order/Non-speaking order
ah

To

1.The Employees Insurance Court
(Principal Labour Court Coimbatore),
Coimbatore

2.Employees State Insurance Corporation,
Represented by its Joint Regional Director,
1897, Trichy Road, Panchdeep Complex,
Ramanathapuram,
Coimbatore – 641 045.

3.The Section Officer,
VR Section,
High Court,
Madras.

N.MALA, J.

ah

PRE DELIVERY JUDGMENT
IN C.M.A.No.369 of 2020

28.06.2023