



CMA.No.727 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.06.2023

PRONOUNCED ON: 01.08.2023

CORAM

THE HON'BLE Mr.JUSTICE **C.KUMARAPPAN**

C.M.A.No.727 of 2021

and

CMP.No.4327 of 2021

The Employees State Insurance Corporation,
Represented by the Regional Director,
No.143, Sterling Road, Nungambakkam,
Chennai-600 034.

... Appellant

- Vs -

Ind Fashions Exports (Private) Limited,
Represented by its Accounts Executive S.N.Masilamani,
No.33, Nelson Manickam Road, Aminjikarai, Chennai-600 029.

... Respondent

Civil Miscellaneous Appeal is filed under Section 82(2) of the ESI Act, praying to set aside the order passed in EIOP.No.122 of 2004 dated 17.12.2018 on the file of the Employees Insurance Court (Principal Labour Court, Chennai) Chennai.

For Appellant : Mr.S.P.Srinivasan
For Respondent : Mr.S.Haroon
for M/s.T.S.Gopalan and Co.



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JUDGMENT

The present Civil Miscellaneous Appeal has been filed against the fair and final order made in EIOP.No.122 of 2004 dated 17.12.2018 by the Employees Insurance Court (Principal Labour Court, Chennai) Chennai.

2. For the sake of convenience, the parties are referred to by their litigative status before the Tribunal.

3. According to the petitioner, they are engaged in manufacturing and export of garments. They would further submit that they have been covered under the ESI Act. While so, the respondent/appellant issued C-18 adhoc notice proposing a contribution of Rs.8,23,910/-. The petitioner further submits that in spite of their reply that, they did not have any supervision or control over the third party employers, an order under Section 45A of the ESI Act dated 29.03.2004 was passed directing the petitioner to pay a sum of Rs.8,23,910/-. According to the petitioner, this 45A order is illegal and liable to be set aside.



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4. Whereas, the respondent filed a counter statement, though admitting that the works were entrusted to the third parties and that the works were carried on outside premises of the petitioner, still the respondent/appellant construed supervision on the ground that the petitioner/respondent has exercised right of rejection of end product on the ground of quality reasons, and that the works entrusted to the third parties are contiguous, incidental, preliminary and in connection with the manufacturing work of the petitioner. Therefore, the respondent/appellant on the assumed supervision has proposed contribution upon the employees of the third party employers.

5. Before the Trial Court, the petitioner/respondent examined one witness as PW1 and marked 8 documents as Exs.P1 to P8. On the side of respondent/appellant, two witnesses were examined as RW1 & RW2, and 11 documents were marked as Exs.R1 to R11.

6. The Trial Court, after considering the material on record, evidence of the both sides, and pleadings, ultimately set aside the 45A order dated 29.03.2004.



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7. Aggrieved by the above order, the respondent/appellant has come up with the instant appeal contending that the Trial Court without considering the evidence of PW1, has wrongly allowed the petition. It is also the submission of the learned counsel for the respondent/appellant that the very determination of contribution was only to the third party employers, who did not have separate ESI code numbers. Therefore, the learned counsel for the respondent/appellant justified the 45A order and prayed to allow the appeal.

8. However, the learned counsel for the petitioner/respondent strenuously contended that, this is a case where all the works, against which the contribution determined, was outsourced, and would also further submit that inspite of ample materials submitted before the appellant/respondent to show the absence of supervision or control over the third party employers, they have wrongly determined contribution. Even the respondent/appellant did not dispute the outsourcing. However, in their counter, they attempted to bring employees of the third party vendors within the definition of “employee” as defined under Section 2(9) of the Act, only on the ground that the works entrusted to third party vendors are incidental, preliminary and contiguous with the manufacturing process of the petitioner/respondent. Further, they



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also attempted to infuse the supervision upon the petitioner over the right exercised by them upon the quality of the product.

9. Now let us consider whether the objections put forth by the respondent/appellant is within the contours of law.

10. To understand the correctness and validity of the finding, this Court deems it appropriate to reproduce the Section 2(9) of the ESI Act and the same is extracted herein below:-

"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

(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 carried on in or incidental to the purpose of the factory or establishment;"

11. As per Section 2(9) (i) of the ESI Act, when the employees are in the roles of the principal employer, and doing work incidental or preliminary, which are connected with the work of the factory, either in the factory or elsewhere, then such employee alone has to be covered under the ESI Act. Therefore, in order to bring a person as “employee”, who discharges a work



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incidental and ancillary to the work of the factory, then it become very much necessary that such “employee” should have been directly employed by the principal employer.

12. In our case, admittedly the petitioner/respondent has not employed any persons, who undertook the work for the outsourcing agency. In fact, even the appellant/respondent-Corporation admits that the outside agencies have engaged their own employees. Therefore, merely because contiguous job work was undertaken by third party vendor through their employee, then the same will not bring those employees under Section 2(9)(i) of the ESI Act.

13. The next ground urged is the right of rejection exercised by the respondent. Before going into this aspect, it is proper to refer the Full Bench Judgment of this Court in ***ESI Corporation Vs. Bethall Engineering Company***, reported in **2007 (3) LLN 934**. The relevant portion of the Judgment is as follows:-

" 9. In our opinion, there is no conflict between the judgments of the Division Benches, since the fact situations are totally different. So far as the issue referred to us is concerned, we answer the same in the negative and hold that the right of the principal employer to reject or accept the work done by the



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contractor through his employees is by itself cannot be construed as effective and meaningful, "supervision" as envisaged under Section 2(9) of the Act. "

(emphasize supplied by this Court)

14. It is also relevant to refer the Supreme Court Judgment reported in **1992 (1) SCC 441 C.E.S.C. Limited vs. Subash Chandrabose and others.** As per this Judgment, in order to bring any employee within the purview of "supervision" of the principal employer, then such employee should be under the immediate gaze and overseeing of the principal employer or his agent. In our case, it is fairly clear that no such overseeing was done by the respondent or his agent. In fact, it is an admitted case of the appellant-Corporation that the activity was not at all carried out in the respondent premises.

15. In yet another recent judgment of this Court in **CMA.Nos.1361, 1362, 1374 of 2021 vide order dated 20.10.2021 (GRT Hotels and Resorts Private Limited vs. ESI Corporation)**, the single Judge of this Court held that it is the duty of the respondent/appellant-Corporation to prove the supervision exercised by the principal employer over the outside agencies. In our case, except the assumed supervision, upon the ground of right of rejection, the appellant/respondent did not produce any documents before this Court to prove the supervision of the petitioner.



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16. According to the evidence of the RW1-Inspector who verified the respondent's accounts, the job work has been carried out by the 3rd party contractors outside the premises of the respondent. Further, he did not whisper anything about the alleged supervision, except the construction of supervision by the respondent, on the ground of the right of rejection of the petitioner/respondent. The said construction and assumption of supervision is contrary to the decisions cited supra. Therefore, the finding of the Trial Court setting aside the 45A order cannot be found faulted with. The Trial Court has categorically found that, no supervision has been proved. Therefore, as rightly contended by the learned counsel for the petitioner/respondent, there is no ground for interference with the well considered impugned order dated 17.12.2018 passed by the Employees Insurance Court, Principal Labour Court, Chennai.

17. At this juncture, the learned counsel for the petitioner/respondent would also invite the attention of this Court in respect of the order passed by the Hon'ble Single Judge in CMA.No.222 of 2021 against the same parties and on the same grounds. Wherein this Court has accepted the contention of the petitioner/respondent and ultimately ordered to set aside the 45A order.



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18. Thus, the very finding of the Court below is perfectly in order and the same does not require any interference by this Court. Hence, the instant Civil Miscellaneous Appeal is dismissed. There shall be no order as to costs. Consequently, connected CMP is closed.

01.08.2023
(2/2)

Index : yes/no

Speaking/Non Speaking Order

Neutral citation case: Yes/No

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To

1. The Principal Labour Court,
Employees Insurance Court,
Chennai.

2. The Section Officer,
V.R.Section,
High Court, Madras.



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C.KUMARAPPAN, J

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