IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.01.2023

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THE HON'BLE MR. JUSTICE S. VAIDYANATHAN

AND

THE HON'BLE MR. JUSTICE MOHAMMED SHAFFIQ

W.A. Nos. 2115, 2125 & 2162 of 2021

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C.M.P. Nos. 13400, 13437 & 13653 of 2021

1. The Authorized Officer,
   Insurance Branch VI,
   Employees State Insurance Corporation,
   Chennai 600 034.

2. The Recovery Officer,
   Regional Office,
   Employees State Insurance Corporation,
   Chennai 600 034.

3. The Regional Director,
   Regional Office,
   Employees State Insurance Corporation,
   Chennai 600 034. ..Appellants in all W.As

Vs.

1. The Tamil Nadu Civil Supplies Corporation,
rep. by its Chairman & Managing Director,
No.12, Thambusamy Road,
Kilpauk, Chennai 600 010.

2. The Tamil Nadu Civil Supplies Corporation,
rep. by its Regional Manager (South),
9, Cornon Smith road, Gopalapuram,
Chennai 600 086.

3. The Chief Manager,
State Bank of India,
Gopalapuram Branch,
Chennai 600 086.

4. The Secretary to Government,
State of Tamil Nadu,
Labour & Employment Department,
Fort St. George, Chennai 600 009. ..Respondents in all W.As

Prayer: Writ Appeals as against the order dated 15.02.2011 passed in W.P. Nos. 6002, 6003 & 6004 of 2006 respectively.

For Appellants in all W.As	::	Mr.S. Jayakumari
For Respondents in all W.As	::	Mr.C. Selvaraj, Standing Counsel for R1 & R2 Mrs.E. Ranganayaki, Addl. Govt. Pleader for R4

Mr. Sivakolappan for R3

JUDGMENT

S. VAIDYANATHAN,J.

AND

MOHAMMED SHAFFIQ,J.

The Tamil Nadu Civil Supplies Corporation had approached this Court by way of writ petitions stating that the proceedings of the ESI Corporation dated 05.01.2006 determined and mentioned in C.18 actuals and the recovery orders passed by the Authorised Officer of ESI Corporation, vide proceedings dated 07.02.2006 are liable to be quashed as there is an exemption granted to the establishment from the application of ESI Act by various orders starting from 01.07.1972 to 30.06.1994 under Section 87 r/w 91A of the ESI Act. The learned Single Judge, by the order under challenge, set aside the demand notices issued by the ESI Corporation and directed refund of the amount collected from the Tamil Nadu Civil Supplies Corporation through garnishee proceedings from the bankers of Civil Supplies Corporation . Aggrieved by the said order, the present writ appeals have been preferred.

2. According to the learned counsel for the Civil Supplies Corporation, the Government by various orders have exempted the Civil Supplies Corporation from the application of ESI Act under Section 87 r/w 91A of the Act for the period from 01.07.1972 till 30.06.2010. It had been brought to the notice of this Court at the time of admitting the appeals that, even as on date, the exemption continues.

3. However, it has been contended by the learned Counsel for ESI Corporation that the employees, who are not exempted under the notification, particularly, loadmen and others who have been engaged by the Tamil Nadu Civil Supplies Corporation are governed by the provisions of ESI Act and that ESI contribution needs to be paid. It is further contended that when Civil Supplies Corporation has got an alternate remedy, they should have approached the appropriate forum invoking Section 75 of ESI Act rather than approaching this Court, more so, when there is a dispute with regard to payment of ESI contribution by the employer to the ESI

Corporation as it is mandatory duty cast upon the employer to pay the same. According to the learned counsel, even the exemption clause can be adjudicated by the ESI Court, which is constituted under the Act and that in terms of Section 91-AA of the Act, which is extracted below, the Central Government is the appropriate Government:

> *" [91-AA. Central Government to be appropriate Government. — Notwithstanding anything contained in this Act, in respect of establishments located in the States where medical benefit is provided by the Corporation, the Central Government shall be the appropriate Government.]"*

4. Heard both sides.

5. In the present writ appeals, the entire issue revolves around Sections 87 & 88 of The Employees' State Insurance Act, 1948 and the same are extracted below:

> ***"87. Exemption of a factory or establishment or class of factories or establishments.***
>
> *The appropriate Government may, by notification in the Official Gazette and subject to such conditions as may be specified in the notification, exempt any factory or*

establishment or class of factories or establishments in any specified area from the operation of this Act for a period not exceeding one year and may from time to time by like notification renew any such exemption for periods not exceeding one year at a time.

[Provided that such exemptions may be granted only if the employees in such factories or establishments are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act:

Provided further that an application for renewal shall be made three months before the date of exepiry of the exemption period and a decision on the same shall be taken by the appropriate Government within two months of receipt of such application.]"

88. Exemption of persons or class of persons:

The appropriate Government may, by notification in the Official Gazette and subject to such conditions as it may deem fit to impose, exempt any persons or class of persons employed in any factory or establishment or class of factories or establishments to which this Act applies from the operation of the Act.

It is also necessary to refer to Section 91A of the said Act at the relevant point of time and the same is extracted hereunder:

[91-A. Exemptions to be either prospective or retrospective. — Any notification granting exemption under section 87, section 88, section 90 or section 91 may be issued so as to take effect 5 [prospectively] on such date as may be specified therein.]*

6. Normally, alternate remedy is a bar for a person to approach the Court, but there may be exceptional cases as the present case on hand and when the writ petition is of the year 2006, relegating the appellant Corporation to go before the ESI Court is not acceptable, having kept the matter for more than 15 years. That apart, there is an exemption notification under Section 87 of the ESI Act, which clearly contemplates that the Tamil Nadu Civil Supplies Corporation as such is exempted. So, any person who is working under the establishment is not entitled to ESI contribution benefits. It is not the class of persons under which notification under Section 88 has been issued. It is no doubt true that the ESI Corporation is empowered to decide the actuals and demand, provided the Act is applicable to the establishment concerned and not otherwise. But in this case, though such an exercise has been done by the ESI Corporation, as there is no

exemption under Section 88 and that there is an exemption under Section 87, we are of the view that ESI Corporation cannot demand any amount much less the one they have recovered by means of an attachment. In spite of payment by Civil Supplies Coproration, the ESI Corporation has not returned the money.

7. Eventhough the learned Single Judge has passed an order quoting Section 91-AA of the Act that Civil Supplies Corporation has to approach the Central Government in case of any future exemption, the effect of Section 91-AA cannot be gone into in the present case on hand as the period in question is much prior to the amendment ie, 01.06.2010. Further, it is stated by the learned counsel appearing for the appellant that Section 91-AA had come into effect from 01.06.2010 and it has no retrospective effect. We find that there is some force in the argument advanced.

8. Moreover, the learned counsel for the Civil Supplies Corporation has brought to the notice of this Court a communication dated 06.12.2010

received by the Labour and Employment Department from the ESI Corporation that the appropriate Government would be the State Government. The said communication has not been produced before the learned Single Judge. The communication dated 06.12.2010 issued by the ESI Corporation to the Deputy Secretary to Government, Labour and Employment Department and the relevant portion is extracted below:

> *"(1) I am directed to refer to your letter No.31256/L1/2010-3 dated 24.11.2010 on above cited subject and to inform that vide this office letter of even No. Dated 05.05.2010, this office has circulated copies of ESI (Amendment)Act, 2010 to all State Governments, for information and necessary action. In Section 21 of the Amendment Act, it is provided that Section 91A of the principal Act has been amended vide which the appropriate State Governments are empowered to grant exemptions to any establishment* ***only from a prospective date.***
>
> *(2) So far as Section 22 of said ESI (Amendment) Act, 2010 is concerned, a new Section 91AA has been inserted in the principal Act, the contents of which are clear. This new Section is applicable only in cases of States where medical care is provided directly by the Corporation. Presently*

medical care is directly being provided by the ESI Corporation only in Delhi. Since in Tamil Nadu, the medical benefit is provided by the Government of Tamil Nadu (except in case of ESIC Model Hospital), the State Government, being the 'appropriate Government' as per sub-section (1) of Section (2) of the principal Act, will continue to exercise its powers to grant exemptions to any factory/establishment ***prospectively only*** *in view of amendment in the Act as mentioned in para (2) above, provided the factory or establishment seeking exemption satisfies the conditions as laid down in other provisions of the ESI Act, 1948(as amended) e.g. If the employees in any such factory or establishment are otherwise in receipt of benefits substantially similar or superior to the benefits provided under Employees' State Insurance Act, 1948."*

9. As observed earlier, we find much force in the contention of the learned counsel for the Civil Supplies Corporation that in the light of the fact that persons for whom C18 actuals have been made were not exempted and therefore, the establishment will have to pay the amount, cannot be accepted. At the risk of repetition, we make it very clear that when there is an exemption granted under Section 87 of ESI Act and not under Section 88

of the ESI Act, the ESI Corporation cannot demand any amount from the Civil Supplies Corporation. Further, in ***U.P. Road Transport Corporation through its Regional Manager, Gorakhpur V. E.S.I. Corporation, Kanpur, reported in 2009 2 LLJ 247: 2009 2 LLN 130,*** it was held that if there was any exemption in force, the employer is not bound to pay the contributions from the date on which exemption was granted to that employer. Hence, the amount already attached and recovered shall be refunded to the Civil SuppliesCorporation with interest @ 12% per annum from the date of attachment till the date of payment. The amount shall be refunded to the Civil Supplies Corporation within a period of four months from the date of receipt of a copy of this order. When the ESI Corporation demands 12% interest in terms of Regulation 31, if the contribution is not paid, the same yardstick would apply while refunding the amount. Hence, the ESI Corporation will have to refund the amount recovered from the Civil Supplies Corporation with interest @ 12% per annum.

S. VAIDYANATHAN,J.

AND

MOHAMMED SHAFFIQ,J.

nv

10. The writ appeals are allowed with the above direction. No costs.

(S.V.N.J.) (M.S.Q.J.)
11.01.2023

nv

To

The Tamil Nadu Civil Supplies Corporation,
rep. by its Chairman & Managing Director,
No.12, Thambusamy Road,
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2. The Tamil Nadu Civil Supplies Corporation,
rep. by its Regional Manager (South),
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