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C.M.A. No.3967/2019, etc. Batch

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 24.11.2023

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

C.M.A. NO. 17 OF 2015

C.M.A. NOS. 3967, 3987, 3988, 3991 & 3992 OF 2019

Employees State Insurance Corporation
143, Sterling Road, Nungambakkam
Chennai 600 034, rep. By the Asst.
Director & Recovery Officer

.. Appellant in all appeals

- Vs -

M/s. New Woodlands Hotel (P) Ltd.
No.72-75, Dr. Radhakrishnan Road
Mylapore, Chennai 600 004
Rep. By the Managing Director

.. Respondent in all appeals

C.M.A. No. 17 of 2015 filed under Section 82 (2) of the ESI Act against the order and decretal order passed by the Employees Insurance Court (Principal Labour Court), Chennai, dated 17.09.2010, made in EIOP No.205/2010 and set aside the same.

C.M.A. No. 3967 of 2019 filed under Section 82 (2) of the ESI Act against the order and decretal order passed by the Employees Insurance Court (Principal Labour Court), Chennai, dated 24.01.2017, made in EIOP No.92/2010 and set aside the same.



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C.M.A. No. 3987 of 2019 filed under Section 82 (2) of the ESI Act against the order and decretal order passed by the Employees Insurance Court (Principal Labour Court), Chennai, dated 17.02.2017, made in EIOP No.7/2009 and set aside the same.

C.M.A. No. 3988 of 2019 filed under Section 82 (2) of the ESI Act against the order and decretal order passed by the Employees Insurance Court (Principal Labour Court), Chennai, dated 24.01.2017, made in EIOP No.8/2009 and set aside the same.

C.M.A. No. 3991 of 2019 filed under Section 82 (2) of the ESI Act against the order and decretal order passed by the Employees Insurance Court (Principal Labour Court), Chennai, dated 24.01.2017, made in EIOP No.5/2009 and set aside the same.

C.M.A. No. 3992 of 2019 filed under Section 82 (2) of the ESI Act against the order and decretal order passed by the Employees Insurance Court (Principal Labour Court), Chennai, dated 24.01.2017, made in EIOP No.6/2009 and set aside the same.

For Appellant : Ms. G.Narmadha

For Respondent : Mr. S.Ravindran, SC, for
Mr. D.Abdullah

COMMON JUDGMENT



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Assailing the orders of the ESI Court, in and by which the said Court interfered with the order of the appellant passed u/s 45-A of the Employees State Insurance Act (for short 'the Act'), demanding contribution in respect of the amount, which were allegedly paid as service charges, but were in effect, payment made by way of wages to the employees, the present appeals have been preferred by the appellant.

2. The sum and substance of the facts and averments, which are necessary for the disposal of the present appeals are as under :-

The respondent is engaged in the business of running a hotel and for catering to the needs of the customers, various contractual employees have been pressed into service through contractors and the said employees are paid wages. However, apart from wages, service charges, which are levied as part of the bill towards the service rendered by the said individuals, are collected by the respondent and paid to the employees at the end of the month.



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3. The inspector of the appellant conducted inspection of the records maintained by the respondent and submitted his report, which led to the issuance of C-18 notice on various dates, claiming contribution of various sums, as spelt out in the impugned orders, for the periods mentioned therein, under the head service charges, on the ground that the said service charges, were, in fact, wages, clothed with the cloak of service charges.

4. To the said notice, the respondent appeared before the authorised officer on several dates and submitted their explanation by explaining that the service charges charged by the hotels and paid to the employees did not partake the character of wages and cited decisions of the judicial forum to substantiate their case. It was further submitted by the respondent that the appellant may depute their inspector to inspect the very many documents and vouchers, which support their case, as the voluminous documents prevented it from being brought and also on account of a chance of they being lost in transit. However, the appellant, negating the submission, passed the order, directing the respondent to pay the compensation



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quantified in the respective cases, against which the respondent preferred the respective petitions before the ESI Court.

5. The ESEI Court, on the basis of the materials placed before it and also relying on the decision of the Apex Court in ***Quality Inn Southern Star – Vs – The Regional Director, Employees State Insurance Corporation (2008 (2) SCC 549)***, held that even the appellant, vide its circular had clearly spelt out that service charges would not fall within the ambit of wages and in the present case, the issue being relatable to service charges, held that the said amount paid to the respective employee do not attract contribution and set aside the order passed by the appellant. Aggrieved by the said order, the present petitions have been preferred.

6. Learned counsel appearing for the appellant submitted that the decision in *Quality Inn case* is only applicable in case where service charges are collected by the Management from the customers in lieu of tips. However, in the present case, the Management has not collected service



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charges in lieu of tips and, therefore, the said decision is not attracted to the case on hand.

7. It is the further submission of the learned counsel that the mere nomenclature of the term as service charges in regard to any collection will not bring the same within the ambit of service charges and, therefore, the employer cannot shirk responsibility from paying the contribution towards the said amounts.

8. It is further submitted by the learned counsel that the respondent has not produced any materials to establish that the said amounts are not part of wages and in the absence of any materials produced by the respondent, the finding and the consequent demand of contribution to the tune as stated in the respective petition is wholly justified. It is the further submission of the learned counsel that even before the ESI Court no material whatsoever is placed by the respondent to substantiate their case that the amounts collected were towards service charges.



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9. It is the further submission of the learned counsel that 75% of the amount paid to the individual constituted the total salary/wages, which were paid to the individuals and only to avoid payment of contribution, the amount has been shown as service charges, though in actuality, it forms part of the wages. It is the further submission of the learned counsel that the circular issued by the appellant is only with regard to service charges, which are received by the Management in lieu of tips, but the alleged service charges cannot be treated to be service charges and it would have to be treated as wages, attracting contribution. Therefore, learned counsel prayed for setting aside the order passed by the ESI Court.

10. Per contra, learned senior counsel appearing for the respondent submitted that inspite of the fact that the respondent was all along ready and willing to place all the materials, including the vouchers and bills at the disposal of the appellant or the person authorised by the appellant for inspection, yet the appellant did not accede to the request of the respondent. Therefore, it is submitted that it is not open to the appellant to contend that no materials was placed before the appellant to substantiate that the



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amounts, which were received as service charges, were, in fact, tips, which were excluded from the purview of being considered as wages for the purpose of payment of contribution on the said amount.

11. It is the further submission of the learned senior counsel that the bills, which were given to the customers, clearly details the service charges separately, which is evident from the bills and without advertng and considering the same, the appellant has passed the order against the respondent, which is against its very own circular which prescribes that the service charges, received from the customers for various services rendered by the employees, which were essentially in the form of tips being paid by the customers to the employees, the amounts were collected and distributed evenly between all the employees so that they could render better service. Since the amount so distributed is not on the basis of any terms of the contract between the employer and the employee, it would not partake the character of wages and, therefore, rightly appreciating the same, the ESI Court had set aside the order passed by the appellant, by advertng to the decision in *Quality Inn case*, which does not warrant any interference.



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12. This Court paid its careful consideration to the submissions advanced by the learned counsel appearing on either side and perused the materials available on record, as also the decision relied on by the learned counsel for the respondent.

13. Before proceeding to analyze the facts of the present case, the ratio with regard to service charges and contribution thereof, has been dealt with by the Apex Court in *Quality Inn case* and the relevant portion is quoted hereunder :-

"7. Section 2(22) defines wages as:

"Wages means all remuneration paid or payable, in cash to an employees or implied, were fulfilled and includes (any payment to an employee in respect of any period of authorized leave, lockout, strike which is not illegal or layoff and) other additional remuneration, if any (paid at intervals not exceeding two months), but does not include

(a) any contribution paid by the employer to any pension fund or provident fund, or under this act:

(b) any traveling allowance or the value of any traveling concession;



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(c) any sum paid to the person employed to defray special expenses entailed on him by the nature employment; or

(d) any gratuity payable on discharge"

8. *The circular referred to by the learned counsel for the appellant reads as follows:*

"E Service charges cannot be included in "wages" for the following reasons-

(a) The Memorandum issued by the ESIC corporation number P11113/97-Ins.IV dated 6.11.2000 clearly states in paragraph 13 that:

"Service Charges are collected by management of the hotel on behalf of their employees in lieu of direct tips and the same is paid to their employees at a later date. Such amount collected as 'service charges' will not constitute wages under S 2(22) of the ESI Act. In the case of ESIC v M/s Rambagh Palace Hotel, Jaipur. The High Court of Jaipur has held that 'service charges' are not wages under Section 2(22) of the ESI Act. This verdict of the High Court of Jaipur was accepted in the ESIC and Hence no contribution is payable on 'service charges'. (Earlier instructions were issued vide letter No. P. 12/11/4/79 Ins. Desk I dtd.18.9.79)"

9. *The introduction to the memorandum dated 6.11.2000 states that it has been issued because:*



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"it is necessary that the instructions issued by this office from time to time are not only consolidated but certain more items are included not only to clear the doubts of the what constitutes part of wage under Section 2(22) Some of the instructions were issued long back rather -as back as in 1967 and certain instructions are not even available in some of the regions and it is difficult to keep a track on the old instructions. Keeping in view the above aspects and consolidated instructions including some more items are as under:"

(b) In the present case, the amounts received by the employees were not in the nature of "wages", as they were not given to the employees under the terms of the contract of employment, either express or implied. The appointment letters expressly state that employees are not entitled to any other remuneration. Thus the distribution of service charges is expressly excluded from the wages."

10. In view of the above-said office memorandum and the view taken by the Madras High Court in [Sathianathan](#)'s case (supra) the orders of the ESI Court and the High Court cannot be maintained and are accordingly set aside."



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14. From the aforesaid decision, it clearly transpires that the amount collected by the management of the hotel as service charges in lieu of direct tips and the same being paid to their employees at a later date cannot be termed to be wages in view of the memorandum issued by the ESI Corporation dated 6.11.2000. Further, the Apex Court held that the amounts so received by the employees therein would not fall within the ambit of wages as they were not given to the employees under the terms of the contract of employment, either express or implied and in the absence of a clear prescription in the order of appointment, the said amounts would not partake the character of wages. In fact, the aforesaid decision had approved the decision of this Court in the case of ***Sathianathan N & Sons (P) Ltd. – Vs – ESI Corporation & Anr. (2002 (II) LLJ 1002 (Mad))***.

15. Keeping the principles of law laid down above, a careful analysis of the materials available on record reveal that no terms of contract has been referred by the appellant while passing the order seeking contribution in relation to the amounts, which have been disbursed to the employees as service charges, which were received in lieu of tips from the customers. The



whole genesis of the case of the appellant is premised on the sole ground that no material whatsoever has been placed by the respondent to claim that what was, in fact, paid to the employees was only service charges, which were in lieu of tips received from the customers and, therefore, the said amounts would have to be taken into account as wages paid by the respondent and, therefore, contribution on the said sums have to be paid by the respondent.

16. However, what is more curious in the aforesaid order is that the basis of such a finding does not stand reflected in the order. The whole order proceeds on mere surmises and conjectures on the part of the appellant to sum up that the amount, which were paid to the employees, which were service charges received in lieu of tips from customers was in fact wages. There is no documentary material to strengthen such a view. However, when such a view was put forth, necessarily the respondent is bound to satisfy the appellant as to the nature of the amount that was paid to the employees.



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17. What is more curious to be noted here is the fact that the respondent has repeatedly sought for inspection of the documents to substantiate its contention that what was paid was service charges, which was in lieu of tips received from the customers for the services rendered to them. The only request placed by the respondent was that the documents were voluminous, as it pertained to vouchers and bills and, therefore, bringing the same to the office of the appellant would be a cumbersome task and there may be chances of misplacement and, therefore, pleaded with the appellant for deputing an official to inspect the said documents. However, for reasons best known to the appellant, such a request was negated. No reason, worth mentioning has been placed by the appellant for negating the said request. However, it is the repeated stand of the appellant that no documents have been placed by the respondent to substantiate its contentions.

18. When the appellant was not willing to scan through the documents, inspite of the request made by the respondent, it does not lie in the mouth of the appellant to contend that the respondent has not



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substantiated the nature of payment made through any documentary evidence.

19. Further, one other aspect, which stares writ large on the case of the appellant is the basis on which the appellant has construed the payments made by the respondent to its employees as wages and not service charges in lieu of tips. The whole basis of the claim of the appellant that the amounts paid were not service charges, but wages stems from the claim of the appellant that the amount, which were paid to the employees as service charges outweigh the wages, which is alleged to have been paid to the employees. In fact, it is the claim of the appellant that 75% of the amount is shown as service charges, which only 25% of the amount is said to be wages. Further, the terms of the contract of employment between the respondent and its employees, which would necessarily be the basis to determine the nature of amount paid by the respondent, has not been adverted to by the appellant, while arriving at the conclusion that the amount paid were not service charges, which were received in lieu of tips for the various types of services rendered to the customers.



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20. It is to be pointed out that the nature of business and the extent of business would be the deciding factor in the receipt of tips by an employee, who renders his service in the hotel. The vastness and the richness of the hotel results in the amount of tips generated and only in this regard, to have an uniformity between the various employees working in the hotel industry, hotels of bigger denomination collect the tips paid by the customers to its employees under the head service charges and, in turn, pay the same uniformly to all the employees, irrespective of the type of service which they discharge. In the case on hand, it is the claim of the respondent that the bills of the respondent even reflect the service charges collected from the customers in lieu of tips and a verification of the material documents in the form of vouchers and other bills would establish the said fact. However, the appellant has not taken any prudent approach to have the bills verified, but had, without proper application of mind, passed the order, which has been rightly set aside by the ESI Court.



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21. Further, as early as in the year 2002 itself, in *Sathianathan's case* (*supra*), on the basis of the stand taken by the Department that the tips collected by the management of the hotel to be paid to their employees at a later date will not constitute “wages” as contemplated u/s 2(22) of the Act, which has been duly accepted by the Department as well, which has been the basis of the order passed in *Quality Inn case*. That being the admitted position, in the absence of any material on the side of the appellant to disprove that what is paid by the respondent is not the tips received from the customers under the pretext of service charges is a wholly unsubstantiated and unreasoned claim, which does not deserve acceptance.

22. The ESI Court, on a careful analysis of both the oral and documentary evidence and also the stand taken by either side, has rightly come to the conclusion that the order passed by the appellant is wholly perverse and unsustainable and had set aside the said order, which order does not suffer the vice of any illegality or unreasonableness and, therefore, does not deserve any interference at the hands of this Court.



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23. For the reasons aforesaid, all the appeals fail and, accordingly, all the civil miscellaneous appeals are dismissed. In the circumstances of the case, there shall be no order as to costs.

24.11.2023

Index : Yes / No

GLN

To

1. The Presiding Officer
Employees Insurance Court
(Prl. Labour Court)
Chennai.
2. Assistant Director &
Recovery Officer
Employees State Insurance Corporation
143, Sterling Road, Nungambakkam
Chennai 600 034.



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M.DHANDAPANI, J.

GLN

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C.M.A. NOS. 3967, 3987,
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