# BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

**DATED : 18.04.2023**

**CORAM**

**THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR**

**C.M.A(MD)No.1629 of 2013**
**and**
**M.P(MD)No.2 of 2013**

Jay Rayen ....Appellant/Petitioner

Vs.

Employee's State Insurance Corporation,
Chennai,
Represented by its Regional Director,
Pradeep Bhavan,
143, Sterling Road,
Nungambakkam,
Chennai. ... Respondent/Respondent

**PRAYER:-** Civil Miscellaneous Appeal filed under Section 82 of the Employee's State Insurance Act, to set aside the fair and decreetal order in E.S.I.O.P.No.170 of 2005, dated 12.02.2013 passed by the Employee's State Insurance cum Principal District Judge, Thanjavur and allow the appeal.

For Appellant : Mr.G.Karnan

For Respondent : Mr.P.Ganapathy Samy

# JUDGMENT

The present appeal has been filed challenging the order passed by the E.S.I Court in which they have confirmed the order passed by the E.S.I corporation under Section 45-A of the E.S.I Act.

2. It is the case of the appellant that her husband, namely Rosewic V.Rayon was running a bakery under the name of Ceylon Dasan Food Products limited for more than 20 years. Due to loss in the said business, he got his license cancelled with effect from 31.03.2001. Thereafter, a new license was obtained in the name of the appellant who is the wife of the previous employer from April 2001 onwards. Thereafter, the bakery was renamed as Dasan Bakers.

3. While the bakery was run under the name and style of Ceylon Dasan Food Products limited, admittedly the said bakery was covered under E.S.I Act and there is no dispute that the contributions have been paid up to 31.03.2001. After a new license was obtained in the name of the present appellant, contributions were not paid to the E.S.I corporation

on the ground that it is the new establishment and the number of employees do not warrant coverage under the E.S.I Act. On 21.01.2003, the Inspector of E.S.I corporation had obtained a letter from the husband, namely the previous owner to the effect that the wife is running the present establishment. Based upon the said letter, a plain paper report was prepared by the Inspector of E.S.I corporation on 21.01.2003 stating that the coverage under E.S.I Act continues.

4. Based upon the said plain paper report, Form D-5 notice was sent by the respondent to the petitioner on 26.08.2003 and Form 'C' 18-Adhoc notice was also issued to the appellant on the same date. For Form D-5 notice and Form 'C' 18-Adhoc notice, replies were sent by the appellant on 04.10.2003, 19.09.2005 and 30.09.2005 contending that the present establishment is a new establishment and the number of employees do not warrant coverage under the E.S.I Act. The E.S.I corporation had issued a show cause notice on 31.08.2005 calling upon the appellant herein to show cause why contribution amount cannot be recovered from the employer. To the said show cause notice, there was

no reply from the employer. Therefore, order under Section 45-A of the Act was passed on 26.10.2005 on the basis of assumed wages for 8 employees and the total contribution was determined at Rs.48,048/- for the period covering April 2003 – March 2005.

5. The appellant herein had filed E.S.I.O.P.No.170 of 2005 seeking for a declaration that the Dasan bakers is not covered under the said Act and the order under Section 45-A of the said Act, dated 26.10.2005 is null and void and unenforceable. The said petition was dismissed by the E.S.I Court after hearing both the parties. Challenging the said order, the present appeal has been filed by the employer.

6. The learned counsel appearing for the employer had contended that the license and the sales tax were originally standing in the name of the appellant's husband which was cancelled and a fresh license and sales tax certificate were issued in the name of the appellant herein with effect from 01.04.2001 onwards. Therefore, it is a new establishment and the corporation has to inspect the premises to find out whether there are

10 or more employees and allot a fresh code number, if there are 10 or more employees. The corporation officials have visited the previous employer and on the basis of the letter issued by him, has prepared a report on 21.01.2003 and based upon the said report, Form D-5 and Form 'C' 18-Adhoc notices have been issued by the corporation.

7. The learned counsel for the appellant had further contended that the appellant had issued reply under Exhibit P.5, P.9 and P.10 to the authorities informing them that it is a new establishment and employees are less than 10 in number does not warranting invocation of the Act. However, without considering the said reply, an order under Section 45-A of the E.S.I Act has been passed on the basis of assumed wages indicating that there are 8 employees.

8. According to the learned counsel appearing for the appellant, in view of the statutory formation of a new establishment, the present establishment can never be considered to be a transfer of ownership or continuation of the previous business. However, the E.S.I Court has

dismissed the petition on the basis of Exhibit R.1 and R.2 letters which were written by the previous employer in favour of the corporation. No proper opportunity has been afforded to the present employer to establish the fact that it is a new establishment and having less than 10 employees. Hence, he prayed for allowing the appeal.

9. Per contra, the learned counsel appearing for the E.S.I corporation pointed out that the contribution for the period between April 2001 to March 2003 which was not paid by the employer has already been debited from the bank account. Only for the subsequent period, namely from April 2003 to March 2005, the present proceedings have been initiated. Therefore, the coverage of the establishment is an admitted fact. He further contended that the previous employer has issued a letter under Exhibit R.1 on 21.01.2003 pointing out that he had just transferred the establishment in the name of his wife, who is now in management of the bakery. Only on the basis of the said letter, a report has been prepared by the Inspector after inspecting the premises to the effect that the establishment continues to be covered under the E.S.I Act.

Exhibit P.1 certificate issued by the sales tax authorities was not produced before the E.S.I authorities. The appellant has not chosen to file any reply to the show cause notice issued and therefore, the E.S.I corporation was constrained to proceed on the basis of presumed wages as empowered under Section 45-A. He further contended that once an establishment gets covered under E.S.I Act, the coverage continues even if the number of employees come below 10. Therefore, the order under Section 45-A of the Act on the assumed wages for 8 employees is legally sustainable. When the employer has not come forward to establish his case either before the authorities or before the E.S.I Court, he cannot get a second chance to prove his case. Hence, he prayed for confirming the order passed by the E.S.I Court.

10. I have carefully considered the submissions made on either side and perused the records.

11. There is no dispute that the bakery that was run in the name and style of Ceylon Dasan Food Products limited was covered under the

E.S.I Act up to 31.03.2001 and contributions up to the said date have been paid. It is the case of the present employer that the license and the sales tax registration in the name of the previous employer have been cancelled and a fresh license in the name of the present employer and a fresh registration under the sales tax Act have been obtained in the name of the present employer.

12. It is contended on the side of the present employer that it is a new establishment and unless inspection is conducted afresh and they found that there are 10 or more employees, the Act cannot be applied to them on the basis of the fact that the previous employer was covered under the E.S.I Act. There is no connection whatsoever with the previous employer except that the previous employer was the husband of the present employer. It has also been brought to the notice of the Court that Section 45-A order clearly points out that there are only 8 employees at the relevant point of time. However, it is settled position of law that once an establishment is covered under the E.S.I Act, in case of any reduction in the number of employees, it will not take away the coverage under the

said Act. However, if the license of the previous employer is cancelled and license is issued to a different person, it is for the E.S.I corporation to initiate independent proceedings to find out the coverage of the present employee.

13. In the present case, the entire proceedings under Section 45-A are based upon the letters said to have been issued by the previous employer. The 45-A order has not taken into consideration the reply issued by the present employer on 04.10.2003, 19.09.2005 and 30.09.2005 which were sent as a reply to Form 'C' 18- Adhoc notice and Form D-5 notice. It is true that the present employer has not responded to the show cause notice under Section 45-A of the Act. However, unless the corporation arrives at a finding that the present employer is not a new establishment, the said order cannot be passed. To arrive at such a finding, notice and enquiry are very much essential. I find that the appellant has made out a *prima facie* case that there are only 8 employees at the time of inspection and also at the time of passing of orders under Section 45-A. The only question that would remain is that whether the

present establishment is a continuation of the previous establishment or it is an independent and new establishment. This fact can be established only after issuing notice and conducting a fresh enquiry by the E.S.I corporation. The E.S.I Court has simply relied upon Exhibit R.1 and R.2 letters said to have been issued by the previous employer and the non-cooperation of the present employer to 45-A proceedings.

14. In view of the above said deliberations, the Civil Miscellaneous Appeal stands allowed. The order passed by the E.S.I corporation under Section 45-A of the order on 26.10.2005 is hereby set aside. The matter is remitted back to the file of the E.S.I corporation. The E.S.I corporation is at liberty to issue notice to the present employer, namely the appellant herein and to conduct an enquiry and arrive at an independent finding with regard to the coverage of the Act. In case, if they arrive at a finding that the coverage continues, then they are entitled to recover the contribution from April 2001 onwards.

15. With the said observations, this Civil Miscellaneous Appeal stands allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

**18.04.2023**

Index : Yes/No
Internet : Yes/No
NCC : Yes/No

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To

1.The Employee's State Insurance
cum Principal District Judge,
Thanjavur.

2.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

**R.VIJAYAKUMAR,J.**

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Judgement made in
**C.M.A(MD)No.1629 of 2013**

**18.04.2023**