



CMA(MD).Nos.1651 & 1679 of 2013

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 12.06.2023 & 15.06.2023

PRONOUNCED ON : 20.06.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)Nos.1651 & 1679 of 2013

CMA(MD).No. 1651 of 2013:

1.The Joint Regional Director
Employees State Insurance Corporation
Sub Regional Office
1-B, Old Post Office Street
Tallakulam, Madurai 625 002

2.The Recovery Officer
ESI Corporation
Madurai

...Appellant

Vs.

Kavitha Restaurant
826, Bus Stand, Madurai Road
Theni through its Manager

....Respondent

CMA(MD).No. 1679 of 2013

Kavitha Restaurant
826, Bus Stand, Madurai Road
Theni through its Manager

....Appellant



CMA(MD).Nos.1651 & 1679 of 2013

VS.

1. The Joint Regional Director
The Employees' State Insurance Corporation
Sub Regional Office
No.1-B, Old Post Office Street
Tallakulam
Madurai 625 002

New Address:
Sub Regional Office
4th Main Road, K.K.Nagar
Madurai 625 020

...Respondent

PRAYER in CMA(MD).No.1651 of 2013:- Civil Miscellaneous Appeal filed under Section 82 of the E.S.I.Act, to set aside the order dated 09.05.2013 passed by the ESI Court (ie.Labour Court), Madurai in ESI.OP.No.46 of 2001 so far as it annuls the order dated 29.02.2000 and allow this civil miscellaneous appeal with necessary directions in favour of the appellant.

PRAYER in CMA(MD).No.1679 of 2013:- Civil Miscellaneous Appeal filed under Section 82(2) of the E.S.I.Act, to set aside the order dated 09.05.2013 passed by the ESI Court (ie.Labour Court), Madurai in ESI.OP.No.47 of 2001 and allow this civil miscellaneous appeal.

For Appellant : Mr.P.Ganapathisamy
appellants in CMA.No.1651 of 2013
& Respondent in CMA.No.1679 of 2013



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For Respondent : Mr.C.Karthikeyan
For Mr.P.Chandrabose
Respondent in CMA.No.1651 of 2013.
& Appellant in CMA.No.1679 of 2013

COMMON JUDGMENT

The Labour Court, Madurai had disposed of E.S.I.O.P.Nos.46 & 47 of 2001 by way of a common order dated 09.05.2013. Challenging the order passed in ESIOP.No.46 of 2001, the E.S.I.Corporation has filed CMA(MD).No.1651 of 2013. Challenging the order passed in ESIOP.No.47 of 2001, the employer had filed CMA(MD).No.1679 of 2013.

2.Since both the petitions were heard together by the E.S.I.Court and a common order was passed, both appeals have been tagged together.

Factual Background:

3.The employer is running a restaurant under a name and style of “Kavitha Restautent” in Theni Bus Stand which was owned by one Rajeswari. The corporation officials have conducted an inspection on 22.04.1997 and according to their report, 10 workers were employed at the relevant point of time. The E.S.I.authorities had initiated proceedings



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to bring the said restaurant under the coverage with effect from 02.04.1997. A C-18 notice was issued on 15.02.1999 for which a reply was sent by the employer on 26.03.1999.

4. On 15.11.1998, one Kabeer who is said to be the Manager of the restaurant had sent a reply stating that he has taken over the restaurant on 15.11.1998 and he would pay the contribution amount from 15.11.1998. In the said letter, it was pointed out that for the previous period he is not responsible. After several hearings, finally the matter was posted on 02.02.2000. The representative of the employer was present to attend the hearing. However, the hearing authority was not available. No further hearing date was intimated. However, an order under Section 45-A of the E.S.I. was passed on 29.02.2000 demanding contribution of Rs.40,085/- for the period between 22.04.1997 to 30.09.1998. The employer through his advocate had filed an application on 14.03.2000 to reopen the case. Accepting the said request, the case was reopened on 22.03.2000. However, no further orders were passed under Section 45-A of the E.S.I. Act. A recovery order was issued on 29.02.2000 demanding a sum of Rs.49,021/-. Therefore, the employer had filed ESIOP.No.46 of 2001 with a prayer to declare that E.S.I. Act is not applicable to the



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applicant and to declare the order dated 29.02.2000 as null and void. The employer had further prayed for permanently restraining the E.S.I.authority from claiming or collecting any amount towards E.S.I.Contribution.

5. Another show cause notice was issued by the E.S.I.authorities on 24.11.1999 demanding contribution for the period covering October 1998 to March 1999 claiming a sum of Rs.13,943/-. The hearing for this show cause notice was also fixed on 02.02.2000 and it was later adjourned to 10.05.2000. Since the employer had not attended the personal hearing nor sought for any adjournment, a second order under Section 45-A of the Act was passed on 25.01.2001. This order prompted the employer to file ESIOP.No.47 of 2001 with a prayer to declare that the E.S.I.Act is not applicable to the applicant and to declare the order dated 25.01.2001 as null and void. The employer had further prayed for permanently restraining the ESI officials from claiming or collecting a sum of Rs.13,943/- towards contribution.

6. E.S.I.O.P.No.46 of 2001 relates to the period between April 1997 to September 1998. ESIOP.No.47 relates to the period between October 1998 to March 1999. Both the ESIOPs were tagged together and



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common issues were framed for both the petitions which is extracted as follows:

“(1).Whether the petitioner concern is covered under the ESI Act?

(2).Whether order of the respondent dated 29.02.2000 is valid?

(3).Whether the order of the respondent dated 25.01.2001 is valid?

(4).Whether the petitioner is liable to pay contribution? If so to what amount?

(5).To what other relief the petitioner is entitled to?”

7.As far as the issue relating to the coverage under E.S.I.Act is concerned, the labour Court had relied upon Exhibit R1-letter addressed by the employer to the corporation wherein the manager of the restaurant had admitted that they would comply ESI Act from 15.11.1998 onwards. In the said letter, it is also mentioned that one Mr.Kabeer has taken over the hotel from the former owner namely Srimathy Rajeswari with effect from 15.11.998 and the contribution for the previous period may be collected from her. The Labour Court also found that the previous owner namely Rajeswari who was examined as PW1 has admitted that she had authorized her manager to write the said letter. Based upon the said fact, the ESI Court had proceeded to hold that the said restaurant is covered by



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the provisions of the E.S.I.Act.

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8.As far as E.S.I.O.P.No.46 of 2001 is concerned, the ESI Court specifically found that on 02.02.2000, no enquiry was conducted, but an order under Section 45-A of the E.S.I.Act was passed on 29.02.2000 as if an enquiry was conducted on 02.02.2000. In view of the above said findings, the E.S.I.Court was pleased to set aside the order under Section 45-A of the E.S.I.Act dated 29.02.2000.

9.As far as the ESIOP.No.47 of 2001 is concerned, the only defence that was taken by the employer was that, he was not provided with sufficient opportunity before passing orders. The Labour Court found that sufficient opportunity has been given and proceeded to dismiss the said ESIOP.

10.Aggrieved over the orders passed in ESIOP.Nos. 46 and 47 of 2001, the E.S.I.Corporation and the employer respectively have filed the above appeals.

11.Contentions of the learned counsel appearing for the ESI Corporation:

(a).A common issue was framed for both the petitions by the Labour Court and as far as the issue relating to the coverage is



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concerned, it has been decided against the employer confirming the order of coverage.

(b).As far as ESIOP.No.46 of 2001 is concerned, the order dated 29.02.2000 was not set aside, but only further opportunity was granted to the employer and therefore, the Labour Court was not right in allowing ESIOP.No.46 of 2001.

(c).As far as ESIOP.No.47 of 2001 is concerned, the only defence that was raised by the employer that he was not given ample opportunities to put forth his case has been falsified by the fact that the employer was given opportunity on 10.05.2000 to put forward his case. However, the employer has neither turned up nor sought for an adjournment. Therefore, the Labour Court was right in dismissing the said petition.

12.Contentions of the learned counsel appearing for the employer:

(a).As far as the issue relating to the coverage is concerned, it was held in favour of the employer in ESIOP.No.46 of 2001, in view of the fact that in the conclusion portion, it has been mentioned as “petition allowed”. Therefore, it should be construed that all the three prayers in the petition have been allowed in favour of the employer.



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(b).As far as the order under Section 45-A of the Act in ESIOP.No. 46 of 2001 is concerned, though the representative of the employer was present on 02.02.2000, due to demise of one ESI official, the hearing officer was not available on the said date. Without conducting a hearing, an order under Section 45-A of the Act is passed. Therefore, the Labour Court was right in setting aside the said order and the same may be confirmed.

(c). As far as ESIOP.No.47 of 2001 is concerned, the employee had sent a detailed reply on 20.09.2000. The said reply has not been properly considered in the impugned order dated 25.01.2001. However, the ESI Court has not properly considered the said fact and proceeded to hold that the proper opportunity has been given to the employer. When a statutory authority has not considered, the reply/explanation submitted and proceeds to pass an order, the said order is clearly in violation of the principles of natural justice warranting interference by this Court. Therefore, the ESI Court was not right in dismissing the said petition and he prayed for allowing the appeals.

13.CMA(MD).No.1651 of 2013 has been filed raising the following substantial questions of law:



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“(1).Whether the trial Court can annual levying of contribution on the basis of perverse finding?

(2).Whether the trial Court can annual any assessment order ignoring the 'Theory of Useless Formality' enunciated by the Supreme Court and High Courts?

(3).Whether the trial Court can annual any assessment order even when the employer has not proved that he had been prejudiced on account of denial of hearing?

(4).Whether the 'Trial Court can annual any assessment order for any period on the pretext of violation of the principles of natural justice without ordering passing of de novo order for the same period?

(5).Whether the trial Court is justified in casually interfering with the decision by way of the said speaking order dated 29.02.2000 of the said corporation despite solid evidence in favour of the said Corporation and despite the protection available in under Section 114, illustration (e) of the Evidence Act?”

14.CMA(MD).No.1679 of 2013 has been filed raising the following substantial questions of law:

“(1). Without conducting proper hearings under Section 45A of the ESI Act and specific decision in relating to the applicability of the ESI Act and without any valid material as well as oral evidence



placed before the 45A Authority as well as the ESI Court, but against the evidence the learned ESI Court's findings that the ESI Act is applicable to the appellant concern is correct or not?

(2).While the ESI Court set aside the 45A order passed by the Deputy Director in ESIOP.No.46 of 2001, the order passed in ESIOP.No.47 of the 2001, that the Act is applicable to the appellant concern is correct or not?

(3).Without furnishing the ESI Inspector's report passing the recovery proceedings and claiming the applicability of the Act to the appellant concern is correct or not?

(4).While the appellant is contesting the applicability of the Act, even before the 45A Authority and the ESI Court, but the learned Judge's conclusion that the ESI Inspector has not established his case that 10 employees were employed for the applicability of the Act but based upon a bald letter submitted by the Manager of the appellant concern before conducting the 45A hearing and that letter has not been relied upon by the 45A Authority and in spite of the fact that a representation through the remarks made by the same Manager before the 45A Authority in Ex.P7 challenging the applicability of the Act the learned Judge's conclusion that the Act is applicable to the appellant concern is correct or not?"

(5).Without proper determination of the amount, the recovery proceedings and the demand of the respondent corporation to claim a sum of Rs.13,946/-for the period from October 1998 to March



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1999 is correct or not?

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(6).Before initiating the recovery proceedings whether the respondent corporation following the procedures laid down under the ESI Act or not?

15.I have considered the submissions made on either side and perused the materials available on record.

Coverage:

16.The employer while challenging two orders under Section 45-A of the ESI Act dated 29.02.2000 and 25.01.2001 had prayed for a declaration that the establishment is not coverable under ESI Act. Both the petitions were tagged together, common evidence was recorded and a common judgement was delivered by the Labour Court.

17.While considering the issue of coverage, the Labour Court had relied upon the letter addressed by the Manager of the restaurant to the ESI Corporation in March 1999 admitting the liability of the restaurant to pay contribution from 15.11.1998. The proprietor of the restaurant namely Rajeswari who was examined as PW1 has also admitted that she had authorised her manager to communicate with the ESI corporation. It is contention of the employer that this letter would not amount to

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admission of the coverage and they are entitled to raise the issue relating to coverage in the present appeals.

18.A perusal of the common order passed by the Labour Court indicates that a common issue has been framed in both the petitions and the Labour Court has relied upon Exhibit R1-letter and deposition of proprietor of the restaurant to arrive at a finding that the restaurant is coverable under ESI Act. The said finding is common to both the petitions. However, the employer has not chosen to challenge the order in ESIOP.No.46 of 2001 on the ground that his petition stands allowed. When two petitions were clubbed together and a common finding is rendered, without challenging the finding in ESIOP.No.46 of 2001 relating to coverage, the employer would not be entitled to challenge the said issue of coverage in the appeal arising out of ESIOP.No.47 of 2001. Therefore, this Court is of the opinion that the employer would not be entitled to dispute the coverage of their establishment in CMA(MD).No. 1679 of 2013 which arises out of ESIOP.No.47 of 2001.

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19.As rightly pointed out by the learned counsel appearing for the employer, without conducting an enquiry on 02.02.2000, an order under



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Section 45-A of the ESI Act has been passed on 29.02.2000 as if an enquiry was conducted on 02.02.2000. Therefore, the Labour Court was right in setting aside the said order. However, the ESI authorities are at liberty to issue a fresh notice and after giving due opportunity to the employer can pass orders relating to the period between 22.04.1997 to 30.09.1998.

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20.This civil miscellaneous appeal arises out of an order passed in ESIOP.No.47 of 2001 in which an order dated 25.01.2001 passed under Section 45-A of the Act was challenged. The said order relates to the period between October 1998 to March 1999. Though the learned counsel appearing for the employer attempted to raise the plea relating to coverage, this Court is of the view that the coverage issue has already been decided in ESIOP.No.46 of 2001 and the same having not been challenged, it cannot be resurrected again in the present appeals.

21.A perusal of the order dated 25.01.2001 indicates that a personal hearing was afforded to the employer on 10.05.2000, the



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employer/representative of the employer has neither chosen to appear nor sought for an adjournment for a future date. Therefore, the ESI authorities were constrained to pass orders.

22.The learned counsel for the appellant had contended that they have submitted a detailed reply on 20.09.2000 which was not considered by the ESI authorities. A perusal of the said reply indicates that there is a passing reference about the show cause notice dated 24.11.1999. However, the entire reply proceeds only challenging the coverage. No specific reply has been addressed, relating to the period between October 1998 to March 1999. Therefore, the said reply dated 20.09.2000 is not a specific explanation to the show cause notice dated 24.11.1999. Therefore, the ESI authorities cannot be found fault with for not considering the said reply which was very general in nature and that too targeting the issue relating to coverage. Therefore, the contentions of the learned counsel appearing for the employer, that the employer was not provided sufficient opportunity or his reply dated 20.09.2000 was not properly considered, is not legally sustainable.



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23.In view of the above said deliberations, both the Civil

Miscellaneous Appeals stand dismissed. No costs.

20.06.2023

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

1. The Labour Court,
Madurai

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



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R.VIJAYAKUMAR,J.

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Pre-delivery Common Judgement made in
C.M.A(MD)Nos.1651 & 1679 of 2013

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