



C.M.A(MD).No.246 of 2020

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 27.06.2023

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THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.246 of 2020

and

C.M.P(MD)No.3618 of 2020

M/s.Hotel Sky Park,
Represented by its Managing Partner,
Tr.S.Asharaf Ali.

... Appellant/Petitioner

Vs.

The Recovery Officer,
Employees State Insurance Corporation,
4th Main Road,
K.K.Nagar,
Madurai-20.

...Respondent/Respondent

PRAYER:- Civil Miscellaneous Appeal filed under Section 82 (2) of the Employee's State Insurance Act 1948, to set aside the decree and judgment, dated 11.02.2020 made ready on 04.03.2020 in E.S.I.O.P.No. 19 of 2010 on the file of the Labour Court, Madurai and allow the petition filed by the appellant.



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For Appellant : Mr.M.Jerin Mathew
for Mr.M.E.Ilango

For Respondent : Mr.I.Pinaygash

JUDGMENT

The present appeal has been filed by the employer challenging the dismissal of E.S.I.O.P.No.19 of 2010 wherein an order of recovery passed by the E.S.I corporation under Section 45-C of the Act has been confirmed.

2. The appellant/employer is running a hotel business in Chennai with effect from 2001 onwards and the said hotel is covered under the E.S.I Act. They have purchased Om Saravana Bhavan International Hotel at Dindigul under 2 sale deeds, dated 22.05.2008 and 07.06.2008 and started their operation at Dindigul as a branch. A sub code was also allotted to the Dindigul unit with effect from 29.09.2009. According to the management, they have purchased only the land and building from the individuals through 2 separate sale deeds and they have not



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purchased the establishment. Therefore, according to the employer, there is no continuation of the business. They have further contended that, for the first time, they received a notice of recovery on 29.03.2010 for the alleged dues of their vendor Om Saravana Bhavan International Hotel for the period between April 2004 to September 2008. Under the said order, a sum of Rs.1,60,241/- was demanded. Challenging the said order, they have filed E.S.I.O.P.No.19 of 2010 contending that without passing any order under Section 45-A or providing any opportunity to them, straight away an order of recovery has been passed.

3. The E.S.I corporation had filed a counter contending that the vendor, namely Om Saravana Bhavan International Hotel was covered under the E.S.I Act and they have suffered various orders. Despite the said orders, they have not paid the contribution amount. Therefore, invoking Section 93-A, the present recovery proceedings have been initiated. As per Section 93-A, for the past dues, the vendor as well as the purchaser are jointly and severally liable and therefore, the recovery proceedings initiated as against the purchaser is legally sustainable.



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4. The tribunal after considering the oral and documentary evidence let in on either side, arrived at a finding that as per Section 93-A, the purchaser is also jointly and severally liable along with the vendor for the past dues. The only limitation is with regard to the value of the assets obtained by the transferee. When there is a statutory liability upon the purchaser, the order of recovery cannot be challenged on the ground that no opportunity was afforded to the purchaser. Based upon the said conclusion, the petition filed by the employer was dismissed. Challenging the same, the present appeal has been filed by the employer raising the following substantial questions of law:

(i) Whether the Lower Court is justified in dismissing the claim of the appellant without even framing issues with regard the fact in issue viz., the applicability of Section 93-A of the Employee's State Insurance Act, 1948 to the case on hand?

(ii) Whether purchase of assets alone from individuals without purchasing the establishment would amount to transfer of undertaking as envisaged under Section 93-A of the Employee's State Insurance Act, 1948?



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(iii) Whether the Lower Court was justified in holding that there was a transfer of undertaking as per Section 93-A of the Employee's State Insurance Act, 1948 without assigning any reasons?

(iv) Whether the impugned demand notice of the respondent, dated 29.03.2012 directing the appellant to pay a sum of Rs.1,60,240/- is justified when the said default was committed by one M/s Om Saravana Bhavan International with regard to the ESI contribution of its employees and when the appellant was not even in existence during the relevant period?

(v) Whether it is justified on the part of the respondent to recover the ESI corporation due amount from the appellant at the first instance without even effecting recovery from M/s Om Saravana Bhavan International when they are very much available?

5. According to the learned counsel for the appellant, the Sky Park Hotel at Dindigul is a branch unit of their Chennai Head Office and they have been allotted a sub code. They have purchased only the land and building and not the running business of the vendor. Further, without issuing any notice for initiating proceedings under Section 93-A, straight



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away an order of recovery cannot be passed. Before the recovery order, no notice was issued at any point of time to the present management. Therefore, unless an opportunity is given to them, they cannot explain whether they are liable to pay the contribution of their vendor or not.

6. Per contra, the learned counsel appearing for the E.S.I corporation has strenuously contended that seven orders under Section 45-A have been passed as against the vendor of the appellant on various dates from 2003 to 2007 onwards. However, those orders have not been complied with by the vendor. He further contended that on 11.11.2009, an attempt was made by the recovery officer to serve a notice upon the present appellant which they had refused. He further contended that on 17.11.2009, an order has been passed as against the present management which was never put to challenge. Therefore, the consequential recovery proceedings cannot be challenged on the ground that they were not afforded with any opportunity. Hence, he prayed for confirmation of the order passed by the labour Court.



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

8. It is not in dispute that one Om Saravana Bhavnan International Hotel at Dindigul was covered under E.S.I Act from 01.12.2001 onwards. According to the appellant, they have purchased only the land and building under two documents, dated 22.05.2008 and 07.06.2008 and they are covered by a different sub code which was allotted to them on 29.09.2009. They have further contended that there was no transfer of establishment in order to invoke Section 93-A of the E.S.I Act and it is a branch unit of the Head Office in Chennai. However, the E.S.I corporation has disputed the said stand and has contended that it is a transfer of business from Om Saravana Bhavan International Hotel. Therefore, it is clear that there is a serious dispute whether the present management is through transfer of business or it is a branch unit of their Head Office in Chennai. The said issue has to be addressed before fixing liability upon the management. According to the learned counsel for the



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appellant, they have not received the notice, dated 11.11.2009 said to have been sent by the corporation. In such circumstances, this Court is of the considered opinion that the purchaser of an establishment should be given an opportunity to explain whether there is any transfer of business or not before initiating any proceedings as against the purchaser. Therefore, the finding of the Labour Court that no notice is necessary before initiating proceedings as against the purchaser is not legally sustainable.

9. In view of the above said deliberations, the order of the Labour Court, Madurai in E.S.I.O.P.No.19 of 2010, dated 11.02.2020 is hereby set aside. The order impugned in the said E.S.I.O.P., namely the order, dated 29.03.2010 is also hereby set aside. The matter is remitted back to the file of the E.S.I corporation. The E.S.I corporation shall pass orders on merits and in accordance with law after giving due opportunity to the appellant herein. The said exercise shall be completed within a period of four (4) months from the date of receipt of a copy of this order. No costs.



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10. In view of the above said deliberations, this Civil Miscellaneous Appeal stands allowed. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

27.06.2023

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

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To

1.The Labour Court,
Madurai.

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



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R.VIJAYAKUMAR,J.

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Order made in
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