BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 23.02.2023

CORAM

THE HONOURABLE MRS.JUSTICE **N.MALA**

C.M.A(MD)No.951 of 2022
and
C.M.P(MD)No.9385 of 2022

Thiruppathy Fire Works
Vilampatti Post – Sivakasi Taluk
Virudhunagar District,
Represented through its Partner ... Appellant

Vs

1.The Joint Director,
E.S.I Corporation, Sub Regional Office,
4th Main Road, K.K.Nagar,
Madurai.

2.The Deputy Director, INS.II,
E.S.I Corporation, Sub Regional Office,
4th Main Road, K.K.Nagar,
Madurai.

3.The Assistant Director, Ins.II,
E.S.I Corporation, Sub Regional Office,
4th Main Road, K.K.Nagar,
Madurai. ...Respondents

PRAYER :-

This Civil Miscellaneous Appeal is filed under Section 82 of the Employees State Insurance Act, 1948 to set aside the orders of the E.S.I Court, Madurai in E.S.IOP No.86 of 2007, dated 10.03.2022 and copy made ready on 01.04.2022.

For Appellant : Mr.C.Karthikeyan

For R1 & R3 : No Appearance

For R2 : Mr.R.Ravi Kumar

JUDGMENT

The petitioner is the appellant in the appeal.

In the appeal the following substantial questions of law arise

i) Whether two orders can be passed by the Respondent for the same period but with different calculations?

ii) Without any material or documents, how the respondent arrived the calculation that the Appellant had employed 100 employees and without any evidence the order passed by the 45A Authority as well as the ESI Court is sustainable under law?

2. At the request of both counsels, the appeal is taken up for final disposal at the admission stage.

3. The appeal is filed challenging the order, dated 10.03.2022 rejecting the petition filed under Section 75 (1) (g) of the E.S.I Act to declare the order of the Deputy Director, E.S.I Corporation, Madurai for a sum of Rs.6,71,710/- as null and void and and to grant permanent injunction against the respondents from claiming the contribution amount with interest from the

petitioner and for costs.

4. The petitioner is a fire cracker unit which was originally leased out to M/s.Vishnu Priya Fire Makers Private Limited, Sivakasi in the year 1988 under the lease agreement, dated 16.12.1988. The lessor ran the factory up to 01.11.1997 with their own employees. The petitioner was never connected with the affairs of the factory. On the expiry of the lease, the lessor handed over the factory on 01.11.1997 and thereafter there was no production till April 1998. The petitioner started the production in the factory only from 1998 by engaging new set of employees. The employees of the lessor M/s.Vishnu Priya fire makers private limited were not employed by the petitioner.

5. On 13.02.2002 and 14.02.2002, the E.S.I Corporation officials visited the petitioner's factory and verified the accounts book, ledgers for the period 1997 to 2001 and further recorded that the petitioner's factory was handed over to M/s.Vishnu Priya Fire Makers Private Limited upto November 1997 and thereafter, the petitioner re-started the factory from the April 1998 onwards. It was further recorded by the respondent that 10 employees were engaged at the time of inspection on 13.02.2002 and 14.02.2002. On the basis of the inspection, the respondent directed the petitioner to submit declaration

forms and further to pay contribution from 11/97 to 3/2001 to the tune of Rs.9,352/-. On the basis of the report of the inspection authorities, the first respondent issued notice in Form C-18, dated 24.02.2002 calling upon the petitioner to pay a sum of Rs.9,352/- along with interest of Rs.1,126/- and damage amount of Rs.1,176/- and the same was paid by the petitioner. Thereafter for the period from 2002 to 2004, according to the petitioner, relevant records were shown to the inspecting officials and no complaint was pointed out by them.

6. The petitioner further contended that from April 2002, the petitioner engaged less than 10 employees for the manufacturing activities for most of the days till November 2006 and that the petitioner remitted the contribution for the said employees. From December 2006, the petitioner engaged 33 casual employees and remitted the contribution for these employees. While so, the accident took place on 05.01.2007, three persons died and one employee was injured. In pursuance of the said accident, the petitioner's factory license was suspended and therefore, the petitioner was not able to carry out the manufacturing activities from 05.01.2007 onwards. The suspension order was revoked subsequently but the factory was not run during the 45-A proceedings.

7. As a consequence of the fire accident, the third respondent issued Form C18 notice dated 23.02.2007 claiming adhoc contribution for 100 employees for the period 20.10.1989 to 31.03.1992 at the rate of Rs.880/- per month, Rs.1,650/- for the period from 01.04.1992 to 31.12.1996, Rs.3,575/- for the period from 01.01.1997 to 31.03.2004, Rs.4,125/- for the period from 01.04.2004 to 05.01.2007 in total Rs.36,15,791/-. The petitioner sent a written representation in reply to the form C18 notice and in pursuance thereof, the third respondent conducted 45A proceedings and vide order dated 04.10.2007, ordered that the additional contribution of Rs.6,71,710/- was payable within a period of 15 days from the date of receipt of copy of the order, failing which, it was ordered that the same would be recovered as an arrear of land revenue.

8. Aggrieved by the order of the third respondent, the petitioner filed E.S.I.O.P.No.86 of 2007 before the Labour Court (E.S.I Court), Madurai.

9. The petitioner raised several contentions before the E.S.I.Court *interalia,* that in the absence of inspection report by the inspecting officials for determining the amount payable by the petitioner, 45A proceedings based on mere newspaper reports was not permissible in law, that the third respondent failed to note that for the period 11/97 to 3/2001, an order was

passed demanding contribution of Rs.9,352/- and the same was also remitted and for the period 4/1991 to 10/1997 an order was passed on 03.11.2004 demanding a sum of Rs.26,769/- which was challenged in E.S.I.O.PNo.93 of 2007 and on the dismissal of the said E.S.I.O.P, the petitioner complied with the order, dated 03.11.2004. For the period Jan 2001 to Feb 2002 the petitioner engaged only 5 employees and only in 2002 he engaged 10 employees and thereafter the number of employees varied from 8-10. Therefore, according to the petitioner by the above said orders, contributions were paid and hence the demand made under the impugned oder for the period for which the contributions were already paid was illegal and liable to be set aside. The petitioner contented that the impugned order was passed without any evidence and hence he was constrained to challenge it.

10. Before the Labour Court, the respondents filed counter denying the contentions raised by the petitioner. According to the corporation, the petitioner had initially informed that the factory was leased out during the year 1991 to 31.10.1997 thereafter the petitioner mentioned that the factory was leased out from 16.12.1988 to 01.11.1997. According to the respondents, a major accident took place in the factory on 05.01.2007 as a result of which, six workers died and three were injured. All the said workers were not registered under the act. It was widely reported in the newspaper that the

factory had engaged more than 100 workers at the time of the accident. Even though, 50 workers were said to be working in the petitioner's unit, the petitioner had registered 8 workers under the E.S.I Act. According to the respondent, the impugned order was passed as the petitioner had failed to register large number of workers. The respondent therefore submitted that the petition deserved to be rejected.

11. Before the Labour Court, the petitioner examined himself as P.W.1 and Exhibit P.1 to P.16 were marked and on the side of the respondents, the Security officer was examined as R.W.1 and Exhibit R.1 to R.6 were marked.

12. The labour Court on an appreciation of the pleadings and the evidence on record dismissed the petition concluding that the employer was misrepresenting the facts and there was every reason to infer that the employer was engaging more workers than indicated in the returns submitted by him The labour Court therefore confirmed the order of the Deputy Director, ESI Corpn.

13. Aggrieved by the order of the labour Court, the petitioner has filed the above appeal.

14. The learned counsel for the petitioner reiterated the submissions made in the petition and submitted that the labour Court failed to note that for the period from 20.10.1989 to 12/2001, the contributions were verified and the same were remitted as per the orders of the E.S.I authorities and therefore there is absolutely no jurisdiction for the second respondent to pass the impugned order, dated 04.10.2007. The learned counsel further submitted that even the assessment for the period from 01/2002 to 06.01.2007 was based merely on the newspaper reports. The counsel submitted that in the absence of any material to show that the determination of the amount was based on records or documents produced by the petitioner the demand was unsustainable, being against the Provisions of the ESI Act. The learned counsel further submitted that there was no power in the authority under the E.S.I Act to re-open concluded proceedings. Therefore, the learned counsel submitted that the order passed by the labour Court confirming the order of the second respondent deserved to be set aside.

15. The learned counsel for the respondent on the other hand submitted that the petitioner was in the habit of mis-representing the facts and failing to pay contribution to the employees engaged by the petitioner. According to the learned counsel, the second respondent passed a detailed and considered ordered, wherein, he recorded various reasons in support of the demand of Rs.

6,71,710/- made by him. The learned counsel therefore submitted that labour Court was justified in confirming the order of the second respondent, dated 04.10.2007.

16. I have heard both the learned counsels at length and perused the materials on record.

Substantial question of law-I:

17. The learned counsel for the appellant submitted that for the period 4/1991 to 10/1997, a demand of Rs.26,765/- was raised vide order dated 03.11.2004, which was challenged in E.S.I.O.P.No.93 of 2007 and on dismissal of the said E.S.I.O.P, the appellant paid the demand of Rs.26,765/-. The appellant further submitted that for the period from 11/97 to 02.03.2001, a demand for Rs.9,353/- was raised and the same was also paid. The counsel therefore submitted that for the period 4/1991 to 02.03.2001, the amount demanded by the respondents was paid and as the same attained finality, the impugned order covering the said period cannot be sustained. The counsel submitted that there was no provision in the Act permitting opening of completed assessments. The orders passed therein reached finality, and therefore in the absence of any provisions in the Act providing for reopening of such concluded proceedings, the impugned order could not be sustained.

The learned counsel further submitted that there was no iota of evidence to support the demand made under the impugned order dated 04.10.2007. The counsel submitted that the impugned order itself states “as reported in the press there was a major accident in the unit on 05.01.2007 in which four employees were reported killed and 100 others were injured whereas in the compliance being made by the employer, the employee is below 10.” The counsel therefore submitted that in the absence of any material to show that the demand under the impugned order was based on any materials like inspection report or the records produced by the petitioner, the notice of demand could not be sustained. The learned counsel submitted that the impugned order as also the evidence of R.W.1 in cross-examination would clearly prove that the impugned demand was made merely on the basis of newspaper reports. The counsel therefore submitted that the Labour Court ought to have set aside the impugned order of the second respondent.

18. The learned counsel for the respondents reiterated the stand of the Corporation in the counter and further submitted that there was absolutely no illegality or irregularity in the impugned order.

19. I find force in the argument of the learned counsel for the appellant. The reasoning of the Labour Court in para 15, in my view is un-sustainable

for the reason that the inspection reports referred to therein relate to the period for which a demand was raised and the same was remitted. In this regard, the reference is made to the Judgment of this Hon'ble Court in the case of *Quality Engineering Works Vs. E.S.I. Corpn.* reported in *2002(3) LLN 1198* is held as follows:-

> *"On the face of this admission that the petitioner had disclosed all the materials including that given to the Income Tax Department by the contractors in reference to the wages, etc., if there is omission on the part of the Assistant Regional Director, the petitioner cannot be blamed for that. There is no provision under the E.S.I. Act to reopen an order of assessment made under such circumstances. A Division Bench of this Court, in Eastern Stores V. Regional Provident Fund Commissioner [1973 (2) L.L.N. 378], dealing with the Employees' Provident Fund and Family Pension Act, held that it is fundamental that if a statutory authority wants to re-examine a concluded affair or subject-matter, it assumed the role of a reviewer in law and unless and until the statute under which he functions, authorises him expressly or by necessary implication to review such matters under certain stated circumstances or situations, he cannot assume such power in him suo motu and set at naught the earlier concluded affairs. Justice Sri Ramprasada Rao (as he then was), held as follows, in Para. 2, at page 380:*
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> *"...It is fundamental that powers of appeal and review are creatures of statute and unless there is an express provision or any other provision from which such a power by*

necessary implication can be inferred, the authority cannot assume such a power and undertake to re-examine a closed situation...”

This Hon'ble Court held that there was no provision under the E.S.I Act to reopen the assessment orders.

20. It is the case of the appellant that for the referred periods, the amounts were demanded and the same were paid. The respondents based on newspaper reports sought to revise/reopen the proceedings by the impugned order, on the ground that there was misrepresentation of facts by the appellant and that there was every reason to infer that the appellant engaged more number of workers than indicated in the various reports submitted by him. In my view, by the impugned order dated 04.01.2007, the respondents seek to reopen concluded proceedings, which is not permissible in law. It is to be noted that the petitioner had disclosed all the materials before the authorities during the earlier assessment proceedings, and therefore the omission, if any, on the part of the respondent, cannot be put against the appellant. I am supported in my said view by the above cited Judgment of this Hon'ble Court.

I therefore answer substantial question of law-I, in favour of the appellant.

Substantial Question of law-II:

21. The submission of the learned counsel for the appellant, that the entire proceedings are vitiated, as the proceedings were not based on any material placed by the appellant or on any other record, but were based purely on newspaper reports, deserves favourable consideration. R.W.1., social security officer has clearly admitted that, the form-C notice was not issued on the basis of any inspection report but was based only on newspaper reports. The said officer further admitted that even in the impugned order, the newspaper report was referred to.

22. I am therefore of the view that the impugned order is vitiated, as it is against the provision of Section 45(A) of the Act. I am fortified in my view by the Division Bench of this Hon'ble Court in the case of *Kandaswami Textiles Vs. E.S.I. Corpn. Reported in* 1991 (1) L.L.N. 802 wherein it is held as follows:-

> "3.*There is nothing on record to show that the determination of the amount payable by the petitioner was based upon any materials or records produced by the petitioner. In fact, nothing has been mentioned in the notice, dated 22 December 1980, or in annexure A attached thereto, as to how the amount was determined by first respondent. No particulars were given either in the notice or in the annexure A.*
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> *4. In these circumstances, the entire proceedings of the first respondent including the notice, dated 22 December*

> *1980, and the communication to the petitioner, dated 6 August 1981, are vitiated and are against the express provisions of the Employees' State Insurance Act,1948. Hence, they cannot be sustained and have to be quashed."*

Therefore Substantial Question of Law-II is also decided in favour of appellant.

For all the aforesaid reasons, the impugned order is set aside and liberty is given to the respondents to issue fresh notice for the period from 01.02.2006 to 06.01.2007, after following due process of law. The appeal is allowed and the Judgment and Decree of the Labour Court is set aside. There shall be no order as to costs. Consequently connected C.M.P.(MD) is closed.

23.02.2023

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

sn /dsn

To

1.E.S.I. Court, Madurai.

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

N.MALA, J

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