BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 18.04.2023

PRONOUNCED ON : 01.06.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.686 of 2019

The Deputy Director (Ins.II)
Employees' State Insurance Corporation
Sub-Regional Office
2nd West Street, K.K.Nagar
Madurai 600 020 ...Appellant/Respondent

Vs

M/s.Viswabharathi Textiles (P) Ltd.,
Represented through its Factory Manager
Shri.B.Radhakrishnan
Unit I, Trichy Road
Vadamadurai, Dindigul District ...Respondent/ Respondent

PRAYER:- Civil Miscellaneous Appeal filed under Section 82 of the E.S.I Act, 1948, to partly set aside the order dated 15.05.2019 passed by the ESI Court (ie. Labour Court), Madurai in ESI.OP.No.36 of 2011, permit the appellant to charge interest and damages as permissible under law and allow this Civil Miscellaneous Appeal with necessary directions in favour of the appellant.

For Appellant : Mr.P.Ganapathisamy

For Respondent : Mr.V.O.S.Kalaiselvam

JUDGMENT

The appeal has been filed by the E.S.I.Corporation challenging the order passed by the Labour Court, Madurai in ESIOP.No.36 of 2011.

2.The E.S.I.Act was extended to Vadamadurai area with effect from 01.08.2001 by way of a notification issued by the Central Government on 20.06.2001. The Trade Union attached to the respondent textile had challenged the said notification in WP(MD).No.24080 of 2006 and an order was passed by the High Court on 28.07.2006 directing the Director General to consider the representation of the Trade Union. The Director General had passed an order on 26.12.2006 rejecting the said representation.

3.The Worker's Union filed W.P(MD).No.24848 of 2007 for a mandamus forbearing the ESI Corporation from implementing the ESI Scheme until they discharge their statutory duties of establishing and providing facilities and amenities. In the said writ petition, the management was arrayed as fourth respondent. The said writ petition was dismissed on 03.10.2007. After dismissal of the said writ petition, a clarificatory Petition was filed by the respondent management in M.P.No. 1 of 2012 in W.P(MD).No.24848 of 2007. In the said clarification petition, the learned Single Judge of this Court had clarified that the payment of ESI contribution in the case of the petitioner mill should be prospective from the date of dismissal of the writ petition namely 01.10.2007. This clarificatory order was passed on 28.02.2013. This order was not challenged by any one of the parties.

4.The Corporation had issued a show cause notice on 13.01.2009 why contribution of Rs.15,57,270/- for the period covering between April 2007 to September 2008 should not be recovered from the employer. The employer had appeared through an authorized representative before the ESI Corporation. As per the representation, the employer had stated that they are regularly paying ESI contribution from 01.04.2009 onwards. In the written representation, they have further stated that they are not obliged to produce any registry or document for the relevant period.

Therefore, the Corporation proceeded to decide the matter on merits and passed an order under Section 45-A of the E.S.I.Act confirming the due amount of Rs.15,57,270/- for the period covering April 2007 to September 2008.

5.The said order of the ESI Corporation was challenged by the employer in ESIOP.No.36 of 2011 before the Labour Court, Madurai. After considering the oral and documentary evidence on either side, the Labour Court arrived at a conclusion that there cannot be any dispute with regard to the coverage of the ESI Act. The Labour Court further found that the High Court by its order dated 28.02.2013 has clarified that the payment of contribution should be made by the mill with effect from 01.10.2007. However, the order of the ESI Corporation under Section 45-A of the Act has directed the employer to pay contribution with effect from April 2007. Relying upon the judgment of the High Court, the Labour Court set aside the demand for the period covering April 2007 to September 2007, but confirmed the liability of the employer from October 2007 to September 2008. The Tribunal further found that the liability of the employer has been adjudicated only before the Labour

Court and therefore, the Corporation cannot claim interest or damages on the said amount at a later point of time. This order is under challenge in the present appeal by the ESI Corporation.

6.The learned counsel appearing for the ESI Corporation raised the following contentions:

(i).Once an Act is extended to a particular locality by way of a notification issued by the Central Government, thereafter, the Court cannot interfere and postpone the applicability of the Act unless the notification itself is quashed. Therefore, according to the learned counsel appearing for the appellant, the clarificatory order dated 28.02.2013 is clearly in violation of the statutory provisions and therefore, the said order should be treated as per incurium.

(ii).The Act has been extended to the said locality with effect from 01.08.2001. Therefore, the order passed by the Corporation demanding contribution for the period covering between April 2007 to September 2008 should not have been set aside by the Labour Court.

(iii).As per Section 39(5) of the E.S.I.Act, the contribution should be paid on the date on which the said contribution has become due. In case, if it is not paid, the employer shall be liable to pay simple interest at the rate of 12% per annum. The Act was extended to the locality with effect from 01.08.2001 and the mill has been started in April 2007. Therefore, from day one, they have to pay contribution. The contribution has to be paid on or before 21st day of the next month. If the contribution is not paid within the said date, it attracts interest as per Section 39(5) of the E.S.I.Act. Therefore, the imposition of interest is statutory in nature and the interest has to be calculated from the due date. Hence, the Tribunal was not right in waiving interest till the date of passing orders by the Labour Court as if it is adjudicated for the first time by the Labour Court.

(iv). The Corporation is empowered to impose damages as per Section 85(B) of the E.S.I.Act due to the non payment or delayed payment. Unless the employer establishes mitigating circumstances, the payment of damages is also statutory in nature. Therefore, the Labour Court was not right in directing the Corporation not to recover any damages from the employer who had not paid the contribution amount on the due date.

(v). With effect from 01.11.1999, the Employee's dispensary has been opened in Vadamadurai area and therefore, the employer cannot contend that the medical facilities and amenities have not been created by the E.S.I.Corporation as per the statute. Hence, he prayed for allowing the appeal and to confirm the order passed under Section 45-A of the E.S.I.Act.

7.The learned counsel appearing for the respondent had contended as follows:

(i).The order under Section 45-A of the Act has been passed based upon the presumption of wages without taking into consideration the actual wages paid by the employer to the employee. In case, if the actual wages are taken into account, the quantum of contribution would come down drastically.

(ii).The employer had produced all the records that are required for determination of the contribution. In such an event, the authorities ought not to have been passed an adhoc order on the basis of certain presumptions.

(iii).The Trade Union had filed WP(MD).No.24848 of 2007 for a mandamus forbearing the E.S.I.Corporation from implementing the E.S.I.scheme till proper hospital facilities are created in the locality. The said writ petition was dismissed on 03.10.2007. The employer had filed MP(MD).No.1 of 2012 seeking clarification of the order. By an order dated 28.02.2013, the writ Court was pleased to clarify that the E.S.I.Contribution can be recovered from the mill with prospective effect from 01.10.2007. Since the clarificatory order was passed on 28.02.2013, only thereafter, the liability to pay contribution arises and the interest, if any, can be calculated only from the said date treating it as due date.

(iv).When the litigation is pending before the Court, no interest can be levied for the said period. Only after disposal of the litigation, the liability of the employer gets crystallized and interest or damages could be levied by the Corporation from the date of disposal of the litigation.

(vi).The learned counsel for the respondent had relied upon the judgment of the Hon'ble Supreme Court reported in ***2006-6 SCC 581 (Employees State Insurance Corporation Vs.Jardine Henderson Staff Association)*** to contend that when the coverage is challenged and ultimately if the said writ petition is dismissed, the principles of prospective over-ruling applies. Therefore, the liability to pay contribution would arise only from the date of order and not from the date of notification issued by the Central Government.

(vii).The learned counsel for the respondent had further contended that it is the specific case of the employer that the medical benefits were extended to the employees by spending huge amount without deducting any amount under E.S.I.Act. Therefore, the implementation of the E.S.I.Act with retrospective effect would cause great prejudice to the employer. He had further contended the when no service has been rendered by the E.S.I.Corporation to the employees and some of the employees have already retired, it would be a huge monetary loss to the management to pay not only the employer's contribution but also the employee's contribution. The learned counsel had relied upon the above said judgment of the Hon'ble Supreme Court and contended that in view of non availability of medical facility, non deduction of contribution from the members of the union for several years, the implementation of the Act from the date of judgment of the High Court would not amount to postponing the enforcement of notification.

(viii).The learned counsel for the respondent had further contended that even for imposing interest under Section 39(5) of the Act, a notice is essential before passing any order.

(ix).He had further contended that from October 2008 onwards, the employer is regularly remitting the contribution amount. When the facts are available with the corporation, the question of arriving at the contribution on the basis of presumption of wages is not legally sustainable. Hence, he prayed for dismissal of the appeal.

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

9.The appeal is filed raising the following subtantial questions of law:

> *"(1).Whether ESI Court has got power to pre-empt charging of interest and damages as admissible as per the provisions of the ESI Act, 1948 and ESI (General) Regulations, 1950?*
>
> *(2).Whether the order of the ESI Court will promote the interest of the workers?*
>
> *(3).Whether the trial Court has power to go against the express provisions of law?*
>
> *(4). Whether the trial Court can grant relief to the employer*

which was not prayed for though the employer has not approached the ESI Court with clean hands?"

10..It is not in dispute that the E.S.I.Act was extended to Vadamadurai locality by way of a notification dated 20.06.2001 with effect from 01.08.2001. It is also not in dispute that the employer is making his contribution with effect from 01.04.2009. Originally, the trade union of the respondent employer had sought mandamus forbearing the E.S.I.Corporation from implementing the E.S.I.Scheme until proper medical facilities are made available in the said locality by filing W.P(MD).No.24848 of 2007. The said writ petition was dismissed by this Court with an observation that the intention of the petitioner is only to stall the implementation of the scheme. The said writ petition was dismissed on 03.10.2007. Though the writ petition was filed by the trade union and the same was dismissed, strangely the employer who was arrayed as fourth respondent in the said writ petition had chosen file a clarification petition in MP(MD).No.1 of 2012.

11. In the said clarification petition, the management/employer had relied upon the judgment of the Hon'ble Supreme Court reported in

2006-6 SCC 581 (Employees State Insurance Corporation Vs.Jardine Henderson Staff Association) and contended that the payment of E.S.I.contribution should be prospective from the date of dismissal of the writ petition i.e from 03.10.2007. The said request of the employer was accepted by the writ Court and an order was passed on 28.02.2013 declaring that the payment of contribution will be prospective in nature with effect from 01.10.2007. Therefore, it is clear that the management themselves have sought the Act to be implemented from October 2007 onwards.

12.While the writ petition filed by the trade union was pending, the Corporation had initiated proceedings under Section 45-A of the E.S.I.Act demanding a sum of Rs.15,57,270/- for a period between April 2007 to September 2008. The employer was represented in the said proceedings and he had not produced the wage record for the said period. Therefore, the Corporation proceeded to pass orders on the basis of presumptive wages of Rs.5,500/- per month for 242 employees on the basis of presumption of average wages thereby confirming the demand of Rs.15,57,270/-. The E.S.I.Court had rightly set aside the payment for the period between April 2007 to September 2007 relying upon the clarificatory order passed by the High Court on 28.02.2013. However, the said clarificatory order is contended to be per incurium on the ground that it is clearly in violation of the statutory provisions of E.S.I.Act.

13.A perusal of the clarificatory order dated 28.02.2013 indicates that the Director General of E.S.I.Corporation, New Delhi, the Regional Director, Chennai and the Joint Director, Madurai were parties to the said petition. The E.S.I.Corporation was also represented through their counsel. A copy of the order has been marked to all the parties under E.S.I.Act. However, none of them have chosen to challenge the said order. A party to a proceeding is bound by the said order, however erroneous it may be. Without challenging the said order in a manner known to law, a party cannot turn around and contend that the said order is per incurium and they are not bound by it. Even an erroneous order operates as *res judicata* between the same parties in the second round of litigation or in the subsequent stage of the same litigation unless challenged by the parties. Therefore, the doctrine of per incurium cannot be invoked to wriggle out of the binding nature of the judgment.

14.The Hon'ble Supreme Court in a judgment reported in ***(2010) 3 SCC 353 (N.Nagaraj Vs.B.R.Vasudeva Murthy)*** in Paragraph No.60 has held as follows:

> *"60....The High Court has failed to appreciate that the principle of per incuriam has relevance to the doctrine of precedents but has no application to the doctrine of res judicata. To quote Rankin, C.J. of the Calcutta High Court in Tarini Charan Bhattacharjee v. kedar Nath Haldar.*
>
> *(1).The question of whether decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as res judicata. The doctrine is that in certain circumstances the Court shall not try a suit or issue but shall deal with the matter on the footing that it is a matter no longer open to contest by reason of a previous decision. In these circumstances it must necessarily be wrong for a Court to try the suit or issue, come to its own conclusion thereon, consider whether the previous decision is right and give effect to it or not according as it conceives the previous decision to be right or wrong. To say, as a result of such disorderly procedure, that the previous decision was wrong and that it was wrong on a point of law, or on a pure point of law, and that therefore it may be disregarded, is an indefensible form of reasoning. For this purpose, it is not true that a point of law is always open to the party".*

15. The Hon'ble Supreme Court in a judgment reported in ***2022 SCC Online SC 1460 (S.Ramachandra Rao Vs. S.Nagabhushana Rao and others)*** in Paragraph No.31 has held as follows:

> *"31.... Moreover, a binding decision cannot lightly be ignored and even an erroneous decision remains binding on a parties to the same litigation and concerning the same issue, if rendered by a Court of competent jurisdiction. Such a binding decision cannot be ignored even on the principle of per incuriam because that principle applies to the precedents and not to the doctrine of res judicata."*

16.In view of the judgment of the Hon'ble Supreme Court, it is clear that the clarificatory order passed by the High Court dated 28.02.2013 is binding upon the E.S.I.Corporation and the same cannot be ignored even on the principle of per incuriam. If such an interpretation is given, every unsuccessful party would attempt to portray the judgment /order as per incuriam and not binding upon him despite being party to the said proceedings. Therefore, the principle of per incuriam can never be invoked by a party to a decision in turn challenging the said decision in a manner known to law. Hence, I am not inclined to accept the contention of the learned counsel appearing for the appellant that the order dated 28.02.2013 in MP(MD).No.1 of 2012 in WP(MD).No.24848 of 2007 should be ignored on the principle of per incuriam.

17.When this Court has decided the applicability of the Act to be prospective in nature with regard to the respondent mill with effect from October 2007 onwards, the demand of contribution from April 2007 under Section 45-A of the E.S.I.Act is not legally sustainable. Therefore, the Labour Court was right in setting aside the payment for the period covering between April 2007 to September 2007.

18.The Labour Court while setting aside the demand of contribution between April 2007 to September 2007 has also proceeded to hold that the liability of the employer is decided only by the Labour Court and therefore, the Corporation would not be entitled to levy any interest or damages for the period prior to the order of the Labour Court. As per Section 39(5) and 85-B of the E.S.I.Act, the employer is liable to pay contribution on the due date. In case of any default or delay, the employer is liable to pay interest and damages. Therefore, the liability of the employer to pay contribution arises on the due date and not on the date when it is adjudicated. In fact, in the present case, the employer himself has filed a clarificatory petition before the High Court seeking to fix the liability to pay contribution from October 2007. If the employer had not paid his contribution from October 2007, the Corporation is legally entitled to recover interest and damages from the said date onwards. The Labour Court was not right in holding that the interest and damages should not be levied upon the said amount till the date of order of the Labour Court.

19.The learned counsel appearing for the respondent had contended that the order passed by the Corporation under Section 45-A of the E.S.I.Act is not based upon the actual wages, but it is based upon the presumptive wages. The E.S.I.Corporation had pointed out that the employer had refused to place the wage register before them for adjudicating upon the quantum of wages. The Labour Court has also pointed out that even before the said Court, no documents were placed to establish the actual wages that were paid to the employees. Therefore, this Court is not in a position to accept the contention of the employer that the order is based upon the presumptive wages and the same is not legally sustainable.

20.The learned counsel for the respondent had relied upon the judgment of the Hon'ble Supreme Court reported in ***2006-6 SCC 581 (Employees State Insurance Corporation Vs.Jardine Henderson Staff Association)*** to contend that when the medical facilities were not extended by the Corporation and the employer had spent huge amount towards medical facilities of its employees, recovering the contribution amount with retrospective effect would cause great hardship to the employer. The authorized representative of the employer was examined as PW1 before the Labour Court. He has specifically admitted in his cross examination that they are not having any records to establish that the management is offering medical and other amenities to the employees. Therefore, it is clear that the employer has not established that they have extended the medical benefits or other amenities to its employees. In such an event, the reliance placed upon the judgment of the Hon'ble Supreme Court referred to supra, is not applicable to the facts of the present case.

21.The learned counsel for the respondent had further contended that the period spent during the litigation should be exempted from the purview of interest and damages. In the present case, the management themselves have approached the High Court to fix the date of applicability of the Act as October 2007 and the same was accepted under clarification order passed by the High Court on 28.02.2013. The E.S.I.Court has also fixed the liability only from October 2007 which has been confirmed by this Court in the preceding paragraph. Therefore, any claim for interest or damages from the admitted date namely October 2007 cannot be considered to be a period covered in litigation.

22.The learned counsel for the respondent had further contended that before passing an order demanding interest, a notice is essential. So far no order has been passed by the corporation demanding interest. Hence, this issue does not deserve any consideration at this point of time and it is left open.

23.The Tribunal has rightly set aside the demand for contribution for the period between April 2007 to September 2007. However, the order of the Tribunal waiving interest and damages for the period between October 2007 to September 2008 is not legally sustainable.

24.In view of the above said deliberations, this Court is inclined to pass the following orders:

(i).The order of the Labour Court with regard to setting aside the payment of contribution for the period between April 2007 to September 2007 is hereby confirmed.

(ii).The order of the Labour Court with regard to the waiver of interest and damages for the period between October 2007 to September 2008 is hereby set aside.

25.This Civil Miscellaneous Appeal is partly allowed to the extent as stated above. No costs.

01.06.2023

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

R.VIJAYAKUMAR,J.

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Pre-delivery order made in
C.M.A(MD)No.686 of 2019

01.06.2023