BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 24.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

C.M.A.(MD)No.108 of 2021
and
C.M.P.(MD)No.949 of 2021

M/s.Raja Salt Corporation,
Rep. by its Partner S.Ponsekar,
S/o.Late P.Selvaraj Nadar,
having office at
No.3, Chidambaram Nadar, 2nd Street,
Tuticorin – 3. ... Appellant / petitioner

(The ESOP petition is amended as per order in
I.A.No.689/2014, dated 11.12.2014 by substituting
the partner name Tr.P.Selvaraj Nadar, S/o.Ponnusamy Nadar
with S.Ponsekar, S/o.Late Selvaraj Nadar in the cause title
of the petition)

Vs.

1.The Joint Regional Director,
The Employees State Insurance Corporation,
Sub-Regional Office, 4th Main Road,
K.K.Nagar, Madurai – 20.

2.The Recovery Officer,
The Employees State Insurance Corporation,
Sub-Regional Office, 4th Main Road,
K.K.Nagar, Madurai – 20. .. Respondents / respondents

PRAYER: This Civil Miscellaneous Appeal is filed under Section 82 of the Employees State Insurance Act, 1948, challenging the Ex-order and Fair-order of the ESI Court (Labour Court), Madurai dated 26.05.2020 made in E.S.I.O.P.No.86 of 2005.

For Appellant	: Mr.B.Satish Sundar
For Respondents	: Mr.P.Ganapathisamy

JUDGMENT

This Civil Miscellaneous Appeal has been filed challenging the order of the ESI Court (Labour Court), Madurai dated 26.05.2020 made in E.S.I.O.P.No.86 of 2005, dismissing the application filed under Section 75(i)(g) of the 'Employees State Insurance Act, 1948' (hereinafter referred to as 'ESI Act' for brevity) to set aside the impugned notice of the 2nd respondent dated 28.11.2005 as null and void.

2. For the sake of convenience, the parties are arrayed as per their own ranking before the Labour Court.

3. The brief facts of the petitioner's case are as follows:-

The petitioner concern is a small salt pan manufacturing salt from sea water. The salt pan is of seasonal character and the same is not carried out continuously. The petitioner used to employ the workers as and where their requirement was in need. Most of the employees working in the petitioner concern were temporary in nature. As the petitioner concern is a seasonal establishment, the provision of the ESI Act is not at all applicable to it. However, the respondents' Insurance Inspector inspected the petitioner concern in the year 1997 and informed that the petitioner concern was covered under the ESI Act with effect from 9/1992 itself. Without giving sufficient opportunity, the respondents ESI Corporation demanded contribution on adhoc basis as if the petitioner had engaged 12 employees as an assumed average wage of Rs.3,575/- per month per employee without any materials and evidences, but on assumption passed orders under Section 45(A) of ESI Act dated 16.11.1999, 08.11.2000, 12.01.2000, 12.01.2001, 16.07.2011 and 06.02.2022, determining the contribution to the tune of Rs.1,42,566/- which is arbitrary. The petitioner has remitted the ESI contribution from 4/2001 to till date on actual payments made to the employees. Subsequently, the 2nd respondent had issued show cause notice for warrant of arrest in No.57/RRC/32230/05, dated 28.11.2005. Hence, the petition.

4. The respondents took a stand before the Labour Court that the petitioner unit was inspected by a team of two Insurance Inspectors on 15.12.1994 and found that there were 10 employees working in the concern. The relevant visit note containing these facts was countersigned by the partner of the petitioner concern. The petitioner did not make compliance despite lawful coverage. The petitioner unit is not a seasonal factory. They failed to pay contribution for the period from 9/1992 to 3/2001 and from 4/2002 to 3/2003 and from 12/2001 to 3/2004. The claims were made on the basis of 12 employees in terms of the inspection conducted by an Insurance Inspector of the respondents' ESI Corporation. Whenever an employer is not produced the records, the wages per month per employee is presumed to be 55% of the coverage limit and this is as per the existing instructions of the respondents' Corporation which is followed throughout the country.

4.1. The respondents had issued notice in Form C-18 dated 30.11.1998, 12.11.1999, 11.09.2000, 15.03.2001 & 24.07.2001 proposing to charge contribution of Rs.11,619/-, Rs.55,770/-, Rs.16,731/-, Rs.16,731/- and Rs.16,731/- for the period from 5/1997 to 9/1997 and from 10/1997 to 9/1999, 4/2000 to 9/2000 and from 10/2000 to 3/2001 respectively by affording personal hearing, but there was no response. Thereafter, an order u/s 45(A) of ESI Act dated 16.11.1999, 08.11.2000, 12.01.2001, 11/16.07.2001 & 06.02.2002 have been issued determining the contribution to the tune of Rs.11,619/-, Rs.55,770/-, Rs. 16,731/-, Rs.16,731/- and Rs.16,731/- for the period from 5/1997 to 9/1997 and from 10/1997 to 9/1999, from 10/1999 to 3/2000, from 4/2000 to 9/2000 and from

10/2000 to 3/2001 respectively. Further, it is the contention of the respondents that the petition is barred by limitation and the petitioner has not discharged their statutory duty. Hence, disputed the petition.

5. Based on the above pleadings, the Labour Court has framed the following issues:

> *"1.Whether the notice of the 2nd respondent in No. 57/RRC/32230/05 dated 28.11.2005 is liable to be set aside and declared as null and void?*
>
> *2.Whether the petitioner is entitled for prohibitory injunction as against the respondents?*
>
> *3.Whether the petitioner is entitled for determination of contribution on actual basis?*
>
> *4.To what other relief the petitioner is entitled?"*

6. Before the Labour Court, on the side of the petitioner, no oral evidence was let in and 10 documents were marked as Ex.P1 to Ex.P10. On the side of the respondents, its Social Security Officer was examined as R.W.1 and 20 documents were marked as Ex.R1 to Ex.R20.

7. Based on the evidence adduced by both sides, the Labour Court has negatived the contention raised by the learned counsel appearing for the petitioner that the petitioner concern exempted from the provisions of ESI Act from the year 1992 – 2001 on the ground that exemption is subject to the condition which has not been fulfilled by the petitioner and dismissed the application. As against the same, the present Civil Miscellaneous Appeal has been filed.

8. The learned counsel appearing for the petitioner / appellant submitted that the State of Tamil Nadu by invoking the provisions under Section 87 of ESI Act, has passed a Government Order in G.O.(D)No.574, Labour and Employment (L-II), dated 10.07.2000, wherein the State of Tamil Nadu exempts the salt manufacturing process in the State of Tamil Nadu which is seasonal in character though not seasonal under clause (12) of Section 2 of the said Act for the period on and from the 1st July 1992 to 31st March 1996 from the operation of the said Act. Therefore, it is his contention that the petitioner being the salt manufacturer covered under the aforesaid Government Order. When the Government itself has exempted the applicability of the provisions of the Act, the respondents passed an order under Section 45(A) of the ESI Act, determining the contribution from the year 1999 onwards is not according to law. Therefore, when the Government

Order exempted the applicability of the provisions of the ESI Act, the show cause notice issued pursuant to the order passed under Section 45(A) is not valid in the eye of law. It is his contention that exemption being the nature of the exception should be construed strictly.

9. It is the further contention of the learned counsel appearing for the petitioner / appellant that though there are some conditions stipulated in the Government Order, the trial Court has not recorded the finding that the conditions are in substantive nature or mandatory or mere procedure. When the substantive conditions or mandatory conditions have been violated, the exemption cannot be claimed. Whereas merely a procedure said to have been violated, the same is not a ground to reject the very exemption provided under the Government Order exempting the applicability of the provisions of the ESI Act.

10. In support of his submissions, he has relied upon the following judgments:

1. ***Mangalore Chemicals & Fertilizers Ltd., Vs. Deputy Commissioner*** reported in ***1991 (55) E.L.T. 437 (S.C.)***; and

2. ***Novopan India Limited Vs. Collector of Central Excise and Customs, Hyderabad*** reported in ***1994 (73) E.L.T. 769 (S.C.)***

11. The learned counsel appearing for the respondents would submit that the petitioner unit was covered under the ESI Act. They are remitting the contribution from 04.01.2001 and orders have been passed under Section 45-A of ESI Act long back. The same ought to have been challenged within a period of three years, whereas the application has been filed beyond the period of three years and therefore, the said application is not maintainable under law. Besides, petitioner / appellant has not produced any witnesses before the trial Court to show that they complied the mandatory conditions stipulated in the Government Order to avail the exemption. The petitioner / appellant has not produced any records like attendance Register, ledger etc. Further, the petitioner / appellant has also not proved that their concern is a seasonal factory. Hence, it is submitted that the very application filed by the petitioner belatedly is not maintainable. In support of his submissions, he has relied upon the following judgments:

1.***Tamil Nadu Petro products Limited Vs. Employees' State Insurance Corporation*** reported in 2011 (1) LLN 633 (Mad.); and

2. ***Ambikanathan P.S. Vs. Employees State Insurance Corporation*** reported in ***1999 (3) LLJ 173***.

12. In the light of the above submissions, now the substantial questions of law arise for consideration in this appeal are as follows:

1. Whether the petitioner / appellant concern was exempted from the applicability of ESI Act from the year 1992 to March 2001?

2. If so, whether the petitioner / appellant has fulfilled all the mandatory conditions to avail the exemption?

3. To what other reliefs, the petitioner / appellant is entitled?

13. As far as the facts are concerned, the inspection made by the authorities in the year 1994 is not disputed and several orders have been passed under Section 45(A) of ESI Act, vide order dated 16.11.1999, 08.11.2000, 12.01.2001, 11/16.7.2001 and 06.02.2002, determining the contribution. These facts also are not disputed. It is relevant to note that the orders passed under Section 45-A of the ESI Act has not challenged within a period of 60 days as contemplated under the ESI Act viz., Section 45-AA of the ESI Act by depositing twenty-five per cent of the contribution so ordered or the contribution as per his own calculation, whichever is higher, with the corporation. That apart, those orders also not challenged within a period of three years before the Labour Court as per Section 77 of the ESI Act. What has been challenged before the Labour Court is only a show cause notice issued in a recovery proceedings dated 28.11.2005 in No.57/RRC/32230/05. Therefore, when the order passed under Section 45 of the ESI Act is neither appealed nor challenged, within a period of three years, this Court is of the view that the show cause notice issued in a recovery proceedings itself cannot be challenged on the ground that orders passed under Section 45 of ESI Act is not authority in the eye of law. The only ground canvassed by the learned counsel for the petitioner / appellant before this Court is that since the Government of Tamil Nadu has exempted certain units from the provisions of the ESI Act, the petitioner's concern is also falls within that category. Therefore, they are exempted from the ESI Act from 1st July 1992 to 31st March 1996 as per G.O.(D)No.574, Labour and Employment (L-II), dated 10.07.2000. For the purpose of convenience, the said Government Order is extracted hereunder:

"Exemption to the salt manufacturing process in the State of Tamil Nadu under certain section for certain period under the Employees' State Insurance Act

(G.O.(D) No.574, Labour and Employment (L-11) , 10th July 2000)

No. II/(2)/LE/803/2000.- In exercise of the powers conferred by section 88 read with sub-section 91A of the ESI Act, 1948 (Central Act XXXIV of 1948), the Governor of Tamil Nadu hereby exempts the salt manufacturing process in the State of Tamil Nadu which is seasonal in character though not seasonal under clause (12) of section 2 of the said Act for the period on and from the 1st July 1992 to the 31st March 1996 from the operation of the said Act.

2.The above exemption is subject to the following conditions namely:-

(a) The aforesaid factory wherein the employees are employed shall maintain a register showing the names and designation of the exempted employees.

(b) Notwithstanding this exemption, the employees shall continue to receive such benefits under the said Act to which they might have become entitled to on the basis of the contributions paid prior to the date from which exemption granted by the notification operates.

(c) The contributions for the exempted period, if already paid shall not be refunded.

(1) The employer of the said factory shall submit in respect of the period during which that factory was subject to the operation of the said Act thereinafter referred to as the said period, said returns in such form and containing such particulars as were due from it in respect of the said period under the Employees State Insurance (General) Regulations, 1950.

(2) Any Inspector appointed by the Corporation under sub-section (1) of section 45 of the said Act or other official of the Corporation authorized in this behalf shall for the purpose of him.

(i) verifying the particulars contained in any return submitted under sub-section (1) of Section 44 for the said period or

(ii) ascertaining whether registers and records were maintained as required by the Employees State Insurance (General) Regulations, 1950 for the said period or

(iii) ascertaining whether the employees continues to be entitled to benefits provided by the employer in cash and kind being benefits in considerations of which exemptions being granted under this notification; or

(iv) ascertaining whether any of the provision of the Act had been complied with during the period when such provisions were in force in relation to the said factor be empowered to-

(a) require the principal or immediate employer to furnish to him such information as the case may consider necessary; or

(b) enter any factory, establishment, office or other premises occupied by such principal of immediate employer at any reasonable from and require any person found in charge thereof to produce to such Inspector or other official and allow him to examine such documents, books and other documents relating to the employment of persons and payment of wages or to furnish to him such information as he may consider necessary; or

(c) examine the principal or immediate employer, his agent or servant, or any persons found in such factory, establishment, office of other premises, or any person whom the said inspector or other official has reasonable cause to believe to have been an employee; or

(d) make copies of or take extracts from any

register, account book or other document maintained in such factory, establishment, office or other premises.

Revision of minimum rates of wages for employment in Printing Presses under Minimum Wages Act, 1948.

(G.O.(2D) No.40, Labour and Employment (J-1), 11th July, 2001)

No.II (2)LE/924/2000- In exercise of the powers conferred by clause (b) sub- section (1) of section 3 and sub-section (2) of section 5 of the Minimum Wages Act. 1948 (Central Act II of 1948), and in supersession of the Labour and Employment Department Notification No. 11(2)/LE/3689/95, published at pages 1035 to 1037 of Part II-Section 2 of the Tamil Nadu Government Gazette, dated the 29th November 1995, the Governor of Tamil Nadu after consultation with the Advisory Board, hereby revises the minimum rates of wages payable to the classes of employees in

(2) in rule 7, in sub-rule (3), for the words "rupees twenty", the words "rupees thirty" shall be substituted;

(3) in rule 9, in sub-rule (2), for the words "rupees fifteen", the words "rupees thirty" shall be substituted

(4) in rule 11, in sub-rule(1), for the words "rupees twenty", the words "rupees thirty shall be substituted."

14. The abovesaid Government Order has been issued pursuant to the powers conferred under Section 88 read with sub-Section 91-A of the ESI Act, 1948, exempting the salt manufacturing process in the State of Tamil Nadu which is seasonal in character though not seasonal for the period from 01.07.1992 to 31.03.1996 from the operation of the said Act. The said exemption is not absolute with the caveat of fulfilling certain conditions. The concerned factory or any factory seeks to avail exemption provided under said Government Order, has to establish that they maintain proper register showing the names and designation of the exempted employees. Besides, the employees shall continue to receive such benefits under the said Act to which they might have become entitled to on the basis of the contribution paid prior to the date from which exemption granted by the notification operates. Only on fulfilling certain conditions, which is in the nature of mandatory in nature, the concern can avail the benefits as per the Government Order. It is the contention of the learned counsel appearing for the petitioner /appellant that once the provision itself has been exempted, the mere procedure violation will not take away the right of the person to claim exemption. Much emphasis has been made to the judgment of the Hon'ble Apex Court in ***Manglore Chemicals & Fertilizers Ltd., VS. Deputy Commissioner*** reported in 1991 (55) E.L.T. 437 (S.C.), wherein, the Hon'ble Apex Court has held that if the condition is a mere procedural condition of a technical in nature, mere non-observation of such conditions are condonable.

15. In ***Novopan India Ltd., Vs. Collector of Central Excise and Customs, Hyderabad*** reported in ***1994 (73) E.L.T. 769 (S.C.)***, the Hon'ble Apex Court has held that exemption being in the nature of exception to be construed strictly at the stage of determination whether assessee falls within its terms or not and in case of doubt or ambiguity, benefit of it must go to the State. It is relevant to note that the Hon'ble Apex Court in a Constitution of Bench, with regard to the matter relating to exemption claimed by the assessee, summed up as follows:

> *"52.To sum up, we answer the reference holding as under:*
>
> *(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.*
>
> *(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject / assessee and it must be interpreted in favour of the revenue.*
>
> *(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled."*

16. The dictum laid down by the Constitution Bench makes it clear that of any person claiming exemption, the burden lies on them to show that their case comes within the parameters of the exemption clauses or exemption notification.

One of the main conditions set out in the Government Order referred above makes it clear that the concerned Unit shall maintain a register showing the names and designation of the exempted employees. The employees shall continue to receive such benefits under the said Act which they might have become entitled to on the basis of the contributions paid prior to the date from which exemption granted by this notification operates. Besides, the contribution for the exempted period, if already paid, shall not be refunded. Therefore, only on establishing those facts, the exemption can be claimed as per the notification. Admittedly, in this case except stating that they are exempted, no evidence has been given to show that the petitioner / appellant concern fall within the parameters of this clause and no oral evidence has been adduced. Whereas, the inspection report which has also been marked as Ex.R1 and Ex.R2, make it clear that at the time of inspection there were more than 10 employees working in the petitioner / appellant concern. The said reports also counter signed and acknowledged by one of the partner of the petitioner concern. Therefore, in the absence of any evidence to show that they complied the substantive conditions, mentioned in the Government Order, this Court is of the view that the petitioner / appellant cannot claim exemption merely on the basis of the Government Order issued by the Government of Tamil Nadu for the period from 01.07.1992 to 31.03.1996.

17. Such view of the matter, this Court is of the view that the petitioner cannot avail the exemption unless they fulfil the conditions incorporate in the above Government Order. As they failed to establish the fulfilment of the conditions merely on the basis of the said Government Order, they cannot non-suit the orders already passed under Section 45 of the ESI Act under the guise of challenging the show cause notice issued much later in the year 2015. Accordingly, all the points are answered.

18. In the result, this Civil Miscellaneous Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

24.04.2023

NCC : Yes/No
Index : Yes/No
vsm

To

1.The ESI Court (Labour Court), Madurai.

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

N.SATHISH KUMAR, J.

vsm

C.M.A.(MD)No.108 of 2021

24.04.2023