



CMA(MD).No.446 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 15.03.2023

PRONOUNCED ON : 21.03.2023

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THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.446 of 2016
and CMP(MD).No.5884 of 2016

M.Subramani

... Appellant

VS.

1.The Assistant Regional Director
The Employees State Insurance Corporation
Sub-Regional Office
4th Main Road
K.K.Nagar
Madurai 625 020

2.The Recovery Officer
The Employees State Insurance Corporation
Sub-Regional Office
4th Main Road
K.K.Nagar
Madurai 625 020

...Respondents

PRAYER:- Civil Miscellaneous Appeal filed under Section 82(2) of the ESI Act, 1948, to set aside the Fair and Ex-order of the Employees State Insurance Court (Labour Court) Madurai in E.S.I.O.P.No.99 of 2007 dated 08.12.2015 and allow the appeal.



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

For Respondents : Mr.R.Ravindran

JUDGMENT

The present appeal has been filed by the employer challenging the order of the E.S.I.Court confirming the the order of the E.S.I.Corporation passed under Section 45-A of the E.S.I.Act.

2.According to the appellant/employer, he is running a small wood working shed where lathe turning, planing and cutting are being carried out. There are no employees in the said Unit and one Shanmugam who is the relative of the employer is taking care of the Unit and he is receiving 40% out of the total income. The outside Carpenters used to bring their work on their own and get it planed in the machine belonging to the petitioner. Since there are no employees, the petitioner has not maintained any Attendance Register or Wage Register.

3.The E.S.I.Inspector had visited the petitioner Unit on 09.11.2006 and made some entry in English and asked the petitioner to sign it. Thereafter, no notice was served upon the petitioner for any personal hearing. Directly Section 45-A of E.S.I. Act order was passed directing



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the employer to pay a sum of Rs.16,920/- towards contribution for the period between 09.11.2006 and 03/2007 of Rs.5,500/- per month per employee by an order dated 12.11.2007. A recovery order was passed on 21.11.2007 directing the employers to deposit a sum of Rs.18,312/- with interest. Since there are no employees with the petitioner, the employer had challenged the said order under Section 75 of the E.S.I.Act before the E.S.I.Court, Madurai.

4.The Labour Judge had considered the submissions made on either side and arrived at a finding that though several chances were given to the employer before passing orders, they have not chosen to attend the enquiry. Therefore, the order passed by the E.S.I. Court under Section 45-A of the E.S.I. Act cannot be found fault with.

5.The Tribunal further found that E.S.I.Inspector had noted in his report that when 10 persons were available at the time of inspection, the entire burden is upon the employers to establish that they are independent Carpenter and not employees under the petitioner. Since the petitioner is not maintaining any records, he has not proved the said fact. The Tribunal further found that the petitioner has not produced any account to show the receipt of alleged 60% of the amount from the said



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Shanmugam and other independent contractors. The Tribunal further found that the employer has not chosen to examine any one to show that they were not employees of the petitioner. Based upon the said findings, the E.S.I. Court confirmed the order passed by the E.S.I. Corporation. Challenging the said order, the present appeal has been filed by the employer.

6. According to the learned counsel for the appellant/employer, the appellant is running a small Wood Working Shop for lath turning, planing the wood and woodcutting. No employee is engaged in the said work. The independent Carpenters bring their own wood to the shop and get it planed. The presence of the independent Carpenters at the time of inspection has been noted down as employees. One of the alleged employee namely Shanmugam who is a relative of the employer has been examined. He has categorically stated that he is not a paid employee. Therefore, the order of the Tribunal is erroneous and it is liable to be set aside.

7. Per contra, the E.S.I. Corporation had contended that when the visit note clearly points out that there are 10 employees at the time of inspection, the entire burden is upon the employer to establish that none



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of them are his employees and they are independent Carpenters.

However, no steps has been taken by the employer to establish the same.

The employer has not produced the Attendance Register or the Wage Register. He has also not produced the account to establish the payment of share in the income to PW2 who is said to be a relative of the employer. Therefore, the Tribunal was right in taking adverse inference as against the employer and confirmed the order the E.S.I. Corporation. 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. There is no dispute with regard to the fact that the appellant/employer is running a Small Wood Shed for the purpose of woodcutting, planing and lath turning. It is also not in dispute that at the time of inspection, the E.S.I. Inspector has noted the presence of 10 persons in the establishment and he has noted down their names along with their monthly/daily salary. In the said visit note, the employer has also signed. But according to the employer, he is an uneducated person



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and he has signed the same without understanding the consequence.

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10.It is the specific case of the employer that one Shanmugam who is his relative is taking care of the woodcutting Unit during his absence. He is not an employee and he receives a share of 40% out of the income. The said Shanmugam has been examined as PW2 on the side of the employer. The said Shanmugam had reiterated the case of the employer. The E.S.I. Corporation was not able to extract from his cross examination in favour of the E.S.I. Corporation.

11.Considering the nature of the establishment, it is clear that the Carpenters take their wood to the Unit, plain it or turn it and thereafter, take it back to their respective places of construction. Therefore, it is clear that the case of the employer is believable. That apart, one of the alleged employee namely Shanmugam has been examined as PW2 and he has categorically stated that he is not an employee. If his name is deleted from the list of employees, then the list of employee in the visit note will fall short of 10 employees, thereby not attracting the provisions of the E.S.I.Act.



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12.The Tribunal has mainly relied upon the non co-operation of the employer in the enquiry conducted by the E.S.I.Corporation to arrive at a finding that the order under Section 45-A is correct. That apart, the Tribunal was not right in holding that the employer has not examined the remaining 9 persons who are shown as employees. In view of the fact that other 9 employees are said to be independent Carpenters by the employer, their non-examination will not be fatal to the case. Therefore, viewed from any angle, the order E.S.I. Court in confirming the order of E.S.I. Corporation, is not legally sustainable and the same is liable to be set aside.

13.In view of the above said deliberations, the order of E.S.I. Court in E.S.I.O.P.No.99 of 2007 and the order of E.S.I.Corporation dated 12.10.2007 are hereby set aside and the appeal stands allowed. No costs. Consequently, connected miscellaneous petition is closed.

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Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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To
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1. The E.S.I.Judge
E.S.I.Court (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 order made in
C.M.A(MD)No.446 of 2016
and CMP(MD).No.5884 of 2016

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