BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 28.08.2023

Pronounced on : 31.10.2023

CORAM:

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

C.M.A.(MD)No.698 of 2018

1. The Deputy Regional Director,
   Sub-Regional Office,
   Employees State Insurance Corporation,
   Madurai – 625 020.

2. The Recovery Officer,
   Sub Regional Office,
   Employees State Insurance Corporation,
   Madurai – 625 020. ... Appellants/ Respondents

Vs.

M/s.B.V.V. Paper Industries Ltd.,
Swaminathapuram,
Madathukulam – 642 11,
Udumalpet Taluk,
Coimbatore District. ... Respondent/ Petitioner

Prayer : This Civil Miscellaneous Appeal filed under Section 82 of the ESI Act, 1948, to set aside the order dated 12.07.2017, passed by the ESI

Court (i.e., Labour Court), Madurai in ESI OP No.54 of 2008 and allow this civil miscellaneous appeal with necessary further directions in favour of the appellants.

For Appellants : Mr.R.Ravindran

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

JUDGMENT

The Civil Miscellaneous Appeal is directed against the order passed in E.S.I.O.P.No.54 of 2008 dated 12.07.2017 on the file of the Employees State Insurance Court (Labour Court), Madurai.

2. It is not in dispute that the respondent-Industry is covered under the Employees' State Insurance Act (hereinafter referred to as 'the ESI Act') from 01.01.1990 onwards.

3. The appellants-Corporation, by alleging that the respondent-Industry has failed to pay the contribution due, has issued a notice in Form C-18 (Ad-hoc) dated 25.08.2004 proposing to claim contribution for the period 10/2003 to 03/2004 at Rs.2,27,263/-, that since the respondent-

Industry has not utilized the opportunities granted to them to participate in the personal hearings, the appellants-Corporation was constrained to pass an order under Section 45-A of the ESI Act dated 03.12.2004 directing them to pay the contribution assessed at Rs.2,27,263/- and that since the respondent-Industry has not chosen to pay the amount, recovery auction had been taken. The respondent-Industry has filed a petition under Section 75(1) of the ESI Act before the ESI Court, Madurai in E.S.I.O.P.No.54 of 2008 challenging the order passed under Section 45-A of the ESI Act and the consequent recovery auction.

4. The main contention of the respondent-Industry is that the respondent-Industry, which is a paper manufacturing mill, was not functioning due to strike from February 2004 to May 2006 and thereafter also continued to be closed on account of the huge loss suffered, that since the respondent-Industry has become sick, their case was referred to the Board for Industrial and Financial Reconstruction (hereinafter referred to as 'the BIFR') and a case was registered in Case No.267 of 2000 and the Bench of the BIFR has declared the respondent-Industry as a sick industrial company in terms of Section 3(1)(o) of the Sick Industrial

Companies Act (hereinafter referred to as 'the SICA'), 1985, that revival rehabilitation scheme was sanctioned and the IDBI Bank was appointed as Operative Agency, that as per Section 22 of the SICA, when declaration as sick industry is made by the BIFR and is pending, no legal proceedings including suit for recovery of money or for the enforcement of any security against the industrial company shall lie or be proceeded with further, except with the consent of the Board or the appellate authority, that the appellants-Corporation has not obtained any consent or permission from the BIFR before passing the order under Section 45-A of the ESI Act and the consequent recovery auction and that therefore, the order dated 03.12.2004 and the recovery notices are all illegal and unlawful and the same are liable to be set aside.

5. The appellants-Corporation has filed their reply statement stating that the financial problem is not a proper reason for non-payment of the ESI contribution, that the respondent-Industry has neither submitted any reply to the show cause notice nor attended the personal hearings and that Section 22 of the SICA is not applicable to the ESI contribution dues.

6. During enquiry, the accountant of the respondent-Industry has been examined as P.W.1 and the order passed under Section 45-A of the ESI Act has been exhibited as Ex.P.1. On the side of the appellants-Corporation, they have examined their Inspector as R.W.1 and exhibited 13 documents as Ex.R.1 to Ex.R.13.

7. The learned ESI Judge, upon considering the evidence both oral and documentary and on hearing the arguments of both the sides, has passed the impugned order dated 12.07.2017 allowing the original petition partly and thereby setting aside the order passed under Section 45-A of the ESI Act and the recovery notice. Aggrieved by the impugned order, the ESI Corporation has preferred the present appeal.

8. The learned counsel appearing for the appellants-Corporation would submit that the ESI Court has come to a wrong conclusion that R.W.1 has not specifically denied that they have not taken steps to implead them as security creditor before the BIFR and on that ground, presumed that the appellants-Corporation had taken steps to implead them as security creditor, that the appellants-Corporation cannot be considered as a

creditor as there was no relationship of creditor and debtor between the appellants-Corporation and the respondent-Industry, that the ESI contributions are statutory dues, that Section 22 of the SICA has no application for the recovery of the ESI contributions, that the appellants-Corporation is not a party before the BIFR proceedings and that therefore, the question of seeking consent or permission from the BIFR does not arise at all.

9. The substantial questions of law are as follows:-

1. *Whether the ESI Court erred in deciding that the ESI Corporation had become secured creditor of the BIFR, despite showing that there existed no relationship of creditor and debtor between the ESI Corporation and the respondent-Industry?*
2. *Whether the ESI Court erred in giving a finding that the order passed under Section 45-A of the ESI Act and the consequent recovery notices are illegal and unlawful in view of Section 22 of the SICA, despite showing that Section 22 of the SICA has no application for the recovery of the ESI contributions and that therefore, the question of getting consent or permission from the BIFR does not arise at all?*
3. *Whether the impugned order dated 12.07.2017 is liable to be interfered with?*

10. It is not in dispute that the respondent-Industry has been declared as a sick industry by the Bench of the BIFR vide order dated 09.05.2001.

11. The only and the main contention of the respondent-Industry is that as per Section 22 of the SICA, the ESI Corporation is duty bound to get consent of the BIFR before ever passing the order under Section 45-A of the ESI Act and the consequent recovery proceedings and that the above order of the ESI Corporation, without the permission or consent of the BIFR, is illegal. But according to the appellants-Corporation, since the ESI contributions are statutory dues and as they are not the creditor, they are not barred from recovering the contribution dues and as such, Section 22 of the SICA has no application.

12. As rightly contended by the learned counsel appearing for the appellants-Corporation, the learned ESI Judge has come to a decision that the appellants-Corporation have impleaded themselves as security creditor before the Bench of the BIFR in respect of the respondent-Industry and for coming that decision, the learned ESI Judge has observed,

"The petitioner in his petition stated that already the respondent corporation took steps to implead them as security creditor in the provisions of BIFR and the respondent corporation was impleaded as security creditor. But on the respondent side it is stated that they have not impleaded as security creditor in the provisions of BIFR in respect of the petitioner concern. The Insurance Inspector of Respondent corporation was examined as RW1. The petitioner while cross examining RW1 he put a question that the respondent corporation took steps to implead them as security creditor in the provisions of BIFR in respect of petitioner concern. For that RW1 replied that he did not know whether they took steps to implead them as security creditor in the provisions of BIFR in respect of the petitioner concern. RW1 has not specifically denied they have not taken steps to implead them as security creditor in the provision of BIFR in respect of the petitioner concern. Hence it is presumed that the respondent corporation has already taken steps to implead them as security creditor in the provision of BIFR in respect of the petitioner concern."

13. Admittedly, neither the respondent-Industry nor the appellants-Corporation has produced any documents or materials to show that the appellants-Corporation has been impleaded as security creditor before the

BIFR. No doubt, R.W.1-ESI Inspector has not specifically denied that they have not taken steps to implead them as security creditor, but that by itself is not sufficient to presume that the appellants-Corporation has already taken steps to implead them as security creditor and got impleaded. In the absence of any acceptable evidence or materials, the finding of the ESI Court that the appellants-Corporation has already been impleaded as security creditor before the BIFR is not only improper, but also not warranted.

14. Before proceeding further, it is necessary to refer Section 22 of the SICA,

> *"22. Suspension of legal proceedings, contracts, etc.--- (1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the*

said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company] shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority. "

15. The learned counsel appearing for the respondent-Industry has relied on the decision of the Division Bench of this Court reported in ***(2007) 1 MLJ 661 (Artson Engineering Limited, Mumbai Vs. Deendayal Ashok Kumar Goidani and another)*** and the decision of the Hon'ble Supreme Court reported in ***(2006) 8 SCC 677 (Jay Engineering Works Ltd. Vs. Industry Facilitation Council and another)***, which were already relied on by the ESI Court.

16. No doubt, in ***Artson Engineering Limited's*** case, the Division Bench has specifically held that during the pendency of the proceedings under the Sick Industrial Companies (Special Provisions) Act against the

industrial company, no proceedings for execution, distress or the like proceedings against the properties of the company shall lie except with the consent of the BIFR.

17. In ***Jay Engineering Works Ltd.'s*** case, the Hon'ble Apex Court by referring to Section 22 of the SICA has held that the said provision mandates that no proceeding inter alia for execution, distress or the like against any of the properties of the industrial company and no suit for recovery of money or for the enforcement of any security, shall lie or be proceeded with further, except with the consent of the Board and that the said statutory injunction will operate when an inquiry had been initiated under Section 16 or a scheme referred to under Section 17 is under preparation and/or inter alia a sanctioned scheme is under implementation and the relevant passage is extracted hereunder:-

> *“21. The 1985 Act was enacted in public interest. It contains special provisions. The said special provisions had been made with a view to secure the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts for preventive, ameliorative, remedial and other*

measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined and for matters connected therewith or incidental thereto."

18. To counter the said argument, the learned counsel appearing for the appellants-Corporation has relied on the Full Bench judgment of this Court in ***Gowri Spinning Mills (P) Ltd. Vs. Assistant Provident Fund Commissioner, Salem and another*** reported in ***2006 4 MLJ 1261*** and the relevant passages are extracted hereunder:-

"13. ..... Section 22(1) of the Act comes into operation where an inquiry under Section 16 is pending or a scheme referred to under Section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending before the Appellate Authority. The provisions of Section 22 of the Act have an overriding effect notwithstanding anything contained in the Companies Act, 1956 or any other law. In fact, once a scheme is made, even the scheme is given an overriding effect by Section32 of the SICA.

14. Both the statutes are special statutes. Whereas the object of enactment of the SICA was to provide for the revival and rehabilitation of sick industrial companies, the object of the EPF Act, as indicated herein before, was a measure to provide social security to the employees. The contribution of the employees as well as the employer towards provident fund is not a tax due. It is also not an amount recoverable under a contract. The moneys, which have been deducted from the wages of the employees as well as the amounts, which the employer is required to pay as its contribution, belong to the employees, and constitute their rightful and just entitlement for the eventual payment of provident fund benefits.

15. In our opinion, the provision of Section 22(1) of the SICA has no application to the provident fund dues and the provisions of the EPF Act would not come within the purview thereof. The provident fund and other dues payable under the EPF Act are part of the legitimate statutory settlements of the workers. The employer is obligated to pay the contribution of the employees as well as his contribution to the Fund, which is set up under the Act, and the Scheme framed there under. The employees contribution together with the employers contribution is required to be paid into the Fund by the employer within the stipulated period. These amounts whether by way of contribution of *the employee or the contribution of the employer, are moneys which belong to the employee. An account which is required to be maintained in the name of each member of the provident fund, contains contribution of the employee, the employer as well as the interest which has been credited. Provident Fund is the foundation of an important measure of social security provided to employees of those establishments to whom the Act applies. In the aforesaid situation, an employer cannot refuse to comply with the statutory mandate to pay the contribution made by the employees as also his share, which was by way of social security scheme. Although the object of the SICA is laudable, but, in our view, the same should not deprive the hard earnings of the employees. It does not and cannot stay the recovery proceedings for recovery of money to which employees are entitled by way of social security scheme. The money does not belong to the company it belongs to the employees. These moneys can be withdrawn by the employees in certain eventualities even prior to the attainment of age of superannuation. The Scheme makes provision for withdrawal from the Fund and for the grant of advances from the Fund in special cases.*

....

22. In the light of the provisions of the EPF Act, and the Scheme framed there under, we are of the view that the rights of the employees under the Scheme are protected and *the proceedings under the EPF Act do not come within the purview of the provisions of Section 22(1) of the SICA. ......*

37. ..... the provident fund dues under the EPF Act are not covered by Section 22(1) of the SICA and the provident fund benefits which the employees are entitled to cannot be placed on the same footing as taxes of the Government or dues of other Commercial Venture or dues to Corporate or like others."

19. The Hon'ble Full Bench of this Court, after considering the subject elaborately, has concluded that the proceedings under the EPF Act do not come within the purview of the provisions of Section 22(1) of the SICA. No doubt, the learned counsel appearing for the appellants-Corporation has cited the above decision before the ESI Court and the learned ESI Judge, after referring to the above decision, has refused to follow the same on the ground that the above decision does not specifically say that Section 22 of the SICA is not applicable to ESI contribution dues.

20. It is pertinent to note that the ***Gowri Spinning Mills (P) Ltd.'s*** case was against the order passed under the Employees Provident Fund

and Miscellaneous Provisions Act and as such, there was no occasion or need for the Hon'ble Supreme Court to observe that Section 22 of the SICA has no application to the proceedings under the ESI Act.

21. ESI Act is an act to provide for certain benefits to the employees in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto. The focus of the ESI scheme is health care, whereas, the EPF is focused towards post-retirement income and benefits and the EPF is a compulsory contributory fund for Indian Organization under the EPF and Miscellaneous Provisions Act. It is pertinent to note that an employee cannot opt out of EPF and ESI once they become eligible and these schemes are mandatory for all eligible employees.

22. The learned counsel appearing for the appellants-Corporation would submit that the basic principles prevailing in the EPF and the ESI are one and same, as both are labour welfare legislations and as per the above Acts, contributions are being collected from employees and the management is duty bound to transfer the said contributions collected

from the employees along with the employers contribution to the respective institutions.

23. The learned counsel appearing for the appellants-Corporation would cite a decision of a learned Judge of this Court in ***Sri Venkateswa Paper and Boards Limited Vs. The Recovery Officer, Employees State Insurance Corporation, Madurai (W.P.(MD)No.11471 of 2005 dated 01.10.2007),*** wherein, auction sale notice issued by the recovery officer, ESI Corporation was challenged on the ground that the petitioner is a sick industry having the protection under Section 22 of the SICA and the learned Judge of this Court, by relying on the Full Bench Judgment of this Court in ***Gowri Spinning Mills (P) Ltd.'s*** case, has held that bar under Section 22 of the SICA will not apply for Provident Fund recovery, dismissed the writ petition.

24. Considering the intention and purpose for the enactment of the ESI Act and the EPF Act and taking note of the fact that both are labour welfare legislations meant to provide social security to the employees, this Court has no hesitation to say that Section 22 of the SICA has no application to the proceedings under the ESI Act in view of the law settled

by the Full Bench of this Court with regard to the proceedings under the EPF Act.

25. As rightly pointed out by the learned counsel appearing for the appellants-Corporation, the ESI Court, in so many places referred the appellants-Corporation as the security creditor. Admittedly, there existed no relationship of creditor and debtor between the appellants-Corporation and the respondent-Industry.

26. As per the Insolvency and Bankruptcy Code, 2016, the word "creditor" is defined under Section 3(10) which means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder, whereas, the word "debtor" has been defined under Section 3(11) which means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

27. As rightly contended by the learned counsel appearing for the appellants-Corporation, the ESI Act does not even refer the words creditor or debtor anywhere. Moreover, admittedly, there is no money transaction

between the appellants-Corporation and the industrial establishments covered under the ESI Act. As already pointed out, the ESI contributions are statutory dues and Section 94 of the ESI Act specifically says that contributions due to ESI Corporation will have priority over other debts.

28. Considering the above, the appellants-Corporation, by no stretch of imagination, can be considered as a creditor or security creditor and even on that basis, the SICA has no application. But, the learned ESI Judge, without considering the above legal aspects in proper prospective, by considering the appellants-Corporation as a security creditor and by presuming that the appellants-Corporation was also before the BIFR as security creditor and since no consent was taken from the BIFR, has declared that the order passed under Section 45-A of the ESI Act and recovery notices as illegal and unlawful and as such, the impugned order passed by the ESI Court is not in accordance with law and the same is liable to be set aside.

29. Considering the other facts and circumstances of the case, this Court further decides that the parties are to be directed to bear their own costs and the above substantial questions of law are answered accordingly.

30. In the result, this Civil Miscellaneous Appeal is allowed and the impugned order dated 12.07.2017 passed in E.S.I.O.P.No.54 of 2008 is set aside. Parties are directed to bear their own costs.

31.10.2023

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

To:

1. The Employees State Insurance Court (Labour Court),
   Madurai.

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

K.MURALI SHANKAR,J.

csm

Pre-Delivery Order made in
C.M.A.(MD)No.698 of 2018

Dated : 31.10.2023