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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 24.04.2023
DELIVERED ON : 01.06.2023

CORAM

THE HON'BLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.346 of 2017
and
C.M.P(MD)No.3831 of 2017

M/s.Naga Industries,
No.9, Balabagya Godown Sugar Mill Colony,
Madurai Road,
Tirunelveli-627 001,
Represented by its Partner,
Vinod Kumar. ... Appellant/Petitioner

Vs.

The Employees State Insurance Corporation,
Represented by its Deputy Director,
Municipal Shopping Complex,
Salai Street,
Sindupoonthurai,
Vannarpettai,
Tirunelveli-627 003. ... Respondent/Respondent

PRAYER: Civil Miscellaneous Appeal is filed under Section 82 of Employees State Insurance Act 1948, to set aside the order passed by the E.S.I Court (Labour Court), Tirunelveli in E.S.I.O.P.No.13 of 2016, dated 07.12.2016 and allow this appeal.

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For Appellant : Mr.S.Karthik

For Respondent : Mr.I.Pinaygash

JUDGMENT

The appeal has been filed by the employer challenging the dismissal of E.S.I.O.P.No.13 of 2016 on the file of the Labour Court, Tirunelveli wherein the Labour Court has confirmed the order passed by the E.S.I Corporation under Section 45-A of the E.S.I Act demanding a sum of Rs.3,331/- towards contribution for the period covering August 2012 – December 2012.

2. The appellant is a partnership concern and an inspection was conducted by the authorities under the E.S.I Act on 06.05.2010 and a visit note was issued. As per the said visit note, 10 employees on head count were working in the concern and they were involved in manufacturing wired fence. Thereafter, an Adhoc C-18 notice was issued requesting the employer why a contribution of Rs.26,813/- cannot be recovered from him. The employer submitted his representation. However, an adverse order came to be passed by the corporation on 05.02.2013 confirming the Adhoc amount. The said order was

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challenged by the employer in E.S.I.O.P.No.8 of 2013 before Labour Court, Tirunelveli. The Labour Court after considering the oral and documentary evidence arrived at a finding that the employer had failed to prove that the establishment is not coverable under the E.S.I Act. However, the Labour Court felt that due to ignorance, the employer had failed to submit partnership deed, rent agreement and the ledger showing the transactions before the E.S.I authorities. In the interest of justice, the Labour Court had set aside the order and remitted the matter back to the E.S.I authority with a direction to the employer to produce the aforesaid documents to the E.S.I authorities.

3. Thereafter, notices were issued by the corporation on 05.02.2015 and 25.11.2015. The authorities under the E.S.I Act passed an order under Section 45-A of the Act on 29.03.2016. During the personal hearing, the employer had produced the partnership deed and the rental agreement. Based upon the said rental agreement and the partnership deed, the authorities came to a conclusion that the employer is undertaking manufacturing process. The authorities further found that the employer had obtained 3 phase service connection. The employer had also produced the profit and loss account for the year 2011-2012. From the above said documents, the authorities arrived at a finding that a sum

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of Rs.51,250/- was paid as a salary for the period between August 2012 – December 2012 and accordingly, the contribution was determined at Rs.3,331/-.

4. The above said order under Section 45-A was challenged by the employer in E.S.I.O.P.No.13 of 2016 before Labour Court, Tirunelveli. The main contention of the employer is that they are not engaged in the manufacturing process. On the other hand, they are purchasing barbed wire and chain link fencing from various concerns and store them in the godown and resell the same to the purchasers. At no point of time, 10 or more persons were engaged in the said business. It was the further contention of the employer that they are not manufacturing anything in the said premises using power.

5. The employer had further contended that the visit note should contain the name of the employee, father's name, place from which the employee hails, the designation, the length of service, emoluments and the signature or thumb impression of the employee. However, in the present case, the visit note did not contain any such details. Only based upon the visit note, the second impuged order on 29.03.2016 has been passed.

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6. The E.S.I corporation had filed a counter contending that only after going through the documents produced by the employer, namely the profit and loss account, partnership deed and the rental agreement, the authorities have arrived at a finding that the establishment is covered under the E.S.I Act and more than 10 employees are working at the relevant point of time.

7. After hearing the submissions on either side, the E.S.I Court arrived at a finding that the employer has not produced the attendance register and the wage register in order to indicate the number of persons who were working at the relevant point of time. Only if the employer produces the list of employees, the visit note prepared by the authorities could be rejected on the ground that it does not contain the full details of the alleged employees. The E.S.I Court further found that the employer had obtained 3 phase service connection on 10.02.2010 for the purpose of manufacturing activities and the partnership deed also reveals that it was created for the purpose of carrying out manufacturing activities. The E.S.I Court further found that on the date of inspection, 10 employees were present as per the visit note. Even assuming that the number of employees had come down on a later date, the coverage under the Act will not get disturbed. Based upon the said findings, the E.S.I Court had

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dismissed the petition filed by the employer. Challenging the same, the present appeal has been filed by the employer raising the following substantial questions of law:

> "*(i) Whether appellant's documentary evidence are appreciated by the lower Court as well as the respondent?*
>
> *(ii) Whether relief claimed by the appellant has to be dismissed without seen the oral and documentary evidence?*
>
> *(iii) Whether respondent has passed orders independently without any influence? Whether the same is considered by the lower Court in his order or not?*
>
> *(iv) Whether the learned Judge has seen the records and facts?*
>
> *(v)Whether trial Court can seen the employees list of the appellant?*
>
> *(vi) Whether the appellant come or cover under the provisions of E.S.I Act?"*

8. The learned counsel for the appellant had contended that it is the specific case of the employer that they are not carrying on any manufacturing activity. In fact, they are purchasing barbed wire and chain link fencing from various manufacturers and they stored them in their godown and later sell it to the customers. When there is no manufacturing activity or power consumption for the said manufacturing

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activity, the present establishment cannot be considered to be a factory or an industry so as to be covered under the E.S.I Act.

9. The learned counsel for the appellant had further contended that in view of the various judgments of our High Court, the visit note prepared by the authorities under the E.S.I Act which does not contain the full particulars of the alleged 10 employees is defective in nature. Therefore, the present impugned order which has been passed relying upon the said defective visit note cannot be relied upon either by the authorities or by the E.S.I Court to arrive at a finding that 10 or more employees are working in the appellant establishment.

10. The learned counsel for the appellant had further contended that though profit and loss account, rental agreement and partnership deed were produced before the authorities, without considering the contents of the said documents, orders have been passed by the authorities which is clearly illegal. He further pointed out that order Under Section 45-A refers to the legal opinion obtained by the corporation from their standing counsel. The said legal opinion cannot be the basis of an order by the statutory authority.

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11. The learned counsel for the appellant had further contended that when the proceedings under Section 45-A were pending, the Deputy Director of the E.S.I corporation had visited the establishment and found only 4 persons were working. But, however the said fact has not been taken into account while passing the order. A reading of the order under Section 45-A would clearly reveal that the authority has predetermined the said issue and has simply confirmed the Adhoc notice. Hence, he prayed for allowing the appeal.

12. Per contra, the learned counsel appearing for the respondent corporation had contended that when the authorities inspected the premises on 06.05.2010, 10 employees were found working and their names along with the monthly wages have been recorded. It was also recorded that the factory is engaged in manufacture of wired fences with use of power. No document has been produced on the side of the employer to contradict the same. If really less number of employees are working in the establishment, the employer could have very well produced the attendance register and the wage register to establish the same.

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13. The learned counsel for the respondent had further contended that originally an order under Section 45-A was passed on 28.03.2013 demanding a sum of Rs.26,813/- towards contribution. This order was challenged in E.S.I.O.P.No.8 of 2013 and it was remitted back to the authorities. After remand, considering the submission made on the side of the employer, the contribution amount was reduced to Rs.3,331/- for the same period. Therefore, the contention of the appellant that the documents produced by the employer have not been considered is not factually correct.

14. The learned counsel for the respondent further contended that the partnership deed produced by the employer would clearly reveal that the main business of the firm is to carry on the business of manufacture of G.I chain link and PVC chain links. Therefore, it is clear that the employer is involved in the manufacture of G.I chain link and PVC chain links. Hence, the contention of the employer that they are not involved in the manufacturing process is not factually correct. Hence, he prayed for confirming the order passed by the E.S.I Court.

15. I have carefully considered the submissions made on either side and perused the records.

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16. This is the second round of litigation challenging the order under Section 45-A passed by the authorities under the E.S.I Act.

17. In the first round of litigation, the employer had challenged the order, dated 28.03.2013 passed by the authorities under Section 45-A on the ground that they are not involved in the manufacturing process and at no point of time, 10 or more employees were employed in their concern. The E.S.I Court was pleased to allow the petition filed by the employer and remitted the matter back to the authorities with a direction to the employer that he should produce the partnership deed, rental agreement and available ledgers showing their transactions during the relevant period. Thereafter, after affording personal opportunity to the employer, a second order under Section 45-A has been passed by the authorities on 29.03.2016. A perusal of the said order indicates that the employer has produced the rental deed, profit and loss account and the partnership deed before the authorities. During the hearing, the authorities have requested the employer to produce the voucher/bills, interest expenses, salary/wage register, attendance register, staff welfare expenses voucher and IT statement for verification. At request of the employer to produce these documents, the hearing was adjourned to 16.03.2015, 31.03.2015, 28.05.2015, 02.07.2015, 14.12.2015, 20.01.2016 and 21.01.2016.

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However, the records called for by the authorities relating to the wage register and attendance register have not been produced by the employer. Therefore, the authorities were constrained to pass an order based upon the rental agreement, partnership deed and the profit and loss account. Based upon the profit and loss account, the authorities arrived at a finding that the total salary that was paid by the employer during the period between August 2012 – December 2012 was Rs.51,250/- and consequently, the contribution amount was fixed at Rs.3,331/-.

18. The employer has not chosen to produce the wage register or the attendance register even before the E.S.I Court which would have clearly pointed out the number of employees who were employed at the relevant point of time. As rightly found by the E.S.I Court, only when the employer produces contra evidence relating to the number of employees, the visit note prepared by the authorities under the Act could be ignored. In all other cases, the visit note prepared by the authorities have to be relied upon.

19. A perusal of the partnership deed produced by the employer before the authorities would clearly reveal that the main object of the partnership firm was to carry on the business of manufacture of G.I chain

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link and P.V.C chain links. Therefore, the contention of the learned counsel appearing for the appellant / employer that they are not at all involved in manufacturing process is not factually correct. It is not the case of the employer that they are not carrying on the business of manufacturing as per the partnership deed and they have restricted their business with regard to the sale and resale of the above said products. The employer has chosen to produce the credit bill, dated 04.05.2011 in order to project that they are only purchasing these products from other manufacturers, the date of credit bill is 04.05.2011 which is after the date of inspection by the authorities on 06.05.2010. Even assuming that they have purchased the wired fencing from other manufacturers, it does not mean that they are not carrying on any manufacturing process, especially in the light of the partnership deed.

20. It could be seen from the rental agreement that at the time of entering into a lease, there was no power supply to the premises. Thereafter, the employer had obtained 3 phase power connection to the said premises. The authorities have relied upon the 3 phase service connection to hold that there is a manufacturing process. Apart from that, the visit note also refers to the fact that the factory is engaged in manufacture of wired fences with the use of power. The employer has not

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produced his electricity bills to establish that only a minimum units of electricity was utilized for power supply and not for manufacturing process.

21. Even assuming that they are not carrying on any manufacturing process, the number of employees as found in the visit note which is not contradicted by any other contra document on the side of the employer, would clearly attract the provisions of the E.S.I Act. Therefore, viewed from any angle, the contention of the learned counsel appearing for the appellant that the establishment is not covered under the E.S.I Act is not legally sustainable.

22. In view of the above said deliberations, all the substantial questions of law raised by the appellant are answered as against the appellant. The order of the Labour Court stands confirmed and the appeal stands dismissed. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

01.06.2023

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To

1.The E.S.I Court (Labour Court),
Tirunelveli.

2.The Section Officer,
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.346 of 2017

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