BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 12.04.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.370 of 2017

1. The Employees' State Insurance Corporation,
   Sub Regional Office,
   4th Main Road,
   K.K.Nagar, Madurai – 625 020,
   Represented through
   The Deputy Director.

2. The Recovery Officer,
   The Employees' State Insurance Corporation,
   Sub Regional Office,
   4th Main Road,
   K.K.Nagar,
   Madurai – 625 020 ....Appellants/ Respondents

Vs.

M/s. Thangamani Textile,
5/1/1/C, Mariamman Kovil Street,
Theni Main Road,
Sakkampatti, Andipatti Post,
Theni District – 625 512. ... Respondent/Petitioner

PRAYER:- Civil Miscellaneous Appeal filed under Section 82(2) of ESI Act, 1948, against the decree and judgment of the Employees' State Insurance cum Labour Court, Madurai, passed in ESIOP No.81 of 2008, dated 23.03.2016.

For Appellants : Mr.I.Pinaygash
For Respondent : Mr.Ravichandran

JUDGMENT

The present appeal has been filed by the E.S.I. Corporation challenging the order passed by the E.S.I.Court, wherein, a recovery notice was set aside.

2. According to the learned counsel appearing for the appellants/ E.S.I. Corporation, one Subramaniam was running a Textile Factory under the name and style of Subramaniam Textile Factory, from the year 1985 onwards and the said Factory was covered under the E.S.I. Act. Due to the default committed by them in payment of contribution amount, various notices were issued to the said Textile Mills from May-1999 onwards. An order of recovery was also passed as against the said Factory on 31.07.2001. Thereafter, the said Subramaniam had executed a settlement deed in favour of his father viz., Alagarsamy on 12.06.2002. The said Alagarsamy has executed a Will on 10.07.2002 in favour of his son Narayanasamy. After the death of Alagarsamy, the Subramaniam Textile Factory had devolved upon the said Narayanasamy.

3. The learned counsel appearing for the appellants had further contended that Narayanasamy who is running Thangamani Textiles has also inherited the Subramaniam Textile Factory and therefore, there is a transfer of establishment of Subramaniam Textile to Narayanasamy and being a transferee, Narayanasamy is liable to pay the dues of Subramaniam Textiles Factory for the period covering from 1997 to 2001.

4. The learned counsel appearing for the appellants had further contended that the said Narayanasamy is none other than the brother of Subramaniam and therefore there is a clear transfer of establishment from the elder brother to the younger brother. The learned counsel for the appellants also relied upon Section 93-A of the E.S.I Act to contend that where there is transfer of establishment, both the transferor as well as the transferee are jointly and severally liable to pay the contribution amount relating to the period before the date of transfer.

5. In order to recover the amount between the period of 1997-2001 the ESI Corporation has issued a communication on 13.03.2006, requesting Narayanasamy to settle the dues in respect of the said A.Subramaniam Power Loom Factory. Thereafter, on 17.04.2008, an order of recovery was passed directing the said Narayanasamy to pay the amount within a period of three days, failing which, an order of attachment would be passed. This recovery order dated 17.04.2008 was challenged by Narayanasamy who is the proprietor of the Thangamani Textile in E.S.I.O.P.No.81 of 2008, before the Labour Court, Madurai. According to the proprietor of Thangamani Textiles, the recovery orders have been passed by the E.S.I Corporation without passing any order under Section 45-A of the ESI Act. He had further contended that no notice was issued to Thangamani Textiles or any opportunity was given to them to offer their explanation as to why the recovery order should not have been passed. All the notices have been issued only to Mr.Subramaniam Power Loom Factory.

6. The E.S.I Court, after considering the oral and documentary evidence filed on either side, came to a conclusion that the E.S.I

Corporation had invoked Section 93-A of the E.S.I Act and therefore, the burden is upon them to establish that there was a Transfer of the establishment of Mr.Subramaniam Power Loom Factory to the petitioner's concern. The E.S.I. Court further found that the Corporation has not issued any notice to the Thangamani Textiles calling upon them to offer their explanation for invoking Section 93-A of the E.S.I. Act. Based upon the above said findings, the E.S.I. Court was pleased to allow the petition filed by the Thangamani Textiles. The said order is under challenge before this Court by the E.S.I Corporation.

7. The learned counsel appearing for the appellants/E.S.I Corporation had contended that the Thangamani Textiles was originally started in the year 2001 and they were covered under the E.S.I Act with effect from 24.07.2001. Thereafter, by virtue of the Will executed by Alagarsamy, Subramaniam Power Loom Factory had devolved upon the owner of the Thangamani Textiles on 10.07.2002. Thereafter, the Code number assigned to the Subramaniam Power Loom Factory was cancelled. In view of the letter dated 22.03.2006, the Subramaniam Power Loom Factory and Thangamani Textile got the code number and

both the Subramaniam Power Loom Factory and Thangamani Textiles textiles were combined together. Therefore, the demand notices issued to Subramaniam Power Loom Factory have to be honoured by the Thangamani Textiles.

8. The learned counsel appearing for the appellants had further contended that only after issuance of several orders under Section 45-A of the Act and recovery notice, the proprietor of Subramaniam Power Loom Factory had settled the property in favour of his father viz., Alagarsamy. He had further contended that since the entire establishment along with employees got transferred from Subramaniam Power Loom Factory to Thangamani Textile, the E.S.I Corporation is empowered to make the said demand from Thangamani Textiles. He further contended that unless the transferee establishes before the E.S.I.Court that he had not inherited Subramaniam Textiles, the employer cannot be exonerated and he is liable to pay the contribution. Hence, he prayed for allowing the appeal.

9. Per contra, the learned counsel appearing for the respondent/ Thangamani Textiles had contended that at no point of time any notice was issued to Thangamani Textiles much less an order under Section 45-A of the E.S.I. Act. He further contended that no point of time any notice was issued before passing a recovery order. He further contended that the Thangamani Textiles is an independent entity and he has not inherited Subramaniam Power Loom Factory. He further contended that he had purchased only the land and buildings and he has not purchased it as a running business along with the employees. Therefore, unless the notices are issued by the E.S.I. Corporation, he would not be in a position to explain the facts. Hence, he prayed for sustaining the order passed by the E.S.I Court.

10. I have carefully considered the submissions made by the learned counsel on either side.

11. It is the specific case of the ESI Corporation that Thangamani Textiles owner viz., Narayanasamy has inherited the Subramaniam Power Looms in the year 2002. Even as per the case of the ESI

Corporation, several demand notices and orders under Section 45-A of the Act have been issued as against the Subramaniam Power Loom Factory for the period covering between 1997-2001 which were not honoured or paid by the Subramaniam Power Looms. According to the E.S. I. Corporation, since the Subramaniam Power Looms Factory has been transferred in favour of the Thangamani Textiles, Section 45-A of the order passed as against the Subramaniam Power Looms Factory has to be honoured by transferee viz., Thangamani Textiles.

12. It could be seen from the records that the Thangamani Textiles have taken a specific stand that they have purchased only the land and building and not as a running concern along with the employees. It could be also seen from the records that at no point of time, any notice was issued as against the Thangamani Textiles and no order has been passed Section 45-A of the Act as against the Thangamani Textiles, for which, the present recovery notices have been issued. Therefore, it is clear that without calling for any explanation or issuing any show cause notice to the Thangamani Textiles, the recovery order dated 17.04.2008 has been passed by the E.S.I. Corporation. Unless an opportunity is granted to

Thangamani Textiles to explain what has been purchased by them, the invocation of Section 93-A of the E.S.I Act cannot be decided.

13. In view of the above said facts, this Court is of the view that the recovery order dated 17.04.2008 is liable to be set aside and it has been rightly set aside by the E.S.I Court. Therefore, there are no grounds to interfere in the order of the E.S.I Court and the present appeal stands dismissed. However, the E.S.I Corporation is at liberty to issue fresh notice to the Thangamani Textiles calling for explanation with regard to the invocation of Section 93-A of the Act, for the purpose of recovery of contribution relating to the period between from the year 1997 to 2001 of the Subramaniam Power Loom Factory.

14. With the above said liberty, this Civil Miscellaneous Appeal is dismissed. There shall be no order as to costs.

12.04.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
ebsi

To

1.The Employees' State Insurance cum Labour Court,
Madurai.

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

R.VIJAYAKUMAR,J.

ebsi

Judgement made in
C.M.A(MD)No.370 of 2017

12.04.2023