



CMA(MD).Nos.387 & 968 of 2017 and Cross Obj.No.22 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 15.03.2023

PRONOUNCED ON : 27.03.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)Nos.387 & 968 of 2017

and

Cross Objection No.22 of 2017

and CMP(MD).Nos.4141 of 2017 & 10136 of 2017

M/s.Poonam Trading Company
No.123, Tenkasi-Shenkottah Road
Ilanji- 627 805
Tirunelveli District
Represented by its
Partner Navin S.Patel

.....Appellants in both appeal
/ Respondent in Cross Objection

Vs.

The Employees State Insurance Corporation
Represented by its Deputy Director
Panchdeep Bhavan,
ESI Complex, Salai Street
Vannarpettai
Tirunelveli 627 003

...Respondents in both appeals
/Cross Appellant

PRAYER in CMA(MD).No.387 of 2017:- Civil Miscellaneous Appeal
filed under Section 82 of Employees State Insurance Act, 1948, to set



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aside the order passed by the E.S.I Court (Labour Court), Tirunelveli in E.S.I.O.P.No.14 of 2016, dated 19.12.2016 and allow this appeal.

PRAYER in CMA(MD).No.968 of 2017:- Civil Miscellaneous Appeal 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.Nos.6 of 2017 dated 06.09.2017 and allow this appeal.

PRAYER in Cross Objection No.22 of 2017:- Civil Miscellaneous Appeal filed under Section 82 of Employees State Insurance Act, 1948, to set aside the portion of the decree and judgment in respect of setting aside the order under Section 45-A dated 23.12.2015 by the Employees' State Insurance Cum Labourer Court, Tirunelveli in E.S.I.O.P.No.14 of 2016 dated 19.12.2016 and allow the cross appeal in CMA(MD).No.387 of 2017.

For Appellant : Mr.S.Karthik
in both appeals
and Respondent in Cross Objection

For Respondent : Mr.I.Pinaygash
in both appeals
and appellant in Cross Objection

COMMON JUDGMENT

Both the appeals have been filed by the establishment challenging the order of E.S.I.Court confirming the order of E.S.I. Corporation



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passed under Section 45-A of the E.S.I.Act declaring the coverage of the appellant establishment.

2.CMA.No.387 of 2017 arises out of an order passed in E.S.I.O.P.No.14 of 2016 challenging the order passed by the E.S.I.Corporation under Section 45-A of the E.S.I.Act on 23.12.2015 claiming a sum of Rs.2,30,052/- for a period covering June 2012 to August 2015.

3.CMA(MD).No.968 of 2017 has been filed challenging the order passed by the E.S.I.Court in E.S.I.O.P.No.6 of 2017 arising out of the order passed under Section 45-A of the Act dated 07.03.2017 demanding a sum of Rs.1,41,570/- for the period of May 2010, August 2010, September 2010 and November 2010 to May 2012.

4.In both appeals, the Corporation Officials have inspected the respondent establishment on 18.02.2013 and prepared a Visit Note to the effect that 10 employees were working in the respondent establishment and therefore, the establishment should be covered under E.S.I.Act. Based upon the Visit Note, an enquiry notice was issued to the employer and the employer had failed to attend the enquiry and thereafter, 2



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independent orders under Section 45-A of the E.S.I.Act were passed on 28.03.2013 for two different periods. The said order was challenged by the respondent establishment in E.S.I.O.P.No.9 of 2013. The said petition was allowed on 28.11.2014 by the E.S.I.Court on the ground that no sufficient opportunity was given to the establishment to put forth their case. Liberty was granted to the Corporation for initiating fresh proceedings as against the respondent establishment in accordance with law.

5. Thereafter, a notice was issued to the establishment to attend for an enquiry and an order was passed under Section 45-A of the E.S.I.Act on 07.03.2017 and 23.12.2015 relating to two different periods. These two orders were challenged by the establishment by way of filing E.S.I.O.P.No 14 of 2016 and 6 of 2017 before the E.S.I. Court/Labour Court, Tirunelveli. The E.S.I.Court was pleased to dismiss both the petitions and therefore, the establishment has filed the above two appeals challenging the said orders.

6. According to the learned counsel appearing for the appellant/establishment, originally there was a visit by the Corporation Officials on 07.08.2009 and according to the said Visit Note, 12 persons



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were employed at that point of time. However, the said Visit Note was not served upon the establishment. Again for the second time on 18.02.2013, the officials have inspected the establishment and prepared a Visit Note which had pointed out that 10 persons were working during the said period. After the order of E.S.I.Court in E.S.I.O.P.No.9 of 2013, no further inspection was conducted. Only an enquiry notice was issued calling the establishment to appear for an enquiry. He had further contended that without providing sufficient opportunity to the employer, 2 independent orders under Section 45-A have been passed on 23.12.2015 and 07.03.2017 relating to two different periods.

7.The learned counsel for the appellant had further contended that the Field Inspection Report dated 18.02.2013 has already been found to be defective by the E.S.I. Court in their order made in E.S.I.O.P.No.9 of 2013. Instead of conducting a fresh inspection, the present 45-A has been passed, based upon the said inspection report dated 18.02.2013 which is not admissible in law.

8.The learned counsel for the appellant had further contended that the Corporation and the E.S.I.Court have not taken into consideration that the establishment is small and at no point of time 10 or more



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members were engaged by the establishment. When the coverage notices were already set aside and the matter was remanded back, the E.S.I Corporation ought not to have relied upon the inspection reports which were prepared prior to the order of E.S.I.Court.

9.The learned counsel for the appellant had further contended that the E.S.I.Court had primarily dismissed the petitions on the ground that the establishment has accepted the coverage and has paid contribution for 2 months. Therefore, they are estopped from contending that the establishment is not covered under the Act. However, the establishment has never paid any contribution at any point of time and the alleged payment of contribution were produced across the Bar without being marked through proper oral evidence. The E.S.I.Court was not right in relying upon these documents.

10.The learned counsel for the appellant had further contended that the coverage under the Act is either through voluntarily submission of declaration form or by an order of coverage passed by the Corporation. Admittedly, in the present case, there is no voluntarily coverage by filing a declaration form on the side of the establishment. Therefore, there is no question of payment of any contribution towards E.S.I.liability.These



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receipts could have been created by the Corporation for the purpose of invoking the principle of estoppel. The learned counsel for the appellant had further contended that they have produced the attendance register as Exhibit P7 and also a copy of trading, profit and loss account for the relevant period which would clearly establish that there were less than 10 workers during the relevant period of time and the establishment is not covered under the Act.

11.The learned counsel for the appellant had further contended that the report of the inspector did not mention the name of the employee, father's name, designation, length of service and emoluments. The Inspector has not obtained any signature or thumb impression from the alleged employee and therefore, the Visit Note is invalid and only based on an invalid Visit Note, an order under Section 45-A has been passed. Hence, he prayed for allowing the appeal setting aside and set aside the order of E.S.I.Court and the Corporation.

12.Per contra, the learned counsel for the respondent/Corporation had contended that after the order of E.S.I.Court in E.S.I.O.P.No. 9 of 2013, several notices were issued by the Corporation directing the establishment to appear for an enquiry. Despite many opportunities



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granted for personal hearing, the employer had neither filed his objection nor produced any records for the purpose of determination of contribution. Therefore, the Corporation was constrained to proceed on the basis of the relevant records that were available. Since he had failed to submit any statement of returns furnish the contribution and he had failed to avail the opportunity, the Corporation had no other option than to presume that the establishment did not possess any record to establish that the liability under E.S.I.Act is less than what is proposed in the notice. Therefore, the Corporation proceeded to determine the contribution under Section 45-A of the E.S.I.Act and the contribution were determined on assumed wages for 12 employees as per the records.

13.The learned counsel had further contended that whenever an inspection is conducted on behalf of the department, neither the employer nor the employee co-operate for the inspection. None of them are providing their details to the Inspector for being recorded in the Visit Note. Considering the environmental prevailing therein, the Court cannot take a view that the details of all the employees should have been recorded. He had further contended that originally, an inspection was



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conducted on 07.08.2009 and based upon the head account, it was found that 12 employees were working and the code number was allotted on 21.08.2009.

14.The learned counsel for the respondent had further contended that in the month of June, July and October 2010, the contribution amount has been paid by the establishment and therefore, there cannot be any dispute with regard to the coverage of establishment and non payment in the remaining period and therefore, the order passed under Section 45-A covering two different periods is legally sustainable.

15.The learned counsel for the respondent had further pointed out that the E.S.I.Court has relied upon Exhibit P8 balance sheet filed by the establishment and arrived at a finding that the subscription amount would be Rs.80,750/- in the impugned period in E.S.I.O.P.No 6 of 2017.

16.In E.S.I.O.P.No 14 of 2016, the E.S.I.Court arrived at a finding that fixing the contribution at Rs.1,39,425/- for the disputed period based upon the trading, profit and loss account. Therefore, according to the learned counsel for the respondent, the contribution determined by the



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Corporation has been reduced by the E.S.I.Court and therefore, the appellant/establishment cannot have any grievance whatsoever and they could continue to pay the contribution every month. Hence, he prayed for dismissing the appeal.

17.I have considered the submissions made on either side and perused the materials available on record.

18.The appeals have been filed by the establishment disputing the coverage of the establishment under E.S.I.Act. According to the appellant/establishment at no point of time, 10 or more workers were engaged by the establishment. However, the contention of the Corporation is that on 07.08.2009, a preliminary inspection was conducted and the head count disclosed that 12 employees were employed. Another inspection on 18.02.2013 disclosed that 10 employees were employed. Therefore, according to the Corporation, the appellant establishment is liable to be covered under the E.S.I.Act. The Visit Note prepared by the officials of the E.S.I. Corporation have been disputed by the establishment on the ground that the signature of the employees have not been obtained. On the other hand, the establishment has chosen to produce Exhibit P7 attendance register for the period



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covering April 2010 to February 2011 and April 2011 and March 2013.

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19.A perusal of Exhibit P7 reveals that it is a xerox copy and no explanation has been offered by the appellant for not producing the original. In case, if the attendance registers are available with the establishment, the same could have been produced before the E.S.I authorities. Despites 7 opportunities granted to the establishment, they have not chosen to appear before the authorities. They have neither raised their objections nor produced any of the documents much less the attendance register. No reason has been given for not producing the attendance registers before the authorities and why it was suddenly produced before the E.S.I.Court. The attendance register has not been counter signed by any officials to authenticate its veracity. The management has chosen to examine the cashier of the said establishment in E.S.I.O.P.No.6 of 2017. In the said deposition, he has admitted that several opportunities were given to them before the E.S.I.Corporation and they did not avail the said opportunity.

20.He had further admitted that there is no explanation for not producing these documents before the Corporation. In fact, he has



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categorycally admitted that their establishment is being regularly inspected by the authorities of the labour department and the factories department. He had further admitted that the attendance register marked as Exhibit P7 does not contain the counter signature or seal of any one of the officials of the labour department. In his deposition, he had further admitted that under Exhibits P10 and P11, notices were issued by the Corporation intimating that they are going to inspect the premises and requested the establishment to keep the records ready. He had further admitted that under Exhibit R23, the Visit Note dated 18.02.2013, the name of the 10 employees has been mentioned and he has also counter signed the said Visit Note. However, he has disputed that there were 10 employees at that point of time.

21.The deposition of the cashier of the establishment will clearly disclose that their Unit is being regularly inspected by the officials of the labour department and the factories department. However, the attendance register does not contain the counter signature or seal of any one of the officials of these departments. The deposition further discloses that only after issuing notice, the authorities under the E.S.I.Court have inspected the Unit on 18.02.2013. However, the said attendance register has not



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been produced at that point of time or during the enquiry under Section 45-A of the Act. Suddenly, a xerox copy of the attendance register is being produced before the E.S.I.Court which creates suspicion and doubts in the minds of the Court with regard to the genuiness of the said document.

22.In CMA.No. 387 of 2017 arising out of E.S.I.O.P.No.14 of 2016, one Sethuramalingam, the cashier of the establishment has been examined. In his deposition, he has not explained why the attendance register or any other document was not showed to the authorities either during the inspection or during the enquiry proceedings.

23.In view of the above said discussions, relating to xerox copy of the attendance register and the deposition of two cashiers of the establishment, it is clear the the establishment is not coming out with the true facts. In such view of the matter, this Court has no other way than to accept the Visit Note dated 18.02.2013. A perusal of the order E.S.I. Court in the first round of litigation in E.S.I.O.P.No.9 of 2013 reveals that Section 45-A order was set aside only on the ground that it was ambiguous in nature and the Corporation is entitled to demand the subscription amount in accordance with law. The E.S.I. Court further



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found that the establishment has failed to prove that their Unit is not coverable under the E.S.I.Act. Therefore, it is clear that the Visit Note dated 18.02.2013 was not set aside in the previous proceedings, but due to ambiguity in Section 45-A, an order was set aside and the Corporation was granted liberty to proceed afresh in accordance with law. Hence, the contention of the learned counsel appearing for the appellant that the Visit Note was set aside in the previous proceedings is not factually correct.

24. When the establishment despite being granted several opportunities, refused to furnish the registers/records, Section 45-A(1) empower the Corporation to determine the amount of contribution on the basis of information available with them. In the present case, the Corporation has relied upon the Visit Note dated 18.02.2013 and proceeded to pass orders. Therefore, the Corporation cannot be found fault with for relying upon their Visit Note when the employer has not co-operated to the enquiry. This Court has already arrived at a finding that Exhibit P7 attendance register is not a genuine document in view of the fact that it has not been counter signed by the officials of labour or factory department despite the fact that the establishment is being



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regularly visited by the said authority.

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25.The E.S.I. Court had relied upon Exhibit P8, a xerox copy of trading, profit and loss amount to reduce the compensation contribution on the basis of the Visit Note prepared by the authorities and has fixed the contribution at the rate of Rs.1,39,425/- in E.S.I.O.P.No.14 of 2016 against which CMA.No.387 of 2017 has been filed by the establishment. In the said appeal, the E.S.I.Corporation has filed a cross objection in Cros.Objection No.22 of 2017 challenging the reduction of the contribution. This Court does not find any error on the part of the E.S.I.Court in reducing the contribution based upon the Visit Note prepared by the E.S.I.Corporation. Therefore, the Cross Objection stands dismissed.

26.In view of the above said deliberations, there are no merit in the appeals and both the Civil Miscellaneous Appeals stand dismissed confirming the orders passed by the E.S.I.Court in both the cases. The Cross Objection filed by the E.S.I. Corporation is also dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

27.03.2023



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Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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To

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

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 Judgement made in
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and
Cross Objection No.22 of 2017
and CMP(MD).Nos.4141 of 2017 & 10136 of 2017

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